

**No. \_\_\_\_\_**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**UNITED STATES OF AMERICA,  
Plaintiff-Appellee,**

**v.**

**JASON DANIEL GANDY,  
Defendant-Appellant, Pro Se**

**On Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:12-CR-503-1**

**APPELLANT JASON DANIEL GANDY'S CONSOLIDATED PRO  
SE MOTION FOR PLAIN-ERROR REVIEW UNDER FED. R.  
CRIM. P. 52(b)**

## **INTRODUCTION**

### **PRELIMINARY JURISDICTIONAL AND CLASSIFICATION STATEMENT**

Rule 52(b) supplies the standard of review for an error properly before an appellate court; it does not, standing alone, reopen a final criminal judgment. Gandy therefore asks the Court first to identify the lawful procedural vehicle and determine whether the governmental-use and derivative-use contention presented in DE 287 was ever adjudicated. DE 289 addressed whether Gandy's own statements were introduced against him at trial. Direct admission of his words and investigative use of information obtained from those words are materially different propositions. Any portion of a filing that attacks a defect in the integrity of the prior collateral proceeding must be classified separately under *Gonzalez v. Crosby*, 545 U.S. 524, 531-36 (2005), *Webb v. Davis*, 940 F.3d 892, 897-99 (5th Cir. 2019), and *Will v. Lumpkin*, 978 F.3d 933, 936-40 (5th Cir. 2020). Any new substantive claim remains subject to 28 U.S.C. section 2255(h). This motion does not ask Rule 52(b) itself to create jurisdiction.

This motion asks the Court to confront a suppression issue that Gandy contends was raised, preserved, and never constitutionally resolved. DE #34 and sealed DE #46 placed suppression and voluntariness before the district court. Years later, DE #89 recorded retained counsel Dan Cogdell stating that the defense was still waiting for rulings on its motions. Charles Flood's handwritten notes dated August 8, 2014 (Exhibit K, p. 1) identify Gandy's number-one goal as "WIN MOTION FOR SUPPRESSION." The same record reflects that Gandy wanted retained trial counsel to remain and that counsel changes occurred while the suppression issue remained unresolved. At the same time the suppression issue remained unresolved, Gandy was confined on suicide watch from March 12 through March 31, 2015, as documented by the custody and suicide-watch records in Exhibit I. Flood - the retained attorney who understood and was pursuing the unresolved suppression issue - was permitted to withdraw at this critical period. The timing matters: Gandy contends he was not abandoning suppression while in crisis;

the lawyer who understood that issue was being allowed to leave while Gandy was confined on suicide watch.

## **I. A VOLUNTARINESS AND SUPPRESSION HEARING WAS REQUIRED**

### **A FILED SUPPRESSION MOTION CANNOT BE TREATED LIKE THE UNFILED REQUEST IN KNEZEK**

The controlling adverse comparison is *United States v. Knezek*, 964 F.2d 394, 397-99 (5th Cir. 1992). *Knezek* involved no timely written suppression motion, grounds raised only near trial, no showing of cause, and no objection when the statements were admitted. Gandy presents the opposite record: DE 34 and sealed DE 46 placed suppression before the district court years before trial, and DE 89 recorded that counsel was still awaiting a response. *Knezek* therefore does not establish that years of nonresolution of timely filed motions constituted Gandy's knowing and intentional waiver.

Persuasive state decisions illustrate the narrower adjudicative principle without supplying federal jurisdiction or establishing structural error. *State v. Martin*, 38 N.C. App. 115, 247 S.E.2d 303 (1978), treated failure to conduct the required suppression hearing as reversible error. *State v. Breeden*, 306 N.C. 533, 539, 293 S.E.2d 788, 792 (1982), required a hearing and findings on a legally sufficient motion. *State v. Mendell*, 191 Ohio App. 3d 325, 2010-Ohio-6107, paragraphs 17, 24, reversed where distinct suppression issues were left unresolved. Gandy relies on these authorities only to show that deciding one suppression question does not silently adjudicate another question actually raised.

*Jackson v. Denno*, 378 U.S. 368 (1964), requires a fair hearing and reliable judicial determination when the voluntariness of a confession is properly put in issue. *United States v. Renteria*, 625 F.2d 1279, 1282-83 (5th Cir. 1980), addressed unresolved suppression motions together with the absence of a *Jackson* hearing and remanded for consideration of suppression and voluntariness. *United States v. Iwegbu*, 6 F.3d 272, 274 (5th Cir. 1993), states that when the evidence clearly raises a genuine question of voluntariness, the district court should conduct the required inquiry

sua sponte. *United States v. Guanespen-Portillo*, 514 F.3d 393, 399-402 (5th Cir. 2008), recognizes the same Fifth Circuit rule in the plain-error setting. *United States v. Kim L. Powe*, 591 F.2d 833 (D.C. Cir. 1978), is persuasive authority concerning alerting circumstances and the trial judge's duty to inquire. Here, the asserted notice was stronger than in a case where defense counsel remained silent: suppression motions were actually filed. DE #34 and sealed DE #46 raised the issue, and DE #89 later documented that counsel was still awaiting rulings. The central question is why the suppression issue already placed before the district court through DE #34 and sealed DE #46 remained unresolved while the prosecution continued.

## **II. GANDY DID NOT AGREE THAT SUPPRESSION WAS “MOOT”**

The fuller record directly answers the argument that the parties could simply agree that the statements or evidence would not be used and thereby eliminate the need to decide suppression. Flood's August 8, 2014 handwritten notes (Exhibit K, p. 1), later available through the December 6, 2021 proceeding at DE #262 and related exhibits DE #263-65, document Gandy's contemporaneous insistence that the suppression issue be litigated. That evidence is material to whether Gandy knowingly and intentionally relinquished the suppression issue. *United States v. Olano*, 507 U.S. 725 (1993), distinguishes forfeiture from waiver. Waiver requires intentional relinquishment or abandonment of a known right. Gandy contends the record shows the opposite: he wanted the suppression issue won and decided. A later lawyer's failure to insist on a ruling, a lawyer's agreement about trial use, or counsel turnover should not automatically be treated as Gandy's personal, knowing waiver. The distinction is especially important because the alleged problem was not limited to whether Gandy's own words were read to the jury. His theory is that the interrogation changed the investigation itself. If statements were used to redirect K.V.'s interrogation, obtain or exploit photographs, identify witnesses, influence family members, support charging, affect bond, or otherwise develop the prosecution, excluding the words themselves at trial would not answer whether derivative evidence was tainted.

### **III. THE JULY 20, 2012 INTERROGATIONS, K.V., AND THE CAUSAL**

CHAIN Gandy states that he and K.V. were interrogated on July 20, 2012. He describes severe fatigue and asserts that he invoked counsel but questioning continued. The complete recordings are critical because they permit the reviewing court to determine what Gandy actually said, what agents learned, what K.V. said before agents used information obtained from Gandy, and how K.V.'s account changed afterward. Attorney Michael Levin's memorandum, identified as Exhibit V, analyzes the theory that information obtained from Gandy after an asserted Edwards violation was then communicated to K.V. and influenced K.V.'s decision to implicate Gandy. The memorandum recognizes that suppression of live-witness testimony is disfavored and requires careful attenuation analysis, but it identifies *United States v. Ceccolini*, 435 U.S. 268 (1978), *United States v. Scios*, 590 F.2d 956 (D.C. Cir. 1978), *Wong Sun v. United States*, 371 U.S. 471 (1963), and *Brown v. Illinois*, 422 U.S. 590 (1975), as authorities requiring the causal chain to be examined rather than assumed away. The trial record itself supplies reasons to examine that chain. In DE #190, Day 2 of trial, at approximately pages 109-111 (ROA 945-947), K.V. testified that he was trying to help Jason, did not want Jason to get in trouble, and "really liked Jason." When asked whether he was still trying to protect Gandy during a later CAC interview, K.V. answered that part of him was still trying to protect him. K.V. also described telling a private investigator that he felt bad about what happened and wanted his friend to get out. On Day 3, DE #192 at page 129, the prosecutor stated that the witnesses were present because they were under subpoena and "didn't want to be here"; at page 130 the prosecutor referred to K.V. as trying to protect the defendant. These statements are material to attenuation, voluntariness, credibility, and whether later testimony was produced or shaped by the challenged investigative process. The record also contains K.V.'s reported September 10, 2012 statements to investigator Bert Diaz. As reproduced in Gandy's Speedy Trial materials, K.V. stated in substance that police kept asking questions, that he told them what they wanted to hear so the questioning would stop, that not

everything he told police really happened, and that Jason never abused him. K.V.'s mother likewise reportedly told Diaz that after K.V. returned to the United States he repeatedly told her Jason had done nothing wrong and police had forced him to make statements. Gandy asks that the original Diaz report, recordings, and any contemporaneous notes be reviewed rather than relying on paraphrase. Gandy further points to DE #190 at approximately pages 105-106 and 136. K.V. correctly referred to Customs when describing the United Kingdom passport incident, but then specifically referred to ICE - U.S. Immigration and Customs Enforcement. Gandy contends that the change in terminology is

significant because immigration enforcement was a particular concern for K.V.'s family and therefore appears to have been on K.V.'s mind while testifying. Later, K.V. acknowledged that he was "cooperating" and expressed concern about possible "fallout." Gandy asks the Court to examine the complete recordings and government records to determine what K.V. meant by "fallout" and whether immigration concerns influenced his cooperation or testimony. Gandy also contends that K.V.'s mother was told that nude photographs of K.V. had been found on Gandy's computer and that Gandy previously had been banned from entering the United Kingdom. Gandy maintains both propositions were false. The constitutional significance, if the record confirms that government agents supplied materially false information, is not simply impeachment. Gandy contends such information could have altered K.V.'s and his family's perceptions, influenced subsequent statements, and become part of an investigative chain originating in evidence that should first have been tested at the unresolved suppression hearing. The Court should determine who supplied these assertions, when, and on what evidentiary basis. Additional investigative leads concern the person identified in K.V.'s trial testimony at approximately page 53 as "Jamie Van." Gandy states that investigators associated that person with Jamie Bam, Luke, and/or Lucas Montagne and with identifiers including "Lucasmontagne," "dlucasmontagnek30," "luke291443," and "jamiebamshortbus@gmail." Gandy further states that in 2017 he personally located and positively identified the individual on a

personal Facebook account, based on the investigators' work and Gandy's prior knowledge of him. Gandy recalls photographs showing the individual with very young-looking males who appeared from the photographs to be romantic partners. K.V.'s sworn trial testimony concerning sexual activity with the person identified as Jamie Van when K.V. was approximately fourteen should be compared with the identity and history of the person Gandy says he located in 2017. Gandy also believes the individual may have had a Homeland Security or other governmental connection. That possible connection requires independent verification from official records. Gandy does not ask this Court to presume that the individual identified in the record as Jamie Van/BAM/Luke committed a crime merely because K.V. later testified about serious conduct involving him. The point is the extraordinary investigative sequence and apparent disparity that the record should resolve. Gandy contends that, after the challenged July 20, 2012 interrogation, he was transported to his July 25 bond proceeding while represented by appointed counsel. Rather than ordinary prisoner transportation, Gandy states that Homeland Security agent Johnson—who had participated in the July 20 interrogation—rode armed in the front passenger seat of a Ford SUV with a notepad and pen while another woman drove. Gandy contends that information was obtained from him during that trip concerning K.V. and the individual later identified as Jamie Van/BAM/Luke. The timing is critical. Gandy contends that investigators confronted K.V. with that specific information the following day, July 26, 2012. According to Gandy, K.V. reluctantly acknowledged conduct predating his relationship with Gandy that was highly damaging to K.V.'s reputation, including receiving shoes in connection with sexual conduct involving the other individual. The July 25 and July 26 records and recordings therefore should be examined together to determine whether information obtained from represented Gandy supplied the factual lead used to elicit K.V.'s subsequent statements. K.V. later gave sworn trial testimony concerning serious conduct involving that other individual. Yet Gandy has not identified a resulting prosecution, conviction, or sex-offender registration arising from those allegations. That does not establish that the other individual committed a crime or received preferential treatment. It

does, however, raise a concrete and answerable question: what investigation followed K.V.'s allegations, what did investigators conclude, and why was the information handled as it was? That question becomes especially significant if official records substantiate Gandy's separate belief that the other individual had a Homeland Security or governmental connection. Gandy requests verification rather than assumption. The relevant investigative files can establish whether such a connection existed and whether the individual was investigated, cleared, prosecuted, or otherwise dealt with. The comparison matters to Gandy's suppression claim. More than fourteen years after his

arrest, Gandy contends that he still has not received the open suppression hearing necessary to determine what information flowed from the challenged interrogations and what evidence resulted from it. The BAM evidence therefore is not offered to accuse a third party without adjudication. It is offered to demonstrate why the July 20, July 25, and July 26 investigative chain must finally be examined in an evidentiary proceeding rather than assumed harmless. The July 25 transport details and the asserted July 25-to-July 26 information flow are presented as Gandy's firsthand account and a testable investigative sequence, not as independently established facts; the requested transportation logs, agent notes, recordings, and investigative files should determine whether that account is corroborated.

**IV. THE BLUE-SHEET PHOTOGRAPH, THE RECORDED JAIL CALL, AND DERIVATIVE USE** K.V.'s first several recorded interrogations are especially important. Gandy contends that K.V. disputed the blue-sheet photograph, said Jason did not own blue sheets, said the person depicted was not K.V., and told investigators to search Jason's house and RV. The fuller materials further contend that an illegally obtained photograph was shown or used during K.V.'s questioning and was discussed with K.V.'s mother and family. For approximately five years, Gandy contends, that photograph formed part of the investigative chain affecting K.V., yet the jury was not permitted to evaluate the photograph or its effect on K.V.'s statements. DE #190 at page 111 / ROA 947 identifies another item that should be preserved and produced. When the prosecutor asked whether Gandy contacted K.V. after K.V. returned to the United States, K.V. testified that Gandy called him from jail. Defense counsel Buckley then requested "a limiting instruction as to the part of the testimony that relates to inadmissible material." Gandy now specifically requests preservation and production of the complete recorded jail telephone call. Gandy recalls explaining during that call how his own statements had been coerced and recalls K.V. responding, in substance, that what happened to him was "the same." The recording itself is the best evidence of what was said and should control over recollection. That call matters because it can be compared with K.V.'s interrogation recordings, the Diaz report, his mother's reported statements, and his trial testimony that he liked Gandy and was trying to protect him. The fact that K.V. accepted a jail call does not by itself resolve whether he was a victim or whether his testimony was voluntary. What matters here is the content of the recording and whether it corroborates or contradicts the government's account of how K.V.'s accusations developed. Gandy contends that this disparity is a direct consequence of the district court's failure to conduct the constitutionally required suppression hearing despite being alerted to the issue. See *Waller v. Georgia*, 467 U.S. 39 (1984); *United States v. Kim L. Powe*, 591 F.2d 833 (D.C. Cir. 1978). Had the required hearing occurred, the court would have been required to confront openly the photograph, the circumstances under which K.V. was shown it, the changes in K.V.'s

account, the allegedly false information supplied to K.V.'s family, the recorded jail call, and whether later evidence was obtained by exploitation of the challenged interrogation. The derivative- evidence principle is illustrated by *United States v. Jonathan Patrick Blevins*, No. 4:12-cr-00693, DE 53 (S.D. Tex. Aug. 12, 2014) (Hughes, J.). There, after finding a warrantless search and unwarned interrogation unconstitutional, Judge Lynn N. Hughes ordered suppression of evidence obtained by exploiting those violations and concluded that later-discovered evidence or statements resulting from the unlawful search or interrogation would likewise be suppressed. The opinion closes with the phrase "fruit of poisonous practices." Official opinion: GovInfo - *United States v. Blevins*, DE 53. Blevins does not eliminate the separate attenuation analysis required for live-witness testimony under *Ceccolini*. It does, however, underscore the basic proposition also reflected in *Wong Sun*, *Brown*, *Scios*, *Murray*, *Nardone*, and *Silverthorne*: a court must identify what the constitutional violation produced and determine whether later evidence resulted from exploitation of the illegality, an independent source, or sufficient attenuation. Gandy's contention is that this inquiry never occurred

because DE #34 and sealed DE #46 remained unresolved while the investigation and prosecution continued. The strongest claimed causal chain is therefore concrete and testable: information obtained from Gandy during the challenged July 20 interrogation; use of that information in K.V.'s questioning; introduction of the disputed photograph and other information; statements made to K.V. or his family; changes or expansions in K.V.'s account; additional investigative leads; the recorded jail call; and eventual use of resulting evidence or testimony in the prosecution. If the record confirms that chain, Gandy contends the prejudice cannot be cured merely by saying that a particular statement or photograph was not itself shown to the jury. The Court should review the complete recordings and documentary record and determine what, if anything, became the fruit of those allegedly poisonous practices.

## **V. CHARLES FLOOD, SUICIDE WATCH, AND THE LOSS OF COUNSEL**

**WHO UNDERSTOOD SUPPRESSION** The original materials treat Charles Flood's withdrawal as part of the suppression story, not as a separate complaint about lawyers. Flood had reviewed the July interrogations, and his contemporaneous notes document Gandy's stated objective concerning suppression. A September 12, 2014 email from Flood (Exhibit K, p. 3) discussed strategy and expressed concern that a transfer could reduce the likelihood that the suppression motion would receive proper consideration. The record further identifies a March 31, 2015 email from Flood to Julie Gandy (Exhibit K, p. 7), sent while Gandy was on suicide watch, stating that if Judge Rosenthal denied Flood's request to withdraw, Flood would continue to fight zealously as though he had never made the request. The supporting materials place Gandy on suicide watch from March 12 through March 31, 2015. Gandy contends that allowing a retained lawyer who understood the suppression issue to leave at that point was devastating to his ability to protect the unresolved motions and devastating to him personally. *Matter of Wynn*, 899 F.2d 644, 646 (5th Cir. 1990), addresses good cause for attorney withdrawal. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), holds that erroneous deprivation of counsel of choice is structural error. The motion does not assume that every attorney withdrawal is automatically structural. It asks the Court to examine the actual circumstances: Gandy's stated desire to retain paid trial counsel, the unresolved suppression motions, his mental condition at the time, the absence of a knowing waiver, and the practical effect of replacing counsel who knew the suppression record.

## **VI. COGDELL, DEBORDE, DE #98, AND THE RECORD OF GANDY'S**

**WISHES** The chronology continued. Dan Cogdell was retained in 2012, filed the suppression motions, and as late as DE #89 in December 2016 stated that the defense was still waiting for rulings. DE #98, the later-transcribed in-camera proceeding, is important because Gandy contends it records him telling the court that he had paid his lawyers for trial and did not want them to withdraw. The fuller record also states that Cogdell and Nicole DeBorde were nevertheless permitted to leave. That chronology matters to waiver. If Gandy wanted the lawyers to remain and wanted the suppression motion won, counsel turnover cannot fairly be treated, without further inquiry, as proof that he intentionally abandoned suppression. The Court should compare DE #98 with DE #141, where the district court later stated that the record seemed to indicate Gandy fired counsel. The Court should determine accurately who chose the counsel changes and whether those changes caused the unresolved constitutional issue to disappear without Gandy's informed consent.

## **VII. NEYLAND AND THE PRACTICAL CONSEQUENCE OF COUNSEL**

**TURNOVER** The Neyland correspondence is relevant because it documents the transition in responsibility. Gandy's materials state that Dustan Neyland originally expected to serve in a secondary role and later became first chair after other attorneys left. Gandy contends Neyland lacked comparable federal trial experience and did not insist that the unresolved suppression and voluntariness questions receive the hearing Gandy had wanted for years. The legal point is not that

inexperience by itself establishes constitutional error. It is that the court should not infer waiver from silence after a sequence in which the defendant wanted suppression litigated, counsel who understood the issue left, and replacement counsel did not renew or force a ruling. Under *Olano and Johnson v. Zerbst*, 304 U.S. 458 (1938), intentional relinquishment must be distinguished from rights lost through counsel action, forfeiture, or procedural breakdown.

## **VIII. STRUCTURAL ERROR AND EXHIBIT O**

### **RUSHEN REQUIRES A RECORD-BASED, TAILORED INQUIRY**

Rushen v. Spain, 464 U.S. 114, 117-20 (1983), forecloses a categorical assertion that every unrecorded or ex parte communication automatically requires reversal. Gandy does not rely on the ex parte character of DE 98 alone as an automatic-reversal rule. He relies on DE 98 as part of the record indicating that the pending suppression issue was discussed outside an open adversarial hearing while no later order has been identified that adjudicated the full motion and derivative-use contention. The requested remedy is correspondingly tailored: disclose the relevant record, identify any ruling on each issue, conduct any necessary adversarial hearing, make reviewable findings, and then apply the proper harmless-error, plain-error, or structural-error framework to the right and defect actually established.

Exhibit O, the Zachary Henderson Missouri Law Review analysis, was cited in the fuller materials for a reason. It surveys structural error, waiver, forfeiture, and plain-error review. Arizona v. Fulminante, 499 U.S. 279 (1991), distinguishes structural defects from ordinary trial errors. Gonzalez-Lopez places erroneous deprivation of counsel of choice in the structural category. Weaver v. Massachusetts, 582 U.S. 286 (2017), further explains structural-error doctrine. This motion does not label every suppression mistake “structural.” Instead, the alleged errors must be separated and analyzed under the doctrine applicable to each. The absence of a constitutionally adequate voluntariness determination is evaluated under the suppression and plain-error authorities; any erroneous deprivation of counsel of choice under Gonzalez-Lopez; and any qualifying public-trial violation under Waller v. Georgia, 467 U.S. 39 (1984). Johnson v. United States, 520 U.S. 461 (1997), makes clear that characterizing an error as structural does not remove a forfeited claim from Rule 52(b) on direct federal review. The significance of Exhibit O is therefore not that structural error automatically bypasses Rule 52(b), but that the Court must identify the right at issue, distinguish waiver from forfeiture, and apply the proper Rule 52(b) analysis without

collapsing a qualifying structural defect into an ordinary harmless-error inquiry.

## **IX. THE HUMAN CONSEQUENCES ARE PART OF THE COUNSEL AND**

**PARTICIPATION RECORD** The supporting materials document repeated periods of suicide watch and severe psychological deterioration during the years of pretrial detention. They also state that Gandy made a serious suicide attempt on July 20, 2018, during the trial period. Those facts are relevant here only insofar as the record shows his ability to participate in his defense, the consequences of counsel turnover, and the circumstances under which alleged forfeitures occurred. They should not be used as a substitute for the constitutional analysis. The hospital photograph in the exhibits is contemporaneous evidence of the severity of Gandy's psychological deterioration during the trial period. Gandy contends that this deterioration cannot be separated from the defense breakdown that preceded trial: retained counsel who understood and pursued suppression were gone, the suppression motions remained unresolved, and replacement counsel entered shortly before trial without the same history or preparation. Gandy further contends that replacement counsel had been on the case only approximately forty-nine days and, during trial, responded to concerns about his performance by telling Gandy, in substance, that he could sue him later for ineffective assistance. The hospital photograph is not an afterthought; Gandy offers it as contemporaneous evidence of what was happening to him while he was being required to proceed through trial under those circumstances. He contends that the combination of the unresolved suppression issue, repeated loss of retained counsel, last-minute replacement representation, and his acute psychological deterioration severely impaired his ability to participate meaningfully in his defense and to protect the constitutional claims he had repeatedly demanded be litigated. Those circumstances also bear directly on whether later silence or failure to object can fairly be characterized as a knowing and intentional waiver.

## **X. PREJUDICE: THE COURT MUST TRACE WHAT FLOWED FROM**

**THE UNRESOLVED SUPPRESSION ISSUE** Rule 52(b)'s substantial-rights inquiry cannot be answered merely by saying the Government agreed not to introduce certain statements or objects

directly. The relevant question is what the challenged interrogation and allegedly unlawful evidence produced. The fuller materials identify potential use in the bond proceeding, K.V.'s questioning, a disputed photograph, communications with K.V.'s family, investigative leads, media publicity, charging decisions, the plea process, trial evidence, the PSR, and psychological records. Each asserted use should be tested against the record. The strongest claimed causal chain is: information obtained from Gandy; use of that information in K.V.'s interrogation; a changed or expanded accusation; use of the disputed photograph and other information with K.V. or his family; development of additional evidence or witnesses; and eventual use of the resulting evidence in the prosecution. If the record confirms that chain, the prejudice is not cured simply because a particular statement or photograph was not itself shown to the jury.

**XI. RULE 52(b) ANALYSIS** First, Gandy alleges error because suppression and voluntariness were affirmatively raised but no constitutionally adequate hearing and reliable determination occurred. Second, he contends the error was plain under Jackson, Renteria, Iwegbu, Guanespen-Portillo, and related authority. Third, he contends substantial rights were affected because the unresolved interrogation issue allegedly altered the investigation and the evidence that reached trial. Fourth, if those propositions are established from the record, he asks the Court to exercise its discretion because allowing a prosecution to retain the benefits of an unresolved constitutional violation would seriously affect the fairness, integrity, or public reputation of judicial proceedings.

**XII. ANTICIPATED GOVERNMENT ARGUMENTS AND GANDY'S RESPONSE TO EACH**

1. THRESHOLD RULE 60(b)(6) TIMELINESS - THE RECORD-ACCESS CHRONOLOGY MUST BE CONSIDERED BEFORE TREATING DELAY AS DISPOSITIVE DE #289 relied on delay as an independent reason for denying Rule 60(b)(6) relief. Gandy therefore addresses that ground first rather than assuming that the Gonzalez classification question alone resolves the matter. Rule 60(c)(1) requires a Rule 60(b)(6) motion to be filed within a reasonable time, and Fifth Circuit authority also requires extraordinary circumstances. The inquiry is circumstance-dependent; Gandy does not contend that the passage of years is irrelevant. The material point is what the record shows about those years. Gandy contends that the documents needed to demonstrate the procedural problem were not available to him despite repeated efforts to obtain them. DE #239 and later record requests document continuing pursuit; DE #277 sought DE #98; the January 8, 2024 court-reporter correspondence stated that the April 27, 2017 transcript was sealed and required a judicial order for release; the July 9, 2018 proceeding reflected in DE #141 was not transcribed until May 6, 2024; and DE #98 did not become available until April 2025. In January 2025, before DE #98 became available, Gandy personally filed a handwritten notice again requesting the April 27, 2017 DE #98 proceeding, identified earlier requests including DE #239 and DE #285, and recorded a January 16, 2025 prison-mail date. On February 3, 2025, the Fifth Circuit confirmed

that the resulting appeal had been docketed as No. 25-20032. That letter is evidence of continued pursuit, not a merits ruling. Accordingly, the timeliness question should not be reduced to the calendar interval between the earlier habeas judgment and a later Rule 60(b) filing. The court should determine when Gandy could reasonably obtain the primary materials on which the asserted procedural defect depends, what steps he took to obtain them, and what he did after they became available. This chronology is offered to answer DE #289's independent delay ground; it does not itself establish entitlement to Rule 60(b)(6) relief.

does not extinguish an error for Rule 52(b) purposes. *Johnson v. United States*, 520 U.S. 461, 465-67 (1997). The chronology is inconsistent with intentional abandonment. DE #34 and sealed DE #46 affirmatively raised suppression. DE #89 later recorded counsel as still waiting for rulings. Flood's August 8, 2014 notes identify Gandy's number-one objective as "WIN MOTION FOR SUPPRESSION." DE #98 is offered to show that Gandy wanted paid trial counsel to remain. Gandy later returned to the unresolved issue through DE #287; DE #289 addressed what Gandy contends was a materially different characterization of that claim; and on April 28, 2026, Gandy filed another Rule 60(b) motion at DE #316. DE #316 is offered here for the limited procedural point that Gandy continued seeking adjudication, not as an independent jurisdictional foundation. The Government therefore should identify the affirmative act constituting intentional waiver, not merely point to the passage of time, changes of counsel, or the absence of a ruling. Renteria and Iwegbu further demonstrate why counsel silence does not automatically answer a clearly raised voluntariness problem. *United States v. Renteria*, 625 F.2d 1279, 1282-84 (5th Cir. 1980); *United States v. Iwegbu*, 6 F.3d 272, 274-76 (5th Cir. 1993). 5. CECCOLINI / LIVE-WITNESS TESTIMONY - ATTENUATION REQUIRES FACTUAL FINDINGS, NOT A PER SE EXCEPTION The Government may rely on *United States v. Ceccolini*, 435 U.S. 268 (1978), because K.V. ultimately testified as a live witness. But *Ceccolini* did not establish an automatic rule that live-witness testimony is cleansed of any antecedent illegality. It examined the witness's exercise of free will, the role of the illegality in obtaining

the testimony, temporal distance, whether tainted information was used in questioning, investigators' prior knowledge of the witness, and the purpose of the unlawful conduct. *Id.* at 275-80. Gandy's asserted chronology therefore requires a fact-specific attenuation inquiry. He contends that information obtained during the challenged July 20 interrogation was carried forward and used in K.V.'s questioning; that Agent Johnson obtained additional information from represented Gandy during the July 25 transport; and that investigators confronted K.V. with that information on July 26. Those assertions must be tested against the transportation logs, recordings, agent notes, and investigative files. They should not be assumed true, but neither can attenuation be assumed merely because K.V. later became a live witness. *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963), *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), and *Murray v. United States*, 487 U.S. 533, 537-42 (1988), reinforce the need to identify exploitation, intervening circumstances, independent source, and attenuation. The unresolved suppression record matters because without determining what investigators knew independently, what they obtained from Gandy, what they communicated to K.V., and what resulted, the court cannot perform the causal analysis Ceccolini requires.

6. OFFER OF PROOF / CAUSATION - THE CLAIM IDENTIFIES SPECIFIC, TESTABLE PRIMARY EVIDENCE The Government may argue that causation is speculative. *United States v. Harrelson*, 705 F.2d 733, 737 (5th Cir. 1983), requires sufficiently definite, specific, detailed, and nonconjectural factual allegations to justify an evidentiary hearing. Gandy identifies the evidence by which his asserted chain can be tested: the July 20 recordings; the July 25 transport records and agent notes; K.V.'s July 26 and other recorded questioning; the disputed photograph; communications with K.V.'s family; the Diaz materials; the recorded jail call; and the later trial record. The request is not that allegations substitute for proof, but that the identified primary evidence be preserved, produced, compared, and judicially evaluated.

7. THIRD PRONG / PREJUDICE - THE COURT MUST TRACE THE ALLEGED DERIVATIVE CHAIN BEFORE ASSUMING INDEPENDENCE Olano ordinarily requires prejudice affecting the

outcome, and the defendant bears the burden. 507 U.S. at 734. *United States v. Dominguez Benitez*, 542 U.S. 74, 81-83 (2004), describes the ordinary inquiry in terms of a reasonable probability of a different result. Gandy does not ask the Court simply to presume prejudice. His theory is that the unresolved interrogation issue changed the investigation itself and helped produce or shape central witness evidence. If the record establishes that information obtained through the challenged interrogation was used to develop K.V.'s accusations or other prosecution evidence, there is at least a concrete basis to determine whether resolving suppression and attenuation before trial could have changed the evidentiary presentation and outcome. The prejudice inquiry cannot begin by assuming the disputed evidence was independently obtained when independence is itself the unresolved factual question. *Renteria* illustrates an appropriate appellate response where the record requires missing suppression and voluntariness determinations: remand for the district court to consider and rule on suppression and conduct the required hearing. 625 F.2d at 1283-84. Gandy therefore seeks a record-based determination rather than appellate factfinding by assumption.

8. FOURTH PRONG / DISCRETION - FAIRNESS, INTEGRITY, AND PUBLIC REPUTATION FAVOR CORRECTION OF A PROVEN, UNRESOLVED ERROR Even when the first three requirements are met, correction remains discretionary. *Olano*, 507 U.S. at 735-37. But *Olano* also makes clear that fourth-prong relief is not limited to cases of actual innocence; an error may seriously affect the fairness, integrity, or public reputation of judicial proceedings independent of innocence. *Johnson*, 520 U.S. at 469-70; *Rosales-Mireles v. United States*, 585 U.S. 129, 139-42 (2018). If the record establishes that suppression and voluntariness were affirmatively placed before the district court, that counsel later documented the absence of rulings, that Gandy continued attempting to obtain adjudication and the underlying records, and that derivative evidence may have been developed while the constitutional question remained unresolved, allowing the passage of time itself to become the reason the question can never be adjudicated would raise substantial fairness and institutional concerns. The requested remedy is deliberately limited. Gandy does

not ask this Court to decide disputed suppression facts in the first instance or automatically suppress K.V.'s testimony. He asks the Court, to the extent jurisdiction exists and Rule 52(b)'s requirements are satisfied, to preserve the primary evidence and remand for a constitutionally adequate hearing and findings concerning voluntariness, suppression, waiver, attenuation, derivative use, and prejudice. That permits the Government to litigate free will, independent source, attenuation, and causation on evidence rather than assumption.

### **XIII. RECORD PRESERVATION**

Gandy respectfully requests preservation and production of the complete audiovisual recordings of his July 20, 2012 interrogation, K.V.'s interrogations, and the complete recorded jail telephone call between Gandy and K.V., including the earliest K.V. interviews in which the blue-sheet photograph was disputed. The recordings are primary evidence of sequence, wording, fatigue, invocation of counsel, what K.V. said before and after particular information was introduced, and whether later testimony or investigative steps were derivative.

### **XIV. YEARS OF EFFORTS TO OBTAIN THE RECORD**

Gandy's inability to present this documentary record earlier was not for lack of trying. The newly documented January-February 2025 record is particularly probative: while DE #98 was still

unavailable, Gandy personally filed a handwritten notice again requesting the April 27, 2017 DE #98 proceeding and identifying prior requests, and the Fifth Circuit then docketed the resulting appeal as No. 25-20032. He contends that beginning in 2019 he repeatedly sought the records needed to prove what had occurred in the suppression, counsel-withdrawal, and speedy-trial proceedings. DE #239, reproduced at Exhibit U, p. 2, documents earlier efforts to obtain the record; later correspondence also shows that Gandy's mother, Julie Gandy, sought the missing transcripts and records on his behalf. These efforts are important because they show that the later production of the transcripts was not the creation of a new claim after the fact, but the culmination of years of attempts to

obtain the documents needed to prove an existing claim. The delay was extraordinary. The July 9, 2018 speedy-trial hearing reflected in DE #141 was not transcribed until May 6, 2024, despite Gandy's earlier requests. The April 27, 2017 in-camera proceeding reflected in DE #98 was even more important because it records Gandy stating that he had paid Cogdell and DeBorde for trial and wanted them to remain. Correspondence from the court reporter on January 8, 2024 (Exhibit T, p. 5) described that transcript as 'sealed EX PARTE' and stated that a judicial order was required for release. The record-access materials identify DE #239, DE #277, and Exhibit T as documenting efforts to obtain it. DE #98 was not finally available to Gandy until April 2025. Thus, from 2019 through 2024 and 2025, Gandy was trying to obtain the very documents that now corroborate central parts of what he had been saying: he wanted the suppression issue litigated; he wanted his retained trial lawyers to remain; and the later description that he had fired counsel must be tested against the actual DE #98 transcript. The timing matters to Rule 52(b), waiver, and fairness. A defendant should not be treated as having knowingly abandoned a constitutional claim when he spent years seeking the sealed or untranscribed records necessary to demonstrate it. The eventual production of DE #141 and DE #98 did not create these allegations; Gandy contends those records finally supplied documentary proof of allegations he had been attempting to substantiate for years. The chronology in Fifth Circuit DE #79, Exhibit C, Exhibit E (Reasons Law Professors Needed), DE #239/Exhibit U, and the later record-access materials shows continuing efforts rather than abandonment: January 27, March 24, May 23, and June 20, 2019: Gandy wrote Judge Rosenthal asking why Dan Cogdell, Nicole DeBorde, and Charles Flood had been permitted to withdraw. The June 20 letter was sent by certified mail on June 24, 2019 at 3:22 p.m., certified no. 7010-3090-0003-3369-2910. June 24, 2019 forward - Fifth Circuit DE #79 / Exhibit C: the appellate correspondence record documents Gandy's effort in Fifth Circuit case No. 18-20823. The fuller materials identify DE #79 as part of the Fifth Circuit's own record of his attempts. February 3, 2021 - District Court DE #239 / Exhibit U: although the docket describes the filing simply as a 'Letter,' the

submitted materials state that it raised the structural constitutional problems and sought records needed to establish them, including the missing DE #98 record. February 4, 2021: the Fifth Circuit sent correspondence addressed to Judge Rosenthal and copied Carmen Mitchell and Andrew Sand. Gandy relies on this as further proof that his concerns had reached both the appellate and district courts. January 5, 2024 - DE #277: Julie Gandy formally sought DE #98 on Jason's behalf. January 8, 2024 - Exhibit T, p. 5: court reporter Kathy Metzger wrote that the April 27, 2017 transcript was 'sealed EX PARTE' and that an order from the judge was required before it could be released. May 6, 2024: the July 9, 2018 speedy-trial hearing reflected in DE #141 was finally transcribed, years after Gandy had begun seeking the underlying record. March 31, 2025 - DE #302: the district court ruled on requests to unseal records. The submitted materials dispute the order's characterization of DE #98 as not filed under seal and contrast it with the court reporter's January 2024 email. April 21, 2025: DE #98, the April 27, 2017 in-camera proceeding, finally became available. Gandy contends that the transcript supplied documentary support for what he had maintained for years: that he had paid Cogdell and DeBorde for trial and wanted them to remain. This history forecloses any fair suggestion that Gandy slept on his rights. He repeatedly attempted to obtain and present the underlying record. Whether the repeated delays, docket characterizations, sealing practices, and treatment of his pro se requests resulted from deliberate

conduct or institutional error, their practical effect was the same: the documents necessary to substantiate his constitutional claims remained unavailable to him for years. Once DE #141 and DE #98 finally became available, they supplied documentary support for assertions Gandy had been making long before he possessed the records necessary to prove them.

## **XV. SUBSEQUENT ATTEMPT TO PRESENT THIS MOTION**

Gandy's continuing efforts did not end when DE #98 finally became available. On April 27, 2026, he submitted to this Court a 'Motion for Relief under Rule 52(b) and for Vacatur or Limited Remand.' The appellate docket reflects that no action was taken because Appeal No. 25-20032 had previously been closed for failure to pay the filing fee and that '[t]he default has not been remedied as of this date.' That procedural disposition should not be mistaken for abandonment of the constitutional claims or an adjudication of their merits. Gandy separately seeks appropriate relief concerning the closed appeal and filing-fee/IFP issue. He includes this history here solely to document continuing diligence and his repeated effort to obtain consideration of the underlying constitutional issues.

## **RELIEF REQUESTED**

Gandy respectfully requests that the Court apply Rule 52(b)'s plain-error framework to the errors properly before it; review the complete suppression, interrogation, counsel-withdrawal, and derivative-evidence record; preserve the relevant recordings; and, to the extent the Court has jurisdiction and the Rule 52(b) requirements are satisfied, remand for a constitutionally adequate hearing and determination concerning voluntariness, suppression, waiver, and the admissibility or derivative use of evidence flowing from the July 20, 2012 interrogations. He further requests any relief required by controlling structural-error authority if the record establishes an erroneous deprivation of counsel of choice or another qualifying structural defect.

## **CONCLUSION**

The record should not be reduced to the proposition that defense lawyers agreed certain evidence would not be used. Gandy's own documented objective was to win the suppression motion. DE #34 and sealed DE #46 raised suppression; DE #89 shows counsel still awaiting rulings years later; Flood's handwritten notes document Gandy's objective; the counsel-withdrawal record bears on whether Gandy ever knowingly waived the issue; and the interrogation recordings permit the Court to trace whether the Government obtained derivative benefits from evidence it could not lawfully exploit. Those issues warrant examination on the actual record rather than resolution by an assumption of mootness.

## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned certifies that all interested persons and entities required by Fifth Circuit Rule 28.2.1 will be identified on the Court-required form or in a completed certificate filed with this motion.

## **RULE 27.4 CONFERENCE STATEMENT**

Because Appellant proceeds pro se, no conference with opposing counsel was required unless directed by the Court.

## **CERTIFICATE OF COMPLIANCE**

This computer-produced motion uses a 14-point proportional typeface and contains 7,266 words, excluding material exempted by Federal Rule of Appellate Procedure 32(f).

## **CERTIFICATE OF SERVICE**

I certify that on \_\_\_\_\_, I served a copy of this motion on counsel for the United States in the manner required by Federal Rule of Appellate Procedure 25.

Respectfully submitted,

\_\_\_\_\_  
JASON DANIEL GANDY, Reg. No. 73006-279, Defendant-Appellant, Pro Se Date: \_\_\_\_\_