NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

LAWRENCE GAINES,

Petitioner

v.

SUPERINTENDENT, BENNER TOWNSHIP SCI, ET AL,

Respondent

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS ERRED WHEN IT REVERSED THE WELL REASONED DECISION OF THE DISTRICT COURT WHICH HELD THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S OMISSION OF THE NO ADVERSE INFERENCE INSTRUCTION AFTER TRIAL COUNSEL REQUESTED THE INSTRUCTION AND THE STATE TRIAL COURT AGREED TO GIVE THE INSTRUCTION?

II. WHETHER THE COURT OF APPEALS ERRED WHEN IT REVERSED THE WELL REASONED DECISION OF THE DISTRICT COURT WHICH HELD THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S OMISSION OF THE NO ADVERSE INFERENCE INSTRUCTION AFTER TRIAL COUNSEL REQUESTED THE INSTRUCTION AND THE STATE TRIAL COURT AGREED TO GIVE THE INSTRUCTION AND THE APPELLATE COURT'S POSTION THAT THE FAILURE TO OBJECT WAS STRATEGIC WHEN TRIAL COUNSEL'S STRATEGY WAS AN UNREASONABLE DECISION PARADING UNDER THE UMBRELLA OF STRATEGY?

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CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution of the United States reads, in pertinent part, as follows:

> 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 defence.

LIST OF PARTIES BELOW

The parties are named in the caption.

STATEMENT OF JURISDICTION

Petitioner, Lawrence Gaines was convicted in Pennsylvania state court of first degree murder in violation of 18 PACSA 2502, which is defined as a willful, deliberate and intentional killing. After pursuing direct and collateral proceedings in state court, Gaines petitioned for habeas corpus under 28 U.S.C. 2254. The district court granted the petition. The district court held that trial counsel was ineffective for not objecting to the trial court's omission of a jury instruction that no adverse inference could be drawn from Mr. Gaines' decision not to testify in his own defense.

The Third Circuit court of appeals reversed. It held that trial counsel made a reasonable tactical choice when he did not object to the trial court's failure to give the requested no-adverse-inference instruction after requesting the court give the no adverse inference instruction during the charge conference.

Mr. Gaines' takes the position that what the Third Circuit calls trial strategy was no strategy at all. The case is like ***Richards v. Quarterman***, 566 F3d 553 (5th Cir. 2009) wherein the Fifth Circuit held that trial counsel's strategy was an unreasonable decision parading under the umbrella of strategy. In the case at hand, trial counsel's strategy is an unreasonable decision parading as strategy for the following reasons: (1) trial counsel persuaded the client not to take the stand in exchange for the promise that the client would receive a no adverse inference instruction (2) Trial counsel asked the trial court to give the no adverse instruction during the charge conference (3) trial counsel made no objection to the trial court's omission of the charge because he thought the no adverse inference instruction should have been given at the beginning of the charge and not at the end of the charge (4) trial counsel had no explanation for why he did not object to the omission of the charge during post-sentence motions at no risk to the client. The trial lawyer claimed he never thought about it which is no strategy at all.

STATEMENT OF THE FACTS

In ***Gaines v. Marsh***, 528 F.Supp. 3d 286 (EDPA 2021), the District Court Judge stated the facts as follows:

> Lawrence Gaines ["Gaines"] abused crack in a known drug house on Ferry Street in the City of Easton, Northampton County, PA. He served as "muscle" to resolve problems when customers lost control. Tony Williams also smoked crack cocaine in the house until around 6:00 a.m. on the morning of July 3, 2012, when he heard knocking on the back door. Mr. Williams did not immediately answer the door because the owner of the Ferry Street house told Mr. Williams no one else should be admitted to the house. The individual continued knocking on the back door and Mr. Williams eventually went to answer it. Mr. Williams recognized the person knocking as William Thompson also known as "Poncho."
>
> Mr. Williams saw Poncho waiving a twenty-dollar bill and asking to be let inside the Ferry Street house. Mr. Williams refused to let Poncho in, telling him the owner would not allow anyone else inside. Mr. Williams returned to the living room, where he and Mr. Gaines began talking. While Mr. Williams and Mr. Gaines sat in the living room, Poncho

continued knocking at the back door which increased.to "boom boom" banging on the door. Mr. Williams and Mr. Gaines ignored the banging, but Mr. Gaines grew tired of the noise and became concerned the continued banging would cause a neighbor to call the police. Mr. Gaines went to the back door and began to speak through the door without opening it to Poncho.

Mr. Gaines then opened the back door, and he and Poncho continued their conversation at the doorway. Mr. Williams could not hear the substance of the conversation but heard the men's voices getting louder. Mr. Gaines then left the house, closing the door behind him. Poncho did not enter the house.

Mr. Williams heard both Mr. Gaines and Poncho continue an escalating argument outside the Ferry Street house. Mr. Williams went to the back door to investigate leaving the house by the back door and walking along an alleyway where the two men argued. Mr. Williams testified he saw Mr. Gaines and Poncho continuing to argue, and he attempted to intervene. Mr. Williams testified that he saw Mr. Gaines "out of nowhere" hit Poncho with a vicious hit.

Mr. Williams saw Poncho fall to the ground and Mr. Gaines on top of Poncho hitting him and kicking him in the back of the head. Mr. Williams testified that he pulled Mr. Gaines off of Poncho who then got up and walked away down the street. Mr. Williams thought the fight ended but then he saw Poncho return "with a big stick." Mr. Williams testified that while he and Mr. Gaines faced each other, and with Mr. Gaines back to Poncho, Poncho "runs with the stick and hits Mr. Gaines in the back" and both Poncho and Gaines fell to the ground. Mr. Williams testified that the stick broke in half. Mr. Williams testified the stick "was not real sturdy." and "was like a rail, like an old house rail or something."

Mr. Williams testified he became afraid when he saw Poncho coming at Mr. Gaines with the stick because "he was standing right--I mean me and Mr. Gaines was talking. We were close to each other talking" and "I was afraid I was going to get hit. With half a stick in Poncho's hand and both he and Mr. Gaines on the ground, the two men began scuffling. Mr. Gaines got up from the ground. Mr. Gaines then pulled a knife out of his pocket and said something like, "Oh, it's like that? Yeah, it's like that." And began to stab Poncho who remained on the ground. Mr. Williams grabbed Mr. Gaines from Poncho. Poncho got up from the ground and left.

Dr. Land testified that his forensic examination revealed five stab wounds: two to the right buttocks, approximately five to six inches deep, one to the right posterior thigh approximately three inches deep, one to the front right bicep approximately two inches deep, and a fifth stab wound to the right groin which perforated the femoral artery.

Dr. Land testified that the femoral artery provides most of the blood for the lower leg and if the femoral artery is damaged, "blood's going to spurt out and the person dies." He testified that the stab wound to the right groin caused massive exsanguination, bleeding out, both externally and into the soft tissues of the thigh and into the back."

Gaines v. Marsh, 528 F.Supp. 3d 286, 296-299 (EDPA 2021).

Dr. Land testified that Mr. Gaines' knife was 3 inches but it could have inflicted the fatal blow if applied with sufficient force. Id. at 299-300

Mr. Gaines presented a theory of self-defense in opening statement and closing argument. Mr. Gaines argued that the stick wielded by Poncho justified the use of force and he had no duty to retreat and had the right to stand his ground and use deadly force because Poncho used a weapon readily or apparently capable of lethal use under Pennsylvania law. The defense attorney planned to bring the self-defense theory through the testimony of Mr. Williams. Mr. Gaines did not testify. Id. at 300.

The issue arose whether the trial court would provide the "no adverse inference instruction" if Mr. Gaines elected not to testify. Id. at 303. At the charge conference, the defense attorney requested the no adverse inference instruction. But the judge after agreeing to give the no adverse inference instruction, inadvertently failed to give it. At the conclusion of the jury charge, the trial judge called counsel to sidebar and asked the district attorney and the defense attorney, “Do you believe I have set forth the law as it applies to this case?” And “Have I given all the instructions that you requested?” The defense attorney responded “yes” to each question. Id. 304. The judge then asked, “Have I given all the instructions that you requested?” The trial court asked the defense attorney if he “is requesting any additional instructions? Id. 304-305. The court asked, “are you satisfied that I set forth the law as it applies to this case? The defense attorney responded, “yes.” The court again asked, “are you requesting any further instructions?” The defense attorney replied, ”no.” Id. 303-304

The jury convicted Mr. Gaines of first-degree murder. The court imposed a sentence of mandatory life.

On May 31, 2013, the trial court denied timely filed post sentence motions. Mr. Gaines filed a timely appeal raising two issues: (1) whether the evidence was sufficient in that the evidence did not establish malice or specific intent to kill. Where the defendant had been attacked by a weapon wielding man and used a knife to defend himself and no evidence would support the inference that the defendant intended to pierce the femoral artery and (2) whether the exclusion of a defense witness who would have testified that the stick wielded by the decedent (a railing used as a club) would have warranted forceful intervention because it was a weapon readily or apparently capable of lethal use. Id. 304

In ***Gaines v. Marsh***, 528 F.Supp. 3d 286 (EDPA 2021), the United States District Court granted habeas corpus on Mr. Gaines' argument that trial counsel was ineffective for not objecting to the trial court's omission of the "no adverse inference instruction." The basis for the claim was that Mr. Gaines agreed to give up the fundamental right to testify in exchange for the no adverse inference instruction informing the jury that it could not use Mr. Gaines decision not to testify against him. The trial court agreed to give the no adverse inference instruction, but then did not give it. Trial counsel asked for the no adverse inference instruction during the charge conference. The judge agreed to give the instruction but inadvertently failed to give it. Instead, the judge asked trial counsel several times if the attorney wanted an additional instruction or instructions, and the attorney did not request the missing no adverse inference instruction. Id. 303-304. At the hearing on the habeas corpus petition, the defense attorney testified that this was a "strategic" decision taken because he did not want to call the attention of the jury to the fact that Mr. Gaines did not testify. At the hearing, the defense attorney stated that giving the no adverse inference instruction after the judge finished giving the jury instructions would draw undue attention to Mr. Gaines decision not to testify, particularly when such an instruction would

normally have been given earlier in the charge. Id. 308. The defense attorney acknowledged that he expected the "no adverse inference' charge would have been given earlier when the trial court informed the jury that the burden of proof rests with the prosecution and the defense has no obligation to present witnesses. Defense counsel testified that he did not raise the failure to request the no adverse inference instruction in the post sentence motion. He agreed he had no strategic reason because "It was not an issue that I frankly even considered."

The district court granted habeas corpus based on the claim of ineffective assistance of counsel for failing to object to the omission of the no adverse inference instruction and for PCRA counsel's deficient performance for failure to raise the claim of ineffective assistance of counsel in the PCRA petition. Id. 309.

The Court of Appeals held that the defense attorney's decision not to ask the trial court to give the no adverse inference instruction was reasonable. The problem with the appellate decision is clear. The defense attorney's decision not to object to the failure to give the instruction because it was too late to give it makes no sense because the trial judge could have cured the error. Second, the defense attorney had no explanation for failure to raise the issue during post sentence motions. Third, the decision was a fundamental decision reserved to the client. The attorney had no right to waive the fundamental right to the no adverse inference charge.

First, the decision whether or not to demand the adverse inference instruction was not the attorney's decision to make. The defense attorney had no right to arrogate to himself the decision to waive the adverse inference instruction. This was a fundamental decision reserved to the client, Mr. Gaines. In ***Commonwealth v. Thompson***, 543 PA 634, 674 A2d 217 (PA 1996), the Pennsylvania Supreme Court held: "we hold that from this day forward, the no adverse inference

instruction shall be given absent an express on the record colloquy by the defendant waiving the charge." ***Id*** at 674 A2d 217

Second, in ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) the Court stated that counsel is an assistant to the defendant, and that counsel has a basic obligation to consult with the client before making important decisions. ***McCoy v. Louisiana***, 584 U.S.___, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018)[Some decisions are reserved to the client. Lawyer is an assistant to the client]

Under ***Government of Virgin Islands v. Weatherwax,*** 77 F3d 1425, 1432 (3d Cir. 1996), the Court acknowledged that the accused has the right to make fundamental decisions regarding representation, and conduct of the defense. The decision to testify is a fundamental decision. ABA Model Code of Professional Responsibility 1.2(a). Likewise, the decision not to testify is fundamental. Even with respect to decisions that are non-fundamental, the attorney is just an assistant and must consult with the client about important matters. Id. 1433. A decision relating to exercise of the right to testify is fundamental. Conversely, a decision relating to the right not to testify is fundamental. In the case at hand, the attorney had no right to abandon the no adverse inference instruction without consultation and approval of Mr. Gaines.

SUMMARY OF THE ARGUMENT

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REASONS WHY THE WRIT SHOULD BE GRANTED

Rule 10. Considerations Governing Review on Certiorari

> Review on certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, though neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The Third Circuit's decision conflicts with decisions of this court and with decisions of other federal appellate courts.

Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) held that United States Constitution, Amendment V requires the trial judge give a "no adverse inference instruction" when requested by a defendant to do so. In the ***Carter*** case. the Supreme Court

stated that relying on the theory that the jury will not notice that the defendant did not testify and draw adverse inferences on their own is a "speculative assumption." The Court described the assumption as "dubious." ***Id.*** at 450 U.S. 299. Consequently, the defense attorney's excuse based on a similar rationale given by the attorney in this case cannot be a reasonable excuse for the failure to give the no adverse inference instruction. ***Id.*** at 450 U.S. 299.

The decision is contrary to ***McCoy v. Louisiana***, 584 U.S.___, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018) and ***Government of Virgin Islands v. Weatherwax,*** 77 F3d 1425, 1432 (3d Cir. 1996), which state that responsibility for the defense is divided between the client and the client's attorney. In this case, Appellant made the fundamental decision not to testify in exchange for the no adverse inference instruction. Trial counsel asked for the instruction during the charge conference but then, according to the defense attorney, consciously decided not to object to the trial court's omission of the no adverse inference instruction. This decision was contrary to the wishes of the client in violation of ***McCoy v. Louisiana***, 584 U.S.___, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018)

Finally, whether trial counsel's "strategy" was reasonable or not must be measured against what is reasonable under Pennsylvania law. There is no other yardstick for performance of trial counsel. Trial counsel is expected to know the law and follow it. As such, trial counsel should have known that the decision to request a no adverse inference instruction was a fundamental decision reserved to the client. ***McCoy v. Louisiana***, 584 U.S.___, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018)

In ***Commonwealth v. Thompson***, 543 PA 634, 674 A2d 217 (PA 1996), the Pennsylvania Supreme Court held: "we hold that from this day forward, the no adverse inference instruction shall be given absent an express on the record colloquy by the defendant waiving the charge." ***Id***

at 674 A2d 217. In ***Commonwealth v. Garcia***, 585 PA 160, 170, 888 A2d 633 (2006) the Supreme Court of Pennsylvania stated: "Whether the defendant asks for a no adverse inference instruction or not, the jury cannot help but notice when the defendant fails to testify, and it is perceived human nature to think unfavorably of silence in the face of criminal prosecution. A decision not to have the court instruct the jury to draw no adverse inference from the defendant's SILENCE IS RISKY.

Mr. Gaines' takes the position that what the Third Circuit calls trial strategy was no strategy at all. The case bears a close resemblance to ***Richards v. Quarterman***, 566 F3d 553 (5th Cir. 2009) wherein the Fifth Circuit held that trial counsel's "strategy" was an unreasonable decision parading under the umbrella of strategy. In the case at hand, trial counsel's strategy is an unreasonable decision parading as strategy for the following reasons: (1) trial counsel persuaded the client not to take the stand in exchange for the promise that the client would receive a no adverse inference instruction (2) trial counsel asked the trial court to give the no adverse instruction during the charge conference (3) trial counsel made no objection to the trial court's omission of the charge because he testified that he thought the no adverse inference instruction should have been given at the beginning of the charge and not at the end of the charge (4) trial counsel had no explanation for why he did not object to the omission of the charge during post-sentence motions which presented no downside risk to the client. The trial lawyer claimed he never thought about it which certainly is the equivalent of no strategy at all.

CONCLUSION

This Court should adopt the well-reasoned decision in ***Gaines v. Marsh***, 528 F.Supp. 3d 286 (EDPA 2021), It should reject the Third Circuit's opinion in this case, and grant the petition for certiorari.

Cheryl J. Sturm
Attorney-At-Law