December 23, 2003

Mrs. Stephanie Lavake, Clerk,
Court of Appeals, Second District
Tarrant County Justice Center
401 West Belknap, Suite 9000
Fort Worth, Texas 76102

Mr. Barton Ray Gaines
Sid #0579723
100 North Lamar Street
Fort Worth, Texas 76102

RE: APPELLATE BRIEF
#2-02-498 and 2-02-499

Mrs. Lavake:

Please find enclosed my Pro Se Brief on Appeal to be filed in your office. I have placed this legal instrument in the internal mailbox over here at the jail just moments after signing it.

Please place this before the court in order that my appeal may be heard.

Thank you in advance for your time.

Sincerely,

BARTON RAY GAINES

IN THE COURT OF APPEALS

FOR THE SECOND JUDICIAL DISTRICT

AT FORT WORTH, TEXAS

BARTON RAY GAINES
Appellant,

v.

THE STATE OF TEXAS
Appellee

Appeal from The Criminal District Court
213TH of Tarrant County, Texas
The Honorable Robert K. Gill presiding
Cause No. 0836985A
And
Cause No. 0836979A

APPELLANT BARTON RAY GAINES BRIEF ON APPEAL

Respectfully submitted

BARTON RAY GAINES
SID # 0579723
100 North Lamar Street
Fort Worth, Texas 76102

ORAL ARGUMENTS

Appellant Pro Se Avers, oral argument will not be necessary, unless the State requests oral argument. In the event that the State request oral argument, appellant respectfully requests the court to appoint counsel to represent the Appellant's interest.

CERTIFICATE OF INTERESTED PARTIES

Appellant Pro Se certifies, to his knowledge on the parties listed below have an interest in the outcome of this case. These representations are made, in order that the judges of this court may evaluate possible disqualification or recusal. They are as follows:

1. **BARTON RAY GAINES**
   Appellant
   SID #0579723
   100 North Lamar Street
   Fort Worth, Texas 76102

2. **PAUL FRANCIS**
   Attorney – Counsel on Appeal
   760 North Fielder Road
   Arlington, Texas 76012
   (817) 543-2600

3. **GREG WESTFALL and CHEYENNE MINICK**
   Attorneys – Counsel at Trial
   910 Mallick Tower
   1 Summit Avenue
   Fort Worth, Texas 76102
   (817) 877-1700

4. **THE STATE OF TEXAS**
   Appellee

5. **CHARLES MALLIN**
   Assistant District Attorney
   Tarrant County Justice Center
   401 West Belknap Street, 7th floor
   Fort Worth, Texas 76196
   (817) 884-1995

6. **MICHELLE HARTMAN and ROBERT FORAN**
   Assistant District Attorneys
   Tarrant County Justice Center
   401 West Belknap Street, 7th floor
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BARTON RAY GAINES

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IN THE COURT OF APPEALS
FOR THE SECOND JUDICIAL DISTRICT
AT FORT WORTH, TEXAS

BRIEF ON APPEAL

BARTON RAY GAINES
Appellant,

v.

THE STATE OF TEXAS
Appellee,

TO THE HONORABLE COURT OF APPEALS

COMES NOW, BARTON RAY GAINES, Appellant Pro Se in the above and entitled numbered cause, pursuant to Rule 74, Texas Rules of Appellant Procedure, and files this, his brief on appeal from a conviction of Aggravated Robbery with a deadly weapon, to–wit: a firearm, and Attempted Capital Murder, in Cause No. 0836985A, The second indictment alleged the same charge, different victim in Cause No. 0836979A, in Tarrant County, Texas, and would show this Honorable Appellate Court as follows:

THE RECORD

The trial record consists of two (2) volumes of clerk's record No. 0836985A and No. 0836979A, and six (6) volumes of reporter's records.

1. Volume One Chronological Master Index

2. Volume Two Voir Dire Proceedings
3. Volume Three Trial On The Merits and Punishment Phase
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5. Volume Five Trial On The Merits and Punishment Phase Continued
6. Volume Six Exhibits
7. Affidavits

PRELIMINARY STATEMENT

Appellant, Barton Ray Gaines was indicted in two cases. The first charged the offenses of Aggravated Robbery with a deadly weapon, to-wit: a firearm, and attempted Capital Murder, in Cause No. 0836985A (CR. 0836985A) The second indictment alleged the same charges, with a different victim, in Cause No. 0836979A (CR. 0836979A). Both cases were tried together.

Appellant entered a plea of guilty to the jury to the two charges of Aggravated Robbery and the State did not proceed on the Attempted Capital Murder charges. (RR III 5). Aggravated Robbery is punishable by confinement in prison from 5 to 99 years, or life, and a fine of up to $10,000.00. Texas Penal. Code § 12.32.

The jury was instructed to return a finding of "guilty" after having heard evidence regarding the punishment. (CR.0836985A I32), (CR. 0836979A I 77). The jury assessed punishment at 35 years in the Texas Department of Corrections and a fine of $10,000.00. (CR0836985A I 37), (CR. 0836979A I 82). The trial court sentenced Appellant on December 12, 2002. (CR. 0836985A I 41), (CR.0836979A I 86)

An appeal was filed timely. (CR. 0836985A I 67), (CR.0836979A I 127). Appellant was declared indigent, (CR. 0836985A I 69), (CR.0836979A I 129), and the undersigned attorney (PAUL FRANCIS) was appointed as the second substitute attorney to represent Appellant on appeal.

An Ander's Brief was filed by the substitute attorney, which is believed frivolous. Appellant, BARTON RAY GAINES is now Pro Se seeking justice.

POINTS OF ERROR FOR REVIEW

NO. 1
TRIAL COURT COMMITTED ERROR IN FAILURE TO HOLD A COMPETENCY HEARING AT THE TIME OF APPELLANTS SENTENCING.

THE EVIDENCE IS LEGALLY SUFFICIENT TO PROVE APPELLANT, BARTON RAY GAINES WAS INCOMPETENT, HAD NO RATIONAL UNDERSTANDING NOR COULD APPELLANT FULLY UNDERSTAND HIS LEGAL RIGHTS BEING WAIVED.

NO. 2
THE TRIAL COURT COMMITTED ERROR ACCEPTING A PLEA OF GUILTY, IN WHICH APPELLANT HAD NO RATIONAL UNDERSTANDING OF THE PROCEEDINGS AGAINST HIM.

NO. 3
THE TRIAL COUNSEL WAS INEFFECTIVE – FAILURE TO RENDER EFFECTIVE ASSISTANCE IN APPELLANT, BARTON RAY GAINES DEFENSE.

TRIAL COUNSEL WOULD NOT RAISE PRETRIAL MOTIONS, PREPARE A DEFENSE, OR DISCUSS THE CASE WITH APPELLANT.

POINT OF ERROR ONE RESTATED

TRIAL COURT COMMITTED ERROR IN FAILING TO HOLD A COMPETENCY HEARING AT THE TIME OF APPELLANTS SENTENCING.

ACCORDING TO THE COURT OF APPEALS OF TEXAS, PURSUANT TO **Tex. Code Criminal. Pro. ANN. Art. 46.02, §2(b) in *Casey, Appellant* v *The State of Texas*.** The APPELLANT WAS ENTITLED TO A COMPETENCY-HEARING REQUIREMENT BECAUSE SENTENCING WAS PART OF THE TRIAL. THE COURT STATED THAT

THERE WAS NO JUDGMENT OF CONVICTION UNTIL AN ACCUSED WAS SENTENCED. SINCE A JUDGMENT, BY DEFINITION, INCLUDED THE SENTENCE. THE COURT FURTHER HELD THAT AT THE SENTENCING STAGE OF TRIAL SUBSTANTIAL RIGHTS OF AN ACCUSED COULD BE AFFECTED. THE COURT FOUND THAT AN ACCUSED MUST BE COMPETENT TO BE SENTENCED, AND A HEARING MUST BE HELD TO ALLOW THE COURT TO DETERMINE WHETHER AN ACCUSED WAS COMPETENT TO UNDERSTAND THE SENTENCE. ***Casey* v. *State*, 924 S.W.2d 946 (Tex. Criminal. App. 1996).**

WHEN EVIDENCE OF INCOMPETENCY BECOMES MANIFESTED IN TRIAL, WHETHER OR NOT A REQUEST OR DEMAND FOR A COMPETENCY HEARING IS MADE BY THE ACCUSED, DUE PROCESS REQUIRES THAT A TRIAL JUDGE ON HIS OWN INITIATIVE TO HALT THE TRIAL AND CONDUCT A COMPETENCY HEARING. ***Bonner* v *State*, 520 S.W.2d 901 (Criminal. App. 1975)**.

IT IS CLEAR IN THE RECORD THAT APPELLANT, BARTON RAY GAINES HAS MENTAL PROBLEMS, AND WAS ENTERED AT THE TRIAL, WHEN **EXHIBIT 20** WAS ENTERED AND WHILE DR. JOHNSTONE TESTIFIED.

ON THE DIRECT EXAMINATION, DR. EDWIN JOHNSTONE STATES HIS CREDITABILITY, AND TO THE FACTS OF APPELLANTS, BARTON RAY GAINES MENTAL HEALTH, ADHD, BORDERLINE PERSONALITY DISORDER, LOW AVERAGE IQ, DRUG USE, AND THE USE OF THE COMMONLY DISPUTED DRUG PAXIL, AND THE ROLE PAXIL CONTRIBUTED TO THE APPELLANT'S MENTAL STATE DURING THE ALLEGED CRIME **(RR IV 120,127)** DR. EDWIN JOHNSTON ALSO TESTIFIED THAT THE DRUG PAXIL HAD DISINHIBITED BARTON'S SOCIAL JUDGMENT, AND THIS WAS

ONE OF THE ADVERSE EFFECTS OF PAXIL. **(RR IV 139)** MEANING THAT BARTON RAY GAINES HAD NO RESTRAINT OR SUPPRESSION OVER HIS BEHAVIOR CONSCIOUS OR UNCONSCIOUS.

DR. EDWIN JOHNSTONE TESTIFIES THAT PSYCHOLOGIST, DR. WARREN, HAD GIVEN APPELLANT A BATTERY OF PSYCHOLOGICAL TESTS. **(RR IV 154-159)** THE TEST RESULTS SHOWED THAT THE APPELLANT, BARTON RAY GAINES, HAD A LEARNING DISABILITY, ATTENTION DEFICT HYPERACTIVITY DISORDER, AND THAT HE HAD BEEN OVERUSING ALCHOL AND MARIJUANA. **(RR IV 159)** HE TESTIFIED THAT ADHD CAUSED DIFFICULTY IN KEEPING ATTENTION FOCUSED. FURTHER, IT MAKES IT DIFFICULT TO CONCENTRATE AND FOLLOW THROUGH OR PAY CONSISTENT ATTENTION, AND HE ALSO SAW, EVIDENCE OF DYSLEXIA. **(RR IV 160-166)** DR. EDWIN JOHNSTONE ALSO TESTIFIED THAT HE WOULD NOT HAVE PRESCRIBED PAXIL TO SOMEONE WITH ATTENTION DEFICIT DISORDER. (RR IV 176) IT HAS BEEN PUBLISHED IN RESEARCH STUDIES, THAT DEPRESSED YOUNG MEN WHO ALSO HAVE ADHD, TEND TO RESPOND POORLY TO THE SSRI ANTIDEPRESSANT PROZAC AND PAXIL, THAT NOT ONLY DO THEY TEND TO
HAVE THE PROBLEM OF BEING PRONE TO HYPO-MANIC KIND OF LOSS OF INHIBITIONS, THEY UNDERGO A RELAPSE OF THEIR OWN HARD FOUGHT SELF-CONTROL OVER THEIR ADHD, THERE IS A GREAT LIKLIHOOD THEY WILL RELAPSE AS THOUGH THEY WERE SCATTERED AND IMPULSIVE THIRD GRADERS. **(RR IV 180-181)** DR. EDWIN JOHNSTON ALSO BELIEVED PAXIL HAD AND DID CONTRIBUTE TO A HYPO-MANIC STATE, INDUCED IN THE APPELLANT, BARTON RAY GAINES. **(RR IV 179-180)**

TEX. CODE CRIM. PROC. ANN. ART. 46.02 SEC. 2(B) SPECIFIES THAT DURING THE TRIAL, IF EVIDENCE FROM ANY SOURCE RAISES THE ISSUE OF DEFENDANT'S COMPETENCY, THE TRIAL COURT **MUST** HOLD A HEARING, IN **STEP THREE, OF THE ART. 46.02 SEC. 2(B)** IT STATES "IF ANY EVIDENCE OF INCOMPETENCY IS PRESENTED DURING THE HEARING, REGARDLESS OF CONTRARY EVIDENCE, THE COURT MUST IMPANEL A SEPARATE JURY TO DECIDE THE ACCUSED'S COMPETENCY. ***Sisco*, 599 S.W.2d AT 613**.

DR. WARREN, A PSYCHOLOGIST FOR THE TEXAS REHABILITATION COMMISSION STATES IN HIS DIAGNOSTIC IMPRESSIONS AND REPORTS AS FOLLOWS:

"BARTON CAN BEST BE CHARACTERIZED AS A RESTLESS, HYPERACTIVE YOUNG MAN WHO HAS DIFFICULTY SUSTAINING HIS ATTENTION AND CONCENTRATION. HE IS PRONE TO IMPULSIVITY, AND FREQUENTLY ENGAGES IN IMPULSIVE SELF-DEFEATING BEHAVIORS WITH LITTLE OR NO REGARDS TO THE POSSIBLE CONSEQUENCES OF SUCH BEHAVIORS. **(SEE EXHIBIT 20)** DR. WARREN DID COMMENT THAT, HE FELT THAT BARTON WAS NOT A GOOD

HISTORIAN, NOT CAPABLE OF A SOPHISTICATED UNDERSTANDING OF HIS OWN ROLE IN SOME OF THE DIFFICULTIES THAT HE HAD EXPERIENCED, AS WELL AS DR. EDWIN JOHNSTONE. **(RR IV 172)**

THE APPELLANT BEARS THE BURDEN OF PRESENTING A SUFFICIENT RECORD TO SHOW ERROR, WHICH REQUIRES REVERSAL. TEX. R. APP. P. 50(d). MERE ASSERTIONS IN A BRIEF WILL NOT SUFFICE TO SATISFY THE BURDEN. *Serna*

v. *State*, 882 S.W.2d 885,890 (Tex. App.-Corpus Christi 1994, no pet.); *Freeman* v. *State*, 828, S.W.2d 179 (Tex. App.-Houston [14th District.] 1992, no pet.)

GENERALLY, TO RAISE THE ISSUE OF INCOMPETENCY, THERE MUST BE EVIDENCE OF RECENT SEVERE MENTAL ILLNESS OR BIZARRE ACTS BY THE DEFENDANT OR EVIDENCE OF MODERATE RETARDATION. Brown v. State, 871 S.W.2d 852,859 (Tex. App.-Corpus Christi 1994, pet. Ref'd)

DR. EDWIN JOHNSTONE'S CREDITABLE DIAGNOSIS AND TESTIMONIAL FACTS OF APPELLANT, BARTON RAY GAINES MENTAL HEALTH, ADHD, BORDERLINE PERSONALITY DISORDER, AND LOW AVERAGE IQ, ALONG WITH DR. WARREN, A PSYCHOLOGIST, DIAGNOSTIC IMPRESSIONS AND REPORT **(EXHIBIT 20)** BARTON'S MOTHER TESTIFIED TO THE FACT THE HE WAS UNABLE TO FILL OUT A CHECK FROM HIS OWN CHECKING ACCOUNT ALONE, OR DISTINGUISH BETWEEN A SAVINGS ACCOUNT AND A CHECKING ACCOUNT **(RR IV 40-43)** IT WAS ALSO BROUGHT TO THE COURTS ATTENTION BY BARTON RAY GAINES MOTHER THAT HE WAS UNABLE TO COMPLETE A JOB APPLICATION UNLESS SHE RODE IN THE CAR, AND WAITED FOR HIM TO GO INSIDE THE BUSINESS ESTABLISHMENT, BRING IT OUT, AND SIT IN THE CAR WHILE SHE FILLED IT OUT FOR BARTON. HE WOULD TAKE IT BACK INTO THE BUSINESS ESTABLISHMENT. **(RR IV 37, 38)** ALONG WITH TESTIMONIAL FROM FAMILY AND FRIENDS **(RR III 205, 206)** THAT APPELLANT BARTON RAY GAINES DISPLAYED BIZARRE ACTS **(RR IV 54, 58), (RR IV 101-110), (RR IV 50-70)** IS SUFFICIENT TO PROVE A COMPETENCY HEARING SHOULD HAVE BEEN HELD.

IN REBUTTAL, THE STATE CALLED SCOTT CHRISTAIN, AN EMPLOYEE OF THE TARRANT COUNTY SHERIFF'S DEPARTMENT WHO TESTIFIED THAT APPELLANT HAD NOT BEEN A DISCIPLINARY PROBLEM WHILE IN JAIL. **(RR IV 205-207)**

ALSO TESTIFYING FOR THE STATE WAS MIMI PARKS, A CASE WORKER WITH THE DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION. SHE TESTIFIED THAT APPELLANT HAD MADE NO COMPLAINTS REGARDING PAXIL SINCE BEING IN JAIL. **(RR IV 216)**

DR. EDWIN JOHNSTONE SPECIFICALLY RESPONDS TO WHY IT IS , THAT APPELLANT, BARTON SEEMED TO HAVE BEEN GETTING ALONG JUST FINE IN JAIL. THE FOLLOWING CONVERSATION BETWEEN DR. EDWIN JOHNSTONE AND COUNSEL FOR THE APPELLANT TOOK PLACE. **(RR IV 181-182)**

20 Q. HOW DO WE EXPLAIN THE FACT THAT BARTON IS NOT HYPO-MANIC
21. IN JAIL?
22. A. THERE CAN BE SEVERAL THINGS THAT HELP TO EXPLAIN THAT.
23. PROBABLY THE MOST IMPORTANT ELEMENT IS THE FACT THAT
24. CONFINED TIGHTLY CONTROLLED SITUATIONS LIKE MENTAL
25. HOSPITALS OR JAILS OR PRISONS ARE CAPABLE OF DIMINISHING
1. THE EXCITEMENT, AND THE ENVIROMENT IT SELF IS BENEFICIAL
2. IN CALMING DOWN A HYPO-MANIC STATE. ALSO BENEFICIAL FOR A
3. PERSON WHO HAS LOSS OF CONTROL OVER HIS ADHD, SO
4. PROBABLY THE SINGLE MOST IMPORTANT THING THERE IS THAT
5. EVEN THOUGH HE CONTINUES ON THE PAXIL WHILE HE'S IN THE

6. JAIL, THE INFLUENCE OF THE JAIL ENVIROMENT WHERE THERE IS

7. VERY LITTLE STIMULATION GOING ON, VERY FEW CHOICES TO BE

8. MADE, EVERYTHING IS KIND OF CHILLED OUT IN THE JAIL, THAT

9. OUTWEIGHS THE INCLINATION OF THE PAXIL TO INDUCE THE

10. HYPO-STATE. PROBABLY IF YOU TOOK THE SAME PERSON ON THE

11. PAXIL OUT OF THE JAIL SETTING, LEFT THEM ON PAXIL, THE

HYPO-MANIA WOULD RE-EMERGE.

MIMI PARKS ON RECROSS-EXAMINATION BY DEFENSE COUNSEL **(RR IV 218-219)**

19. Q. LOOK AT THIS REPORT RIGHT THERE. THIS IS YA'LLS RECORD,

20. RIGHT?

21. A. YES.

22. Q. PUT YOUR FINGER RIGHT THERE. THAT'S THE

23. SENTENCE ON…DOES IT SAY THERE, NEVER SEEN BY A

24. PSYCHIATRIST?

25. YES, SIR.

1. Q. THIS IS 5-20 OF 02 AND THIS INFORMATION

2. GATHERED FROM BART. BART IS THE HISTORIAN OF THIS

3. INFORMATION?

4. A. YES, SIR.

5. Q. IT SAYS NEVER SEEN A PSYCHIATRIST, AND THAT HIS FAMILY

6. DOCTOR PRESCRIBED ANY MEDICATION HE GOT. ISN'T THAT

7. WHAT IT SAYS?

8. A. YES, SIR.

B. DISCUSSION

THE EVIDENCE IS LEGALLY SUFFICIENT TO PROVE THAT A COMPETENCY HEARING SHOULD HAVE BEEN HELD AT THE TIME OF APPELLANT'S SENTENCING. THE FACT OF THE APPELLANT'S MENTAL CONDITION DOES ALSO RAISE THE ISSUE OF THE APPELLANT'S GUILTY PLEA, WHICH WAS NOT MADE WITH A RATIONAL UNDERSTANDING OF THE PROCEEDINGS AGAINST HIM, NOR DID BARTON RAY GAINES, OR COULD HE FULLY UNDERSTAND HIS CONSTITUTIONAL RIGHTS BEING WAIVED. WHEN INSANITY OF THE ACCUSED, AT THE TIME OF COMMISSION OF THE OFFENSE IS NOT RAISED AT TRIAL, THIS BRINGS GROUNDS FOR HABEAS CORPUS OR CORAM NOBIS AFTER CONVICTION. 29 A.L.R.2d 703. THE DEGREE OF MENTAL COMPETENCE REQUIRED OF THE ACCUSED WHO PLEADS GUILTY, MUST SATISFY REQUIREMENTS OF RULE 11 OF FEDERAL RULES OF CRIMINAL PROCEDURE, 31 A.L.R. FED. 375 APPELLANT, BARTON RAY GAINES, A 19-YEAR OLD MALE AT THE TIME OF THE CRIME WAS IN A HYPO-MANIA STATE, **(RR IV 179-180)** ON THE WRONG MEDICATION, APPELLANT; BARTON RAY GAINES HAD ALSO RESENTLY BEEN A PATIENT WITH MHMR REHABILITATION.

THE FACTS SHOW APPELLANT, BARTON TO BE LEGALLY INCOMPETENT WITH SEVERAL MENTAL CONDITIONS, UNABLE TO CONCENTRATE, RATIONALLY UNDERSTAND, COMPREHEND, FOLLOW THROUGH ON A THOUGHT, AND UNABLE TO PAY ATTENTION AND UNDERSTAND THE SEVERITY OF WHAT WAS HAPPENING TO HIM IN THE TRIAL. **(RR IV 159-161)** IN ADDITION, DR. EDWIN JOHNSTONE TESTIFIED TO THE FACT THAT THE APPELLANT'S IQ WAS IN THE DULL LOW RANGE. **(RR IV 164)** INCOMPETENCY AT THE TIME OF THE OFFENSE OR TRIAL IS

GROUNDS FOR VACATING OR SETTING ASIDE THE SENTENCE UNDER 28 U.S.C.S. SEC. 2255, AND 7 A.L.R. FED. 565 ANY PERSON NOT GIVEN THIS RIGHT IS ENTITLED TO FILE A HABEAS CORPUS AS REMEDY AFTER A CONVICTION. 2 L. Ed. 2d 1531

IN EVALUATING FACTUAL SUFFICIENCY, AN APPELLANT COURT MUST REVIEW ALL THE EVIDENCE WITHOUT THE PRISM "IN LIGHT MOST FAVORABLE TO THE PROSECUTION" AND SET ASIDE THE VERDICT IF IT IS SO CONTRARY TO THE OVERWHELMING WEIGHT OF EVIDENCE AS TO BE CLEARLY WRONG AND UNJUST.

ART. 571.0039(14) MENTAL HEALTH CODE DEFINES MENTAL ILLNESS AS "AN ILLNESS, DISEASE, OR CONDITION, OTHER THAN EPILEPSY, SENILITY, ALCHOHOLISM, OR MENTAL DEFECIENCY, THAT:

(A) SUBSTANTIALY IMPAIRS A PERSON'S THOUGHT PERCEPTION OT REALITY, EMOTIONAL PROCESS, OR JUDGMENT; OR

(B) GROSSLY IMPAIRS BEHAVIORS AS DEMONSTRATED BY RECENT DISTURBED BEHAVIOR."

WHEN MENTAL INCAPACITY REDUCES THE DEFENDANT'S ABILITY TO UNDERSTAND WHAT IS HAPPENING TO THEM, TO PARTICIPATE IN THEIR OWN DEFENSE, THE BASIC FAIRNESS OF THE CRIMINAL TRIAL PROCESS IS THREATENED. WHEN A DEFENDANT IS INCOMPETENT, THEY MAY NOT BE ABLE TO MAKE INFORMED DECISIONS ABOUT FUNDAMENTAL ISSUES, SUCH AS WHETHER OR OT TO ENTER INTO A PLEA BARGAIN AGREEMENT OR, INSTEAD PROCEED TO TRIAL.

DUE PROCESS REQUIRES SEPARATE HEARINGS TO DETERMINE COMPETENCY TO STAND TRIAL. IN *Pate* v. *Robison*, 383 U.S. 375, 86 S. CT. 836, 15L. Ed.2d 815, THE SUPREME COURT DECLARED THAT THE TRIAL AND CONVICTION OF AN INCOMPETENT DEFENDANT CONSTITUTES A DENIAL OF DUE PROCESS AND THAT STATE PROCEDURE MUST BE ADEQUATE TO PROTECT THIS RIGHT. *Ramirez* v. *State*, 92 Tex. Criminal. 390, 120 S.W.2d 588 AND *Morales* v. *State*, 427 S.W.2d 51, (Tex. Criminal. App. 1968).

APPELLANT'S RIGHT TO DUE PROCESS BY WAY OF A COMPETENCY HEARING, AND HIS GUILTY PLEA, WHICH WAS NOT MADE WITH A RATIONAL UNDERSTANDING, OR COULD HAVE BEEN, WAS IRREPARABLY DISTURBED TO HIS DETRIMENT. FOR THE REASONS, APPEALLANT, BARTON RAY GAINES IS AND SHOULD BE ACQUITTED AS A MATTER OF LAW, IF NOT, SHOULD BE, AND AT LEAST GRANTED A NEW TRIAL. Art. 46.02 Code of Criminal. Procedure. Sec. 4(a) AND Long, Ex Parte 564 S.W.2d 760 (Tex. Criminal. App. 1978)

POINT OF ERROR TWO RESTATED

THE TRIAL COURT COMMITTED ERROR ACCEPTING A GUILTY PLEA IN WHICH APPELLANT; BARTON RAY GAINES HAD NO RATIONAL UNDERSTANDING OF THE PROCEEDINGS AGAINST HIM.

APPELLANT, BARTON RAY GAINES, AN MHMR PATIENT WAS TOLD BY DEFENSE COUNSEL TO "FOLLOW MY NODS" (YES AND NO'S) DURING THE GUILTY PLEA. THE RECORD SHOWS, BARTON RAY GAINES HAS SEVERAL MENTAL ILLNESSES AND COULD NOT KEEP ATTENTION FOCUSED, CONCENTRATE, FOLLOW-THROUGH, OR PAY CONSISTENT ATTENTION **(RR IV 126, 127), (RR IV 159),**

(RR IV 160-166), AND **(RR IV 176)** AND THAT PAXIL INDUCED A HYPO-MANIC STATE. **(RR IV 179-180)**

PLEAS OF GUILTY ARE SUFFICENT, IF THEY ARE BOTH KNOWING AND VOLUNTARY ADMISSIONS OF GUILT BY THE DEFENDANT THEMSELVES. DEFENSE COUNSEL COERCED APPELLANT, BARTON RAY GAINES, WHERE COUNSEL STATED APPELLANT COULD RECEIVE A PROBATED SENTENCE IF ENTERING A PLEA OF GUILTY, AND THAT IT WAS HIS BEST CHOICE. **SEE AFFIDAVITS ANS (RR VOL. 1 PG. 29)** DEFENDANTS ELECTION TO PLEAD GUILTY WHEN BASED UPON ERRONEOUS ADVICE OF COUNSEL IS NOT DONE VOLUNTARILY OR KNOWINGLY. A GUILTY PLEA WILL NOT SUPPORT A CONVICTION WHERE THAT PLEA IS MOTIVATED BY SIGNIFICANT MISINFORMATION CONVEYED BY THE DEFENSE COUNSEL. *Burk* v. *State*, 80 S.W.3d 82 note the cite is one of Westfall's cases

AT NO TIME COULD BARTON RAY GAINES UNDERSTAND HIS CONSTITUTION RIGHTS BEING WAIVED. CRIMINAL LAW PROCEDURE REQUIRES A GUILTY PLEA MUST BE MADE KNOWINGLY AND INTELLIGENTLY TO BE CONSTITUTIONALLY VALID. WITH HELP FROM THE DEFENSE COUNSEL THIS WAS DONE (RR I 4-5) WITH DEFENSE COUNSEL GIVING “NODS” AS TO YES AND NO.

THERE IS NO CONCEIVABLE WAY APPELLANT; BARTON RAY GAINES COULD HAVE KNOWN THE RIGHTS BEING WAIVED. **EXHIBIT 20** SHOWS THE MENTAL DEFICIENCY AND IQ OF THE APPELLANT, AND THE APPELLANT’S MENTALITY AS WELL AS BARTON’S MENTAL ILLNESSES. *Guzman* v. *State*, 923 SW 2d 792 (Tex. App. 1996)

THE CREDITABILITY OF THE MHMR RECORDS **(EXHIBIT 40),** THE CREDITABILITY OF DR. EDWIN JOHNSTONE'S TESTIMONY, MEDICAL REPORTS FROM TEXAS REHABILITATION COMMISSION, DR. WARREN ARE SUFFICIENT EVIDENCE AND FACTUALLY SUFFICIENT TO PROVE BARTON RAY GAINES PLEA OF GUILTY WAS FAR FROM INTELLIGNTLY AND KNOWINGLY MADE, AS A MATTER TO LAW, IN GOVERN WITH RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, INVOLUNTARY QUALITY PLEADINGS.

THE DEFENDANT IS "INCOMPETENT" TO STAND TRIAL IF THEY DO NOT HAVE (1) SUFFICIENT PRESENT ABILITY TO CONSULT WITH THEIR ATTORNEY WITH A REASONABLE DEGREE OF RATIONAL UNDERSTANDING; OR (2) A RATIONAL, AS WELL AS A FACTUAL, UNDERSTANDING OF THE PROCEEDINGS AGAINST THEM. THE COMPETENCE INVOLVES MORE THAN THEIR ABILITY TO CORRECTLY IDENTIFY THE DIFFERENT ACTORS IN THE COURT PROCESS (e.g., PROSECUTOR, JUDGE, DEFENSE ATTORNEY, OR BALIFF) ARTICLE 571.003(14) OF THE HEALTH AND SAFETY CODE. GENERALLY, ISSUES RELATING TO YOUR CLIENT'S COMPETENCE TO STAND TRIAL SHOULD BE RESOLVED BEFORE THE TRIAL ON THE MERITS. HOWEVER, YOU CAN REQUEST A COMPETENCE EXAMINATION AT ANY POINT DURING THE PROCEEDINGS AT WHICH YOU BELIEVE THE DEFENDANT IS NOT COMPETENT TO STAND TRIAL- EVEN IF YOU ARE IN THE MIDDLE OF TRYING THE DEFENDANT'S CASE ON MERITS. YOU SHOULD NOTE THAT THE AMERICAN BAR ASSOCIATION HAS RESOLVED THAT IT IS IMPROPER TO USE COMPETENCE PROCEDURES FOR PURPOSES UNRELATED TO THE DETERMINATION OF COMPETENCE, SUCH AS OBTAINING MITIGATION

INFORMATION, OBTAINING FAVORABLE PLEA NEGOTIATIONS, OR DELAYING PROCEEDINGS. STANDARDS RELATING TO COMPETENCE TO STAND TRIAL § 7-4.2(e) (1989) THE AMERICAN BAR ASSOCIATION STRESSES A LAWYER'S PROFESSIONAL RESPONSIBILITY TOWARD THE COURT AND THE FAIR ADMINISTRATION OF JUSTICE AS THE PARAMOUNT OBLIGATIONS IN SUCH AN INSTANCE, AND EXPECTS AN ATTORNEY TO ADVANCE THE ISSUE EVEN OVER A CLIENT'S OBJECTION WHENEVER A GOOD FAITH DOUBT ARISES ABOUT A DEFENDANT'S COMPETENCE TO STAND TRIAL STANDARDS RELATING TO COMPETENCE TO STAND TRIAL § 7-4.2.(c) (1989) SEE AFFIDAVITS.

UNLESS COMPETENT, A DEFENDANT CANNOT KNOWINGLY WAIVE HIS RIGHT TO A TRIAL AND PLEAD GUILTY. IT IS A CONTRADICTION TO ARGUE AND DEFENDANT MAY KNOWINGLY WAIVE A RIGHT IF HE IS INCOMPETENT. THE ADVERSAY SYSTEM OF JUSTICE INSISTS A DEFENDANT BE COMPETENT AT TRIAL. TO CONVICT A DEFENDANT WHILE HE IS LEGALLY INCOMPETENT VIOLATES HIS RIGHT TO DUE PROCESS AND DUE COURSE OF LAW. NEVERTHE LESS, APPELLANT, BARTON RAY GAINES COULD NOT HAVE AND DID NOT INTELLEGENTLY AND KNOWINGLY ENTER A VOLUNTARY PLEA OF GUILTY, BUT WAS COACHED BY DEFENSE COUNSEL.

POINT OF ERROR THREE RESTATED

TRIAL COUNSEL WAS INEFFECTIVE FAILING TO RENDER EFFECTIVE ASSISTANCE IN APPELLANT, BARTON RAY GAINES DEFENSE.

AN ATTORNEY'S FAILURE TO REQUEST THE APPOINTMENT OR OTHERWISE OBTAIN THE ASSISTANCE OF QUALIFIED MENTAL HEALTH OR MENTAL

REHABILATATION PROFESSIONALS WHEN INDICATED CAN BE VIOLATION OF A DEFENDANT'S **SIXTH** AND **FOURTEENTH AMENDMENT** TO EFFECTIVE ASSISTANCE OF COUNSEL. THIS CERTAINLY APPLIES TO CAPITAL CASES BUT ALSO OTHER HOMICIDE CASES AND ANY ALLEGED OFFENSE THAT SUGGESTS MENTAL ABERRATION. A DEFENDANT'S PRIOR HISTORY OF MENTAL IMPAIRMENT MAY INDICATE THAT THE DEFENSE COUNSEL NEEDS THE ASSISTANCE OF A PROFESSIONAL EVALUATION. AN APPELLATE JUDGE MAY FIND REVERSIBLE ERROR IF A CLIENT IS TRULY INCOMPETENT OR INSANE AND THE ISSUE IS NOT RAISED IN COURT.

A DEFENDANT IS ENTITLED TO THE REASONABLE EFFECTIVE ASSISTANCE OF COUNSEL. *Wilkerson* v. *State*, 726 S.W.2d 542, 548 (Tex. Criminal App. 1986) TO DEMONSTRATE INEFFECTIVE ASSISTANCE, THERE MUST BE PROOF THAT COUNSEL'S DEFICEINT PERFORMANCE WAS DEFICIENT, RESULTING IN PREJUDICE TO THE DEFENSE. A DEFENDANT DEMONSTRATES PREJUDICE BY SHOWING A REASONBALE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSOINAL ERRORS, THE OUTCOME OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT. *Strickland* v. *Washington*, 466 U.S. 688, 698 (1984)

THE REVIEWING COURT MUST CONSIDER THE TOTALITY OF COUNSEL'S REPRESENTATION. *Strickland* v. *Washington*, 466 U.S. 700 IT CANNOT SECOND GUESS COUNSEL'S TACTICAL DECISIONS WHICH DO NOT FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS. *Young* v. *State*, 991 S.W.2d 835,837 (Tex. Crim. App. 1999)

A DEFENDANT NEED NOT PROVE THAT, BUT FOR COUNSEL'S ERROR, HE WOULD HAVE BEEN AQUITTED, RECEIVED A MISTRIAL BECAUSE of A DEADLOCKED JURY, OR HAD HIS CONVICTION REVERSED ON APPEAL. RATHER, THE ULTIMATE ISSUE IS WHETHER HE RECEIVED A FAIR TRIAL RESULTING IN A VERDICT WORTHY OF CONFIDENCE. *Kyles* v. *Whitley*, 514 U.S. 419-430 (1995)

COUNSEL MUST HAVE A FIRM COMMAND OF THE FACTS AND APPLICABLE LAW. *Lilly*, *Ex Parte*, 656 S.W.2d 490, 493 (Tex. Crim. App. 1983) IT MAY NOT BE ARGUED THAT A GIVEN COURSE OF CONDUCT WAS WITHIN THE RELEAM OF TRIAL STRATEGY "UNLESS AND UNTIL THE TRIAL ATTORNEY HAS CONDUCTED THE NECESSARY LEGAL AND FACTUAL INVESTIGATIONS, WHICH WOULD ENABLE HIM TO MAKE AN INFORMED RATIONAL DECISION. *Welborn*, *Ex Parte*, 785 S.W.2d 391,393 (Tex. Crim. App. 1996) **EMPHASIS ADDED**. COUNSEL HAS A DUTY TO PRESENT ALL AVAILABLE EVIDENCE AND ARGUMENTS TO SUPPORT THE DEFENSE OF HIS CLIENT. *Langley*, *Ex Parte*, 833 S.W.2d 141,143 (Tex. Crim. App. 1992) AND BRING TO BEAR SUCH SKILLS AND KNOWLEDGE AS WILL RENDER THE PROCEEDING A "RELIABLE ADVERSARIAL TESTING PROCESS." *Strickland* v. *Washington*, 466 U.S. 688

WHERE COUNSEL'S PERFORMANCE "FALLS BELOW ARE OBJECTIVE STANDARD OF REASONABLENESS UNDER PREVAILING PROFESSIONAL NORMS, "HIS CONDUCT IS DEFICIENT WITHIN THE MEANING OF STRICKLAND. *Vasquez* v. *State*, 830 S.W.2d 948, 949 (Tex. Crim. App. 1992)

DEFICIENT PERFORMANCE

WHAT DEFENSE THAT WAS PREPARED BY 2ND DEFENSE COUNSEL MR. MINICK, CONCERNING PAXIL **(RR I 16, 17)** WAS DEMOLISHED BY DEFENSE COUNSEL MR. WESTFALL, ARGUMENT AS FOLLOWS **(RR V 8)**

17. MAY IT PLEASE THE COURT, COUNSEL, LADIES

18. AND GENTLEMEN OF THE JURY. "THE PROBLEM I HAVE HAD WITH

19. THE PAXIL THEORY IS THAT BART HAS BEEN ON PAXIL SINCE HE

20. GOT INOT JAIL. THAT'S THE PROBLEM I HAVE HAD WITH

21. IT. THAT'S THE WEAKNESS I HAVE SEEN IN THE PAXIL THEORY.

22. EVERYTHING ELSE MAKES SENSE, BUT BEING IN JAIL AND BEING

23. ON PAXIL, WHY ISN'T HE FREAKING?

MR. WESTFALL, DEFENSE COUNSEL COMPARES APPELLANT, BARTON RAY GAINES WITH A BIRD THEORY **(RR V 9)** MAKING THE FOLLOWING CLOSING STATEMENT.

15 IF THE BIRD IS INHERENTLY DANGEROUS, WE

16. PROBABLY OUGHT NOT LET HIM OUT OF THE SHOE BOX. AN I

17. AGREE WITH THE STATE AND THE COMMUNITY ON THAT. SO

18. THE ISSUE IS: IS BART INHERENTLY DANGEROUS?

DEFENSE COUNSEL, MR. WESTFALL GOES ON TO SAY THAT BARTON RAY GAINES IS GUILTY AND ADMITS TO EXTRANEOUS CRIMES IN HOOD COUNTY. AT NO TIME HAS APPELLANT BARTON RAY GAINES ADMITTED TO ANY SUCH CRIMES, NOR HAS BARTON RAY GAINES EVER BEEN CONVICTED OF SUCH CRIMES. **(RR V 11)**

MR. WESTFALL, DEFENSE COUNSEL; **(RR V12)**

1. I DON'T WANT YA'LL TO BE MISLED BY THAT.

2. THE LAW SAYS YOU HAVE TO BELIEVE THAT STUFF BEYOND A

3. REASONABLE DOUBT. OKAY?

COUNSEL HAD ACESS TO THE STATE'S FILE, WHICH HE READ AND TOOK EXTENSIVE NOTES FROM, YET HE CONDUCTED ONLY A PERFUNCTORY INVESTIGATION, LIMITED TO CONVERSATIONS WITH APPELLANT ABOUT THE CASE AND CRUCIAL WITNESSES TO APPELLANT'S BEHAVIOR WHILE IN JAIL. **SEE AFFIDAVITS.**

COUNSEL FAILED TO FILE PRETRIAL MOTIONS OR SECURE A RULING FROM THE COURT AS TO THE ADMISSIBILITY OF PRIOR BAD ACTS, AND WOULD ONLY SEEK TO PLEA-BARGAIN. COUNSEL FAILED TO OBJECT ON SEVERAL OCCASIONS TO IMPROPER HEARSAY.

COUNSEL AGREED WITH STATE ON EXTRENEOUS OFFENSES STATING, "WE ADMIT IT, AND THAT BARTON, APPELLANT, IS GUILTY OF A CRIME IN HOOD

note the charge error

COUNTY. **(RR V 11), (RR V 12)** *Murphy* v. *State*, 777 S.W.2d 44 (Tex. Crim. App. 1989) PUNISHMENT STAGE OF A TRIAL, THE SUFFICIENCY OF AN ATTORNEY'S ASSISTANCE IS GAUGED BY THE TOTALITY OF THE REPRESENTATION OF THE ACCUSED. *Walker*, *Ex Parte* 777 S.W.2d 427 (Tex. Crim. App. 1989), *Hernandez* v. *State*, 726 S.W.2d 53,57 (Tex. Crim. App. 1986), *Duffy*, *Ex Parte* 607 S.W.2d 507 (Tex. Crim. App. 1980)

COUNSEL WAS INEFFECTIVE AT THE PRE-TRIAL AND PUNISHMENT STAGES OF APPELLANT'S TRIAL. DEFENSE COUNSEL, MR. WESTFALL REFUSED TO ENTER INTO BARTON RAY GAINES she was MOLESTED, AND CRITICAL FAMILY HISTORY, NOR WOULD COUNSEL INVESTIGATE BARTON RAY GAINES BEHAVIOR AROUND

IMANTES THAT WERE HOUSED IN JAIL WITH APPELLANT. HAD HE DONE SO, OFFICERS THAT WORKED THE HOUSING AREA WHERE APPELLANT BARTON RAY GAINES WAS HOUSED WOULD HAVE TOLD BARTON WAS CONSTANTLY LOCKED DOWN FOR BEHAVIORAL PROBLEMS WITH OTHER INMATES, INCLUDING A OFFICERS. **SEE AFFIDAVITS.** THE LAW REQUIRED DEFENSE COUNSEL TO HAVE SUCH MASTERY OF THOSE FACTS. *Welborn*, *Ex Parte*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1996)

A THOROUGH INVESTIGATION REQUIRED DEFENSE COUNSEL TO SEEK OUT AND INTERVIEW POTENTIONALLY KNOWN WITNESSES TO THE FACTS, AND TO MAKE SUCH INDEPENDENT INVESTIGATION OF HIS CLIENTS CASE, ESPECIALLY AT THE PUNISHMENT PHASE.

PREJUDICE

APPLICANT MUST SHOW THAT, BUT FOR COUNSEL'S ERRORS, THERE IS REASONABLE PROBABILITY THAT THE OUT COME OF THE PUNISHMENT STAGE WOULD HAVE BEEN DIFFERENT. HOWEVER, HE NEED NOT SHOW THAT COUNSEL'S DEFICIENT PERFORMANCE MORE LIKELY THAN NOT AFFECTED THE SENTENCE. *Milburn* v. *State*, 3 S.W.3d 918 (Tex. Crim. App. 1999)

COUNSEL OFTEN PROVIDES HIS MOST IMPORTANT REPRESENTATION AT THE PUNISHMENT STAGE *Vela* v. *Estelle*, 708 F.2d 954, 964 (5TH Circuit. 1984) THE SENTENCING PROCESS CONSISTS OF WEIGHING MITIGATING AND AGGRAVATING FACTORS, AND ADJUSTING THE SEVERITY OF THE SENTENCE CONSISTENCE WITH THIS CALCULUS.

DEFENSE COUNSEL'S FAILURE TO DEFUSE THE MOST COMPELLING PORTION OF THE STATES PUNISHMENT CASE, WITH FACTUAL EVIDENCE READY AVAILABLE TO THE DEFENSE, FAILURE TO RAISE THE PROPER DEFENSE OF THE DEFENDANT'S SANITY AND A PRELIMINARY HEARING ON THE DEFENDANT'S COMPETENCY. COUNSEL HAD UNLIMITED INFORMATION, AND FACTS MADE KNOWN TO HIM, YET, COUNSEL FAILURE TO FILE PROOPER MOTIONS TO RAISE APPELLANT'S CONDITION TO COMPREHEND HIS SITUATION OR MAKE HIS DEFENSE, FAILING TO BRING THESE ISSUES TO THE TRIAL JUDGE TO CAUSE A SANITY OR COMPETENCY HEARING ON THE ISSUES TO BE HELD AS PROVIDED BY LAW, THIS UNDERMINES CONFIDENCE IN THE SENTENCE OF 35 YEARS IN PRISON, AS TO JUSTICE.

CONCLUSION AND PRAYER

THE EVIDENCE OF APPELLANT IS LEGALLY AND FACTUALLY SUFFICIENT, WARRANTING AN AQUITTAL OR, AT LEAST A NEW TRIAL. MOREOVER, APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE AT THE PRETRIAL AND PUNISHMENT PHASE, WARRANTING REVERSAL.

APPELLANT PRAYS THIS HONORABLE COURT TO REVERSE THE TRIAL COURTS JUDGMENT AND CONVICTION, AND TO ACQUIT APPELLANT, BARTON RAY GAINES OR ORDER A NEW TRIAL. THEREFORE, JUSTICE MAY BE SERVED.

RESPECTFULLY SUBMITTED

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BARTON RAY GAINES
SID NO. # 0579723
100 NORTH LAMAR STREET
FORT WORTH, TEXAS 76102

PRO SE LITIGANT

CERTIFICATE OF SERVICE

I BARTON RAY GAINES, SID NO. 0579723, CERTIFY THAT I HAVE SENT A TRUE AND CORRECT COPY OF THE FOREGOING APPELLANT'S BRIEF ON APPEAL, TO MS. LESA PAMPLIN, ASSISTANT DISTRICT ATTORNEY, 401 WEST BELKNAP, 3RD FLOOR, FORT WORTH, TEXAS 76196, ON THIS _______DAY OF ______________, 2003.

____

BARTON RAY GAINES
SID NO. 0579723
100 NORTH LAMAR STREET
FORT WORTH, TEXAS 76102

PRO SE LITIGANT

VERIFICATION

I, BARTON RAY GAINES, SID NO. 0579723, VERIFY UNDER THE PENALTY OF PERJURY THAT I HAVE READ THE FOREGOING APPELLANT'S BRIEF ON APPEAL, AND THAT THE SAME IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. I, ALSO STATE THAT I HOPE PLACED THE SAME IN THE INTERNAL MAIL BOX OF THE TARRANT COUNTY JAIL, FOR MAILING ON _______DAY OF ____________, 2003.

BARTON RAY GAINES
SID NO. 0579723
100 NORTH LAMAR STREET
FORT WORTH, TEXAS 76102

PRO SE LITIGANT