CASE NUMBER 4-06-CV-0409-Y

BARTON RAY GAINES,	§	**IN THE UNITED STATES**
PETITIONER	§	**DISTRICT COURT**
	§	
	§	
VS.	§	**NORTHERN DISTRICT OF TEXAS**
	§	
	§	
	§	
	§	
NATHANIEL QUARTERMAN,	§	**FORT WORTH DIVISION**
DIRECTOR, TEXAS DEPARTMENT	§	
OF CRIMINAL JUSTICE,	§	
INSTITUTIONAL DIVISION,	§	
RESPONDENT	§	

FIRST AMENDED MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

Submitted by:

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HEARING REQUESTED

I. TABLE OF AUTHORITIES

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Petitioner, BARTON RAY GAINES, and submits this Memorandum in Support of Petition for Writ of Habeas Corpus:

II. PROCEDURAL HISTORY

Petitioner was charged with two counts of attempted capital murder by indictment that alleged that during the course of or attempting to commit robbery, Petitioner intentionally shot one Michael Williams with a deadly weapon, to wit: a firearm. This offense was alleged to have occurred on or about February 21, 2002.

Petitioner entered a plea of guilty to lesser charges of two counts of aggravated robbery with a deadly weapon. A jury was empanelled, and on December 10, 2002, a trial by jury on punishment commenced. After presentation of evidence, the jury set Petitioner's punishment at thirty five years in the Institutional Division of the Texas Department of Criminal Justice.

Notice of appeal was given and the case was appealed to the Court of Appeals of Texas, Second District (Fort Worth). On October 14, 2004, the Court of Appeals affirmed the conviction. 2004 Tex. App. LEXIS 9147. A petition for discretionary review filed. On May 18, 2005, the Texas Court of Criminal Appeals denied Petitioner's petition for discretionary review. 2005 Tex. Crim. App. LEXIS 773.

A federal writ of habeas corpus has not previously been filed. There are no other appeals or collateral attacks on the conviction pending.

III. SUMMARY OF TESTIMONY

On December 9, 2002, Petitioner pleads guilty to two counts of aggravated robbery with a deadly weapon. (R. II, 3-6). On December 10, 2003, The jury was sworn for the purposes of determining punishment and the State presented its case. (R. III, p. 24-253). On December 11, 2002, Gregory Westfall presented the defense for Petitioner. (R. IV, 3-219).

IV. GROUNDS FOR RELIEF

A. Ground One: Petitioner was denied the effective assistance of counsel.

1. Facts

Between the time that Gregory Westfall, Petitioner's trial attorney, was retained in February, 2002, until December 12, 2002, when Petitioner received his sentenced, Westfall spent a total of ten (10) minutes during four meetings with Petitioner (EXHIBIT 1). During these meetings, Westfall never discussed the facts of the case or the law with Petitioner. (EXHIBIT 1). During one period of time, Westfall did not visit with Petitioner for almost six months. (EXHIBIT 1). Westfall hired two psychiatrists to speak to Petitioner. Dr. Mary Connell briefly spoke to Petitioner, and Westfall did not subpoena Dr. Connell to testify during trial. (EXHIBITS 1 and 5). Dr. Edwin Johnstone, spoke to Petitioner for 20 minutes. (R. IV, 129). Westfall apparently attempted to send a private investigator to speak with one of the alleged victims, Andrew Horvath. However, Horvath and his mother, Rosie Horvath, were told by an investigator from the Forth Worth District Attorney's Office that they were not to speak to any investigators or lawyers. (EXHIBIT 7). Westfall never disclosed this fact to Petitioner or his family.

Westfall never discussed the case with Petitioner, and without Petitioner's permission, plead Petitioner guilty to two counts of aggravated robbery. (EXHIBIT 1). Further, Westfall promised Petitioner that Petitioner would receive probation if he pleads guilty. (EXHIBIT 1). Westfall asked Cheyenne Minick, an attorney hired by Westfall, to speak to Petitioner and assure Petitioner that he would receive probation. (EXHIBIT 1).

Westfall met with Paula Thomas, a witness for the defense, for one minute to prepare her for trial. (EXHIBIT 2). Cheyenne Minick spent about five minutes with Paula Thomas, instructing her only as to which court in which to appear and who would be questioning her. (EXHIBIT 2). Neither Westfall nor Minick prepared Paula Thomas for any questions or testimony. (EXHIBIT 2). Further, Ms. Thomas had no idea what would be asked of her by either the prosecutor or Westfall. (EXHIBIT 2).

Westfall met with defense witness Tiffani Brooks (formerly Tiffani Phillips) one time prior to trial. (EXHIBIT 3). During this meeting, Westfall told Ms. Brooks almost nothing about the case or what Ms. Brooks could expect during testimony. (EXHIBIT 3). No member of the defense

team prepared Ms. Brooks for her testimony. (EXHIBIT 3). During the direct examination of Ms. Brooks, Westfall stated the following: "*Hold on. I don't know how to ask the question. Is there anything you have forgotten to tell me?*" (R. IV, 109). The State successfully objected as to the vagueness of the question. (R. IV, 109).

For the purpose of investigation and attaining records for the case, Westfall had Petitioner's mother, Melissa Adams, contact various entities, including the Texas Rehabilitation Commission, Crowley School District, Wells Fargo Bank, Fort Worth City Credit Union, and various doctors who had examined and diagnosed Petitioner. (EXHIBIT 4). Adams encountered tremendous difficulty attaining the records for Westfall because the aforementioned entities largely refused to speak to her because Petitioner was no longer a minor. (EXHIBIT 4). Adams was asked by the entities, "why isn't your lawyer handling this?," and was informed that the normal process of attaining documents for trial was that a lawyer files for a subpoena through the court system. (EXHIBIT 4).

Several months prior to Petitioner's trial, Westfall asked Melissa Adams whether she knew the location of where Petitioner and his friends met on the night of the shooting. (EXHIBIT 4). Westfall asked Ms. Adams to go the location, take photographs, and bring the photographs to his office. (EXHIBIT 4). Ms. Adams took photographs of everything she felt was important, but admits that she was not sure what she was supposed to photograph. (EXHIBIT 4). Shortly before the trial, Westfall asked Ms. Adams to accompany him to the same locations that Westfall previously sent Ms. Adams to take pictures. (EXHIBIT 4). Westfall spent approximately 10 minutes at each location taking pictures. (EXHIBIT 4). Westfall also informed Adams that he planned to use Adams as a witness during the trial. (EXHIBIT 4). Westfall asked Adams about her childhood and what kind of mother Adams thought she was for Petitioner. (EXHIBIT 4). Westfall did not discuss with Adams the type of questions that may be asked of Adams by Westfall or the district attorney. (EXHIBIT 4). Leading up to the trial, Adams attempted to contact Westfall on many occasions and Westfall never returned her phone calls. (EXHIBIT 4). Several days prior to trial, Adams finally contacted Westfall, who told Adams that the State had an "airtight" case against Petitioner and that it was apparent that Petitioner was guilty. (EXHIBIT 4). Westfall also told the same to Gail Inman, Petitioner's grandmother. (EXHIBIT 5). Westfall then told Ms. Adams that he planned to prepare for the punishment phase of the trial because there was nothing Petitioner could do but "throw himself at the mercy of the jury." (EXHIBIT 4). Westfall had actually used Gail Inman to receive a continuance in this case because he claimed that because of a death penalty

case, he needed time to prepare for Petitioner's case and wanted to use Inman as a witness. (EXHIBITS 4 and 5). However, Westfall has spent at least part of the time granted for the continuance working on a music CD. (EXHIBIT 4).

During all of Ms. Adams's dealings with Gregory Westfall, Westfall never asked Ms. Adams any questions regarding Petitioner's mental disabilities, even though Adams and Westfall agreed that Petitioner was unable to make important decisions. (EXHIBIT 4). As a result of this agreement, Westfall agreed with Adams to have Petitioner sign a power of attorney, granting Ms. Adams the right to make decisions for Petitioner. (EXHIBITS 4 and 6). Adams specifically told Westfall that under no circumstances was Westfall to enter a guilty plea on behalf of Petitioner without first informing Adams, and Westfall agreed. (EXHIBIT 4). However, entered a guilty plea on behalf of Petitioner without informing Adams.

Gail Inman, Petitioner's grandmother, was diagnosed with cancer in April 2001, and was undergoing chemotherapy treatment for much of 2002. (EXHIBIT 5). Westfall asked Ms. Inman if she could get a letter from her oncologist stating that she was too sick to participate in the trial. (EXHIBIT 5). After receiving the letter from the oncologist, Judge Gill of the 213th District Court demanded that Ms. Inman drive 200 miles to the Court so that Judge Gill could interview her. (EXHIBIT 5). Westfall told Ms. Inman not wear her wig when she met Judge Gill and that if she needed to throw up, to do so in Judge Gill's courtroom. (EXHIBIT 5). After entering the courtroom, Ms. Inman was told by a bailiff that she could leave because Judge Gill had seen Ms. Inman and realized the degree of her illness. (EXHIBIT 5).

For month after Westfall was hired, each time that Ms. Inman spoke to Westfall, Westfall told her that he had not begun preparations for Petitioner's case. (EXHIBIT 5). Westfall also told Inman that he had not had the chance to speak to Petitioner but he intended to do so. (EXHIBIT 5). When Inman spoke to Westfall about Petitioner's use of the selective serotonin reuptake inhibitors drug knows as Paxil, Westfall dismissed the idea of using Petitioner's mental condition as a defense, telling Inman that "no jury in Texas would ever entertain the idea of Petitioner's mental condition as a defense." (EXHIBIT 5).

Immediately before trial, Westfall told Ms. Inman that the State had an "airtight case" against Petitioner, that it "was apparent that Petitioner was guilty," and that he would start working on the punishment phase of the trial because there was "nothing Petitioner could do but throw himself at the mercy of the jury." (EXHIBIT 5). Inman told Westfall that she did not understand Westfall's strategy because she (Inman) was not aware that Westfall performed any investigation or

questions of any witnesses. (EXHIBIT 5). Inman states that to the best of her knowledge, Westfall visited Petitioner in jail only four times, and each time Westfall did not spend more than a few moments with Petitioner. (EXHIBIT 5).

Shortly before trial, Westfall contacted Gail Inman to inform her that he had hired Dr. Edwin Johnstone to examine Petitioner at a cost of $17,000 to Ms. Inman. (EXHIBIT 5). When Inman asked Westfall why he hired Dr. Johnstone, Westfall told Ms. Inman that Dr. Johnstone would testify that Paxil causes erratic behavior in young adolescent men with Attention Deficit Hyperactivity Disorder ("ADHD"). (EXHIBIT 5). This fee was in addition to the $40,000 that Inman paid Westfall for representing Petitioner, despite the fact that Westfall originally quoted a total fee of $15,000. (EXHIBIT 5).

Inman states that after the trial, she learned that although Westfall was granted a continuance in the trial until December 2002 by claiming to the court that she was an important witness and that her cancer prevented her from testifying in the case, Westfall in fact delayed the trial so that he can complete his music CD. (EXHIBIT 5). Further, Inman met Westfall in person on two occasions, and Westfall said nothing other than that Petitioner had little chance of success at trial. (EXHIBIT 5). When Inman asked Westfall why he believed as he did, he told Inman that the "proof was in the file of the district attorney." (EXHIBIT 5).

A few days before trial, Westfall told Inman that he made a deal with the District Attorney to drop the charges from attempted capital murder to aggravated robbery if Petitioner would plead guilty. (EXHIBIT 5). Westfall told Inman that by pleading guilty, Petitioner would get probation. (EXHIBIT 5). Westfall assured Ms. Inman that he "had a good case." (EXHIBIT 5). Later, Inman learned that Cheyenne Minick made opening arguments in the case, although Inman did not hire Cheyenne Minick and never gave Westfall authorization to delegate his obligation to any other lawyer. (EXHIBIT 5).

During a break in the trial testimony of Dr. Johnstone, in the hallway outside the courtroom, Westfall told Inman that he did not believe he can use Dr. Johnstone's testimony. (EXHIBIT 5). Inman told Westfall that he had to use Johnstone's testimony because she believed that this testimony was Petitioner's only chance. (EXHIBIT 5). In addition, Inman had already paid Johnstone $17,000 as a result of Westfall's demand he hire Dr. Johnstone. (EXHIBIT 5).

During the defense opening statement, Cheyenne Minick discussed Petitioner's general demeanor, mental deficiencies and disabilities, and problems with drugs. (R. III, p. 14-15). Minick then discussed the types of medication Petitioner was taking at the time of the shooting, including

Paxil, and the way Paxil affected Petitioner. (R. III, p. 15-21). During this argument, Minick refers to a "Ph.D-type psychologist" who "diagnoses (Petitioner) as ADD/ADHD," and a "D.O. psychiatrist" who "diagnoses (Petitioner) as having depression and puts him on Paxil..." (R. III, p. 15). Minick then states that "Petitioner's mother was trying to figure out a way to get the Paxil paid for because (Petitioner) is over 18 and can't be on his stepfather's insurance anymore. So she is trying to get the Texas Rehabilitation Commission to pay for the Paxil." (R. III, p. 17). Minick then discusses Petitioner's problems with his girlfriend, especially Petitioner's paranoia regarding his girlfriend's infidelity. (R. III, p. 18). Minick then states "Saturday about 3:00 a.m. is when (Petitioner) shoots at these guys near Granbury and then goes to Tiffany's house and walks in like he owns the place..." (R. III, p. 21).

Minick closed the opening argument by stating "(Petitioner) was out of his mind. Now (Petitioner) has pled guilty to two indictments of aggravated robbery. And it is true it is y'all's job to set the punishment in this case, and we will make our arguments as well. But all of the evidence taken together I believe will show you that Bart Gaines was not Bart Gaines during that entire week. He was in a manic, crazy state of mind, and that was caused by the Paxil..." (R. III, p. 22).

The State called a number of witnesses. During the cross-examination of these witnesses, Westfall and Minick asked few to no questions. (R. III, p. 26 – 47). Then one of the alleged victims, Michael Williams, testified. (R. III, p. 48). Williams described what allegedly took place during the shooting. (R. III, p. 48 - 73). Williams did not state specifically who shot him. (R. III, p. 74-86). During cross-examination, Westfall referenced a statement that Williams made to the police, and asked Williams only about location of the gun in the vehicle. (R. III, 87-88). Westfall did not ask Michael Williams any questions regarding any other part of the statement. Westfall then asked Williams about the smoking of marijuana and whether in the past any person ever thought Williams was an undercover police officer. (R. III, 89-90). Neither Westfall nor Minick asked Williams any other questions on cross-examination.

Next to testify was Andrew Horvath, the second alleged victim, who recounted his version of the events. (R. III, 103 - 109). On cross-examination, Westfall asked Horvath whether he knew anybody in a picture presented to Horvath. (R. III, 110). Horvath answered "no." Then Westfall asked Horvath whether he saw who lifted up Michael Williams's shirt. Horvath answered that he did not. (R. III, 111). Westfall asked no further questions of Horvath.

The State then presented more witnesses, and during cross-examination, Westfall and Minick asked few to no questions. (R. III, 125- 252).

First to testify on behalf of Petitioner was William Gordon, president of Fort Worth City Credit Union, who testified that he brought with him copies of cancelled checks from Petitioner's account. (R. IV, 4-5). Westfall asked Gordon whether he is the custodian of the records, and Gordon answered that he is. (R. IV, 5). Westfall then terminated the direct examination. On cross-examination, the Gordon was asked whether he has a signature card to match the cancelled checks that Gordon brought to court. (R. IV, 6). Gordon said he did not have the signature card in his possession but that he would provide it at a later time. (R. IV, 7).

Next to testify was Melissa Adams, Petitioner's mother. (R. IV, 7). Westfall asked Adams questions regarding her past, about Petitioner's father, and about her past relationships with other men. (R. IV, 9-24). Then Westfall questioned Adams about Petitioner's mental deficiencies, use of marijuana, general demeanor since childhood, and other events that happened during Petitioner's childhood. (R. IV, 24-38). Adams also testified that when Petitioner wanted to write a check, she (Adams) usually completed the checks and Petitioner merely signed them. (R. IV, 41-42). The State repeatedly and successfully objected to her testimony based upon hearsay and nonresponsive answers. (R. IV, 24-46).

Adams testified that when Petitioner was 18 years of age, she took Petitioner to the Texas Rehabilitation Commission for the purpose of psychiatric examination. (R. IV, 44-45). When Adams attempted to testify as to what Doctors Warren and Ouseph told her about Petitioner's problems, the State successfully objected to Adams's testimony based upon hearsay. (R. IV, 46). Adams then testified that Dr. Ouseph prescribed Paxil for Petitioner, and that she gave Petitioner Paxil from the supply of her husband. (R. IV, 46-47).

Then Adams testified that when Petitioner learned that Petitioner's girlfriend, Tiffani Phillips, may have been unfaithful to Petitioner, Petitioner became very upset. (R. IV, 51-54). Throughout this testimony, the State successfully objected to Melissa Adams's testimony as to hearsay or nonresponsive answers. (R. IV, 46-56). When Westfall asked questions that pertained to Petitioner's activities leading up to and including the day following the shooting, the State successfully objected to Adams's testimony as to hearsay or nonresponsive answers. (R. IV, 56-68). At one point, Westfall said the following: *"Do you know what? I'm confused. Let's talk about Friday because that will draw an objection."* (R. IV, 64). When Adams attempted to tell the jury about the contents of a phone conservation she had with Dr. Ouseph immediately following Petitioner's arrest, the State successfully objected to hearsay. (R. IV, 70-71).

During the cross-examination of Melissa Adams, Westfall made only one objection when

the State asked Adams whether she (Adams) knew that voluntary intoxication is not a legal defense to a criminal act. (R. IV, 85). When the State immediately asked the question again, Westfall did not object. (R. IV, 85).

Next to testify for the defense was Tiffani Phillips. (R. IV, 99-100). During her testimony, the State successfully objected to questions based upon hearsay, speculation, and nonresponsive answers. (R. IV, 100-109). At one point, Westfall said the following: *Hold on. I don't know how to ask the question. Is there anything you have forgotten to tell me?"* (R. IV, 109). The State objected as to the vagueness of Westfall's question, and the objection was sustained. (R. IV, 109).

The next witness for the defense was Dr. Edwin Johnstone, a psychiatrist who was hired by Westfall to examine Petitioner and testify as an expert witness. (R. IV, 121). Johnstone testified that after examining Petitioner and reviewing his records, it was his opinion that Petitioner has features of borderline personality disorder, which were described as "emotional instability, irrational sensitivity or fear of abandonment that lead to intense relationships that are full of conflict." (R. IV, 125). Johnstone also stated that after Petitioner began using Paxil, Petitioner had "spurts of excited behavior where he was more energized, talking rapidly and loudly, and getting into people's faces with a kind of intensity and a wild look in his eye." (R. IV, 126-127). Johnstone testified to Petitioner's hypomania, which Johnstone described as the opposite of depression, or "overenergized with a mood that is lifted instead of down... not necessarily lifted to be a happy mood... it may be an irritable mood." (R. IV, 127). Westfall then asked Dr. Johnstone whether hypermania is a possible risk from using Paxil, and Dr. Johnstone said that hypermania was. (R. IV, 128). Westfall then terminated his direct examination of Dr. Johnstone.

On cross-examination, the State asked Johnstone how many times he had met with Petitioner, and Johnstone said one time for about 20 minutes. (R. IV, 129). Johnstone admitted that he received information regarding Petitioner's use of Paxil from another party, but could not identify the party. (R. IV, 130, 131). Johnstone also admitted that he was not sure when Petitioner started using Paxil. (R. IV, 130). Johnstone then admitted that during the 20 minutes he met with Petitioner, he (Johnstone) did not perform any testing and did not take any notes. (R. IV, 131).

In the presence of the jury, Johnstone testified that another doctor, Dr. Warren found that Petitioner had ADHD and that Petitioner's full scale IQ is 84, plus or minus 5 points. (R. IV, 164). Johnstone concluded that based upon the available information, Petitioner was in a hypomanic state at the time of the shooting, and that Paxil contributed to such hypomanic state. (R. IV, 179-180). Johnstone also believed that the reason that Petitioner was not in a hypomanic state in jail was that

Petitioner was in a tightly controlled environment, which eliminates most stimuli that may induce the hypomanic state. (R. IV, 181-182).

The next witness for the defense, Paula Adams-Thomas, testified that Petitioner was a "loving person," and that on Sunday prior to the shooting, Petitioner was behaving strangely in church. (R. IV, 147-149). Thomas also testified as to how she thought of Petitioner. On cross-examination, Thomas testified that she did not see Petitioner on the day of the shooting and could not tell the jury anything about Petitioner's behavior on or about that day. (R. IV, 154).

2. Applicable Law

To establish ineffective assistance of counsel, a habeas corpus petitioner must show (1) that the defense counsel's performance fell below an objective standard of reasonableness, by identifying acts or omissions showing that counsel's performance was deficient, and (2) that, but for the unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Craig v. State, 825 S.W.2d 128, 129 (Tex. Crim. App. 1992); Ex parte Welborn, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). A habeas corpus petitioner is entitled to relief if he or she can demonstrate that he or she was deprived of the reasonably effective assistance of counsel at trial, Ex parte Duffy, 607 S.W.2d 507, 516 (Tex. Crim. App. 1980), without regard to whether defense counsel was retained or appointed. Cuyler v. Sullivan, 446 U.S. 335, 344-345, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). It is not enough to show counsel erred; a petitioner must also show the probability of a different outcome absent the ineffective performance of counsel. Strickland v. Washington, 466 U.S. at 686; Craig v. State, 825 S.W.2d 128, 129 (Tex. Crim. App. 1992). Defense counsel's performance must be gauged by the totality of his or her representation. Mercado v. State, 615 S.W.2d 225, 228 (Tex. Crim. App. 1981).

Defense counsel must have a firm command of the facts of the case and the governing law before he or she can render reasonably effective assistance of counsel. Ex parte Lilly, 656 S.W.2d 490, 493 (Tex. Crim. App. 1983). Defense counsel has the duty to seek out and interview potential witnesses, and the failure to do so renders counsel's performance ineffective when the result is that a viable defense is not advanced. Ex parte Ybarra, 629 S.W.2d 943, 946 (Tex. Crim. App. 1982). It is defense counsel's duty to undertake an independent factual investigation, and this responsibility

may not be delegated to an investigator. Flores v. State, 576 S.W.2d 632, 634 (Tex. Crim. App. 1978).

In Ex parte Ybarra, the defendant's trial counsel, a newly-licensed attorney, walked into the office of a partner at his law firm and was assigned by the partner to handle the case *starting the following morning* (emphasis added). 629 S.W.2d at 947. Prior to this assignment, his only trial experience had been gained in a trial before a justice of the peace. Id. at 947, n6. As a result, the trial counsel had less than twelve hours to prepare for trial. During the habeas corpus hearing, the trial counsel admitted that he spent a few hours studying the Code of Criminal Procedure, but otherwise did nothing to prepare the defendant's case. Id. at 947, n7. More disturbingly, the trial counsel admitted that he tried the case the way he had seen it done on *Perry Mason.* Id. at 947, n7. The trial counsel proceeded to file motions late, failed to examine the indictment, the State's files on the case, and did not meet with the applicant to learn of potential defense witnesses. Id. at 948. In fact, the trial counsel failed to discover that two other persons had also been indicted for the murder of the victim. Id. at 948.

The court found that the trial counsel did not conduct "an independent investigation of the facts of the case" that is demanded for competent criminal defense lawyers in Texas. Id. at 948. The court also found that the record "glaringly reflects" that trial counsel "was limited to defending through cross-examination rather than presenting a defensive theory." Id. at 948. The court further found that "as is so often the case in those situations where any viable defense has not been raised, the dereliction is because the attorney is not familiar with the defense or he has not adequately investigated the facts of the matter." Id. at 948.

In Flores v. State, the trial counsel hired a private investigator to assist him. Id. at 633. The next day, the trial counsel telephoned the investigator and was promised information. Id. at 633. Three months later, after receiving nothing from the investigator, the trial counsel requested a complete written report from the investigator and again received no response. Trial counsel again asked the investigator for a written report, but received nothing. Id. at 633.

Just prior to commencement of trial, trial counsel filed a motion for a continuance, claiming "If the man (the investigator) can't get it done I will get somebody to do it and pay it out of my pocket. But, I just can't go to trial today." Id. at 633. Trial counsel testified under oath that he had not conducted a factual investigation, had not spoken to any witnesses, and had not previously

brought to the trial court's attention the lack of cooperation on the part of the investigator. Id. at 633. The trial court denied the motion for a continuance. Id. at 633.

The court found that the defendant was denied the effective assistance of counsel, ruling "it is fundamental that an attorney must acquaint himself not only with the law but also the facts of a case before he can render reasonably effective assistance of counsel. The size of the burden on the counsel to acquaint himself with the facts will vary of course depending upon the complexities of the case, the plea to be entered by the accused, the punishment that may be assessed, and other such factors, but that burden may not be sloughed off to an investigator...it is counsel's responsibility." Id. at 634.

In determining whether defense counsel's acts or omissions constituted deficient conduct, courts must look to whether such conduct fell below an objective standard of reasonableness under prevailing norms. Vasquez v. State, 830 S.W.2d 948, 949 (Tex. Crim. App. 1992). While any challenged action on defense counsel's part is presumed to be sound trial strategy, Rogers v. State, 795 S.W.2d 300, 303 (Tex. App. Houston [1st Dist.] 1990, pet. ref.), it may not be argued that a given course of conduct was within the realm of trial strategy unless counsel has conducted the necessary legal and factual investigation on which to base an informed rational decision. Ex parte Welborn, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990); Smith v. State, 894 S.W.2d 876, 880 (Tex. App. Amarillo 1995, pet. ref.) (failure to investigate cannot be considered sound trial strategy because no strategy can be formulated until counsel has investigated facts and witnesses); Wiggins v. Smith, 123 S. Ct. 2527, 2536, 156 L. Ed. 2d 471 (2003) (ineffective assistance to fail to investigate possible mitigating evidence relevant to punishment in capital murder case when counsel discovered no evidence to suggest that mitigation case would have been fruitless).

In Ex parte Welborn, trial counsel did not interview the State's witnesses. 785 S.W.2d at 392. He spoke with the defendant three times prior to trial, and no visit lasted more than fifteen minutes. Id. at 392. Two of these meetings may have been devoted entirely to discussion of trial counsel's fee. Id. at 392. In addition, trial counsel did not discuss with the defendant the elements of the offense or the State's theory of the case with him. Id. at 392. As part of his pretrial investigation, trial counsel took some photographs of the pharmacy, which he never introduced into evidence. Id. at 392. Trial counsel also failed to voir dire the jury on the law of parties. Id. at 392. Although he knew that applicant was being tried as a party, trial counsel could not recall whether or not he explained the law of parties to the applicant. Id. at 392.

The court ruled that trial counsel's representation fell below an objective standard of reasonableness. Id. at 392. The court further ruled that trial counsel's failure to interview any of the State's potential witnesses is sufficient to "undermine confidence in the outcome" of the applicant's trial. Id. at 392. As a result, the performance of trial counsel failed to meet the standard of reasonably effective assistance of counsel established in Strickland v. Washington. Id. at 392.

Nevertheless, when the record contains no evidence to rebut the presumption that trial counsel made all significant decisions in the exercise of reasonable professional judgment, the accused is not entitled to relief, because a finding of ineffective assistance of counsel may not be based on speculation. Rodd v. State, 886 S.W.2d 381, 385 (Tex. App. Houston [1st Dist.] 1994, pet. ref.) (conviction affirmed when record silent concerning counsel's reasons for not calling available witnesses whose testimony would have been favorable); Weeks v. State, 894 S.W.2d 390, 392 (Tex. App. Dallas 1994) (counsel's failure to object to inadmissible extraneous offense evidence was not ineffective assistance without evidence of counsel's possible trial strategy); Kemp v. State, 892 S.W.2d 112, 115 (Tex. App. Houston [1st Dist.] 1994, pet. ref.) (presumption of sound trial strategy means record on direct appeal rarely sufficient to rebut presumption of effectiveness and claim must be established in habeas corpus proceeding).

3. Application

It is clear from the record and the affidavits attached to this petition that Gregory Westfall's trial counsel fell far below what is considered effective assistance of counsel. It is evident that the standards of Strickland v. Washington have been met: Westfall's performance fell below an objective standard of reasonableness because of Westfall's failure to investigate the case, and that but for Westfall's failure, there is a reasonable probability that the outcome of the proceedings would have been different.

Between the time Westfall was retained in February, 2002, and until December 12, 2002, when Petitioner received his sentenced, Westfall spent a total of ten (10) minutes during four meetings with Petitioner (EXHIBIT 1). This is *ten minutes total* divided by four meetings. During these meetings, Westfall never discussed the facts of the case or the law with Petitioner. (EXHIBIT 1). Clearly, Westfall could not have discussed anything of substance when each meeting average approximately two and one-half minutes. During one period of time, Westfall did not visit

Petitioner for almost six months. (EXHIBIT 1). Petitioner had no idea what was transpiring in his case, and could not understand why Westfall entered a plea of guilty on his behalf.

Westfall failed to investigate the facts of the case and completely failed to prepare his witnesses. This conclusion is ascertained from the trial records and the attached Affidavits: one psychiatrist, Mary Connell, was not subpoenaed by Westfall. Another, Edwin Johnstone, spoke to Petitioner for 20 minutes. (R. IV, 129). Westfall met with Paula Adams-Thomas for a total of one minute. During his one meeting with Tiffani Phillips, Westfall told her almost nothing about the case or what she could expect during testimony, and no member of the defense team prepared Ms. Brooks for her testimony. (EXHIBIT 3). This was painfully evident during testimony, when at one point during the direct examination of Ms. Brooks, Westfall stated the following: *"Hold on. I don't know how to ask the question. Is there anything you have forgotten to tell me?"* (R. IV, 109).

The few instances in which Westfall may have conducted an actual investigation was delegated to a private investigator and Petitioner's mother. An investigator was told by Andrew Horvath and his mother, Rosie Horvath, that the District Attorney's office instructed them to not speak to any investigators or lawyers. (EXHIBIT 7). Then, Westfall had Melissa Adams contact various entities, including the Texas Rehabilitation Commission, Crowley School District, Wells Fargo Bank, Fort Worth City Credit Union, and various doctors who had examined and diagnosed Petitioner. Several months before Petitioner's trial, Westfall asked Adams whether she knew the location of where Petitioner and his friends met on the night of the incident that led to his trial, and asked Adams to take photographs. (EXHIBIT 4). In essence, Westfall asked an individual who knew nothing about crime scene investigation to take photographs for purposes of investigation. Immediately before the trial, and nearly a full ten months following the shooting, Westfall asked Adams to accompany him to the same locations, where Westfall spent approximately 10 minutes at each location taking pictures. (EXHIBIT 4).

Petitioner, Petitioner's mother, Adams, and Petitioner's grandmother, Inman, had no idea what steps Westfall was taking in order to prepare for trial. Other than telling Adams and Inman that the State had an "airtight" case against Petitioner and that it was apparent that Petitioner was guilty, Westfall did not reveal any information. (EXHIBIT 4). Westfall then used Inman to receive a continuance because Westfall claimed that because of a death penalty case, he needed to prepare for Petitioner's case and wanted to use Inman as a witness. (EXHIBITS 4 and 5). However, Westfall in fact spent at least part of the time working on a music CD. (EXHIBIT 4).

As agreed between Westfall and Adams, Westfall was not to enter a guilty plea on behalf of Petitioner without first informing Adams. (EXHIBIT 4). Westfall in fact entered such guilty plea without informing Ms. Adams.

Westfall told Gail Inman that she would be a very important witness in Petitioner's case, who was diagnosed with and was undergoing chemotherapy treatment for much of 2002. (EXHIBIT 5). Westfall asked Inman if she could get a letter from her oncologist stating that she was too sick to participate in the trial. (EXHIBIT 5). After receiving the letter, Judge Gill of the 213th District Court demanded that Inman drive 200 miles to the Court so that Judge Gill could interview her. (EXHIBIT 5). Westfall told Inman not wear her wig when she met Judge Gill and that if she needed to throw up, to do so in Judge Gill's courtroom. (EXHIBIT 5). Up until the time of trial, each time that Inman spoke to Mr. Westfall, Westfall told her that he had not begun preparations for Petitioner's case. (EXHIBIT 5). Westfall also told Inman that he had not had the chance to speak to Petitioner but he intended to do so. (EXHIBIT 5).

When Inman spoke to Westfall about Petitioner's use of Paxil, Westfall dismissed the idea of using Petitioner's mental condition as a defense, telling Inman that "no jury in Texas would ever entertain the idea of Petitioner's mental condition as a defense." (EXHIBIT 5). However, Westfall presented such a defense by presenting Dr. Johnstone, yet failed to prepare Johnstone. Johnstone testified that Petitioner has features of borderline personality disorder, which Johnstone described as "emotional instability, irrational sensitivity or fear of abandonment that lead to intense relationships that are full of conflict." (R. IV, 125). Johnstone also stated that after Petitioner began using Paxil, Petitioner had "spurts of excited behavior where he was more energized, talking rapidly and loudly, and getting into people's faces with a kind of intensity and a wild look in his eye." (R. IV, 126-127). Dr. Johnstone also testified that Petitioner exhibited signs of hypomania, which is a possible risk from using Paxil. (R. IV, 128).

However, Johnstone admitted that he had met with Petitioner one time for about 20 minutes and that he received information as to Petitioner's use of Paxil from another party, but could not identify the party. (R. IV, 129-131). Johnstone also admitted that he was not sure when Petitioner started using Paxil. (R. IV, 130). This testimony makes it evident that Westfall failed to give Johnstone any important information regarding Petitioner and failed to discuss with Johnstone's the testimony that was to be offered during trial.

Further evidence of Westfall's failure to prepare Dr. Johnstone is apparent from an incident during a break in the testimony of Dr. Johnstone, where in the hallway outside the courtroom,

Westfall told Gail Inman that he did not believe he can use Dr. Johnstone's testimony. (EXHIBIT 5). Inman told Westfall that he had to use Johnstone's testimony because she believed that his testimony was Petitioner's only chance. (EXHIBIT 5). Clearly, Westfall did not prepare Dr. Johnstone because Westfall had no idea what Dr. Johnstone was going to say during testimony. When Westfall realized that Johnstone's testimony may actually damage Petitioner's case, he decided to not use the testimony, but did so at the demand of Petitioner's grandmother.

During the opening statement of the defense, after making several mistakes regarding the identity of witnesses and facts of the case, Minick states that "Saturday about 3:00 a.m. is when (Petitioner) shoots at these guys near Granbury and then goes to Tiffany's house and walks in like he owns the place…" (R. III, p. 21). Petitioner was never charged with the shooting near Granbury, and little evidence was presented that connected Petitioner with such shooting.

Perhaps the most damning evidence of Westfall's failure to provide effective trial counsel comes from the trial transcripts. Regardless of whether those giving testimony were witnesses for the State or for the defense, Westfall either failed to ask relevant questions, or failed to ask any questions at all. Such failure is a result of Westfall's failure to investigate the case, as a lawyer who does not have a command of the facts is unable to ask relevant questions. For instance, during the cross-examination of Michael Williams, Westfall referenced a statement that Williams made to the police on February 23, 2002 by asking Williams only about location of the gun in the vehicle, (R. III, 87-88), although this question was not relevant to Williams's direct testimony. Westfall then asked Williams about the smoking of marijuana and whether in the past any person ever thought Williams was an undercover police officer. (R. III, 89-90). Again, this question had no relevance as to whether Petitioner was the shooter. Then when Westfall cross-examined Andrew Horvath, the second alleged victim, Horvath was asked only whether he knew anybody in a picture presented to Horvath. (R. III, 110), and whether Horvath saw who lifted up Michael Williams's shirt.

The trial record and the attached Affidavits prove that Westfall did not prepare any of the defense witnesses. For instance, when Westfall asked questions of Melissa Adams that pertained to Petitioner's activities leading up to and including the day following the shooting, the State repeatedly and successfully objected to Melissa Adams's testimony as to hearsay or nonresponsive answers. (R. IV, 56-68). At one point, Westfall said the following: *Do you know what? I'm confused. Let's talk about Friday because that will draw an objection."* Westfall was so unprepared to question his Adams that he refused to ask further questions on important topics for

fear of drawing an objection.

When Westfall questioned Tiffani Phillips, the State successfully made objections as to hearsay, speculation, and nonresponsive answers. (R. IV, 100-109). In her Affidavit, Tiffani states that neither Westfall nor Minick spent any time with her. (EXHIBIT 3). Tiffani's statement in her Affidavit is corroborated by Westfall's incredible statement, *"Hold on. I don't know how to ask the question. Is there anything you have forgotten to tell me?"* (R. IV, 109). The only conceivable reason why Westfall would have said such a statement to Tiffani is Westfall's failure to prepare Tiffani for testimony

Paula Adams-Thomas testified that Petitioner was a "loving person," and that on the Sunday prior to the shooting, Petitioner was behaving strangely in church. (R. IV, 147-149). Yet, on cross-examination, Ms. Thomas testified that she did not see Petitioner around the day of the shooting, and could not tell the jury anything about Petitioner's behavior on or about that day. (R. IV, 154). Neither Westfall nor Minick prepared Ms. Thomas for her testimony. (EXHIBIT 2).

4. Conclusion

Evidence of Westfall's ineffective performance is clearly evident from both the attached sworn affidavits and from the trial record. Westfall spent a total of ten (10) minutes during four meetings with Petitioner during the span of ten months. During these meetings, Westfall never discussed the facts of the case or the law with Petitioner. During one period of time, Westfall did not visit with Petitioner for almost six months. As a result, Petitioner had no idea what was transpiring in his case, and could not have understood why Westfall entered a plea of guilty. Westfall failed to investigate the facts of the case and completely failed to prepare his witnesses. This conclusion is easily ascertained from the trial records and the attached Affidavits.

The law clearly states that an attorney who fails to investigate his case and fails to interview witnesses and communicate with his client fails to render the effective assistance of counsel. Westfall cannot even use the excuse of lack of compensation, as he was paid $40,000 for his services, an amount that does not include the expense of hiring expert witnesses.

As a result, the standards of Strickland v. Washington have been met: Petitioner has shown that Westfall's performance fell below an objective standard of reasonableness by establishing that Westfall failed to investigate the case and failed to interview witnesses, and that but for these

substantial errors, there is a reasonable probability that the outcome of the proceedings would have been different. As a result, Petitioner should be granted relief and the conviction should be vacated.

B. Ground Two: The conviction was obtained by a plea of guilty that was not made voluntarily, and was made without an understanding of the nature of the charge and the consequences of the plea

1. Facts

Petitioner first met Gregory Westfall the day after Petitioner's arrest in February 2002. (EXHIBIT 1). Westfall told Petitioner that he was hired by Petitioner's family. (EXHIBIT 1). Westfall asked Petitioner about an armband that was on Petitioner's arm. (EXHIBIT 1). Then, Westfall left. (EXHIBIT 1). Westfall did not ask Petitioner any other questions or otherwise speak to Petitioner. (EXHIBIT 1).

The next time Westfall met with Petitioner was one month later. (EXHIBIT 1). Westfall brought with him Dr. Mary Connell, who met with Petitioner briefly. (EXHIBIT 1). Westfall did not speak with Petitioner at all. (EXHIBIT 1).

Later that month, Petitioner signed a General Power of Attorney, giving his mother, Melissa Adams, the power to make important decisions on his behalf. (EXHIBITS 1, 4, and 6). Adams and Westfall agreed this was necessary because neither believed that Petitioner could make important decisions for himself. (EXHIBIT 4). Westfall was fully aware of the General Power of Attorney because the notary who notarized the document, Michelle Pitt, was an employee of Westfall. (EXHIBIT 4).

In May 2002, Westfall visited Petitioner and him a single question about a shooting that occurred in Granbury. (EXHIBIT 1). Westfall did not ask Petitioner any questions regarding the actual charges, and left within minutes. (EXHIBIT 1). Westfall did not visit Petitioner again for almost six months, when in November 2002, Westfall visited him only to tell him that he (Petitioner) was "in trouble." (EXHIBIT 1). Westfall promptly left. (EXHIBIT 1).

One week later Westfall and Minick went to visit Petitioner. (EXHIBIT 1). Westfall told Petitioner only that Minnick was going to help him represent Petitioner. (EXHIBIT 1). Both attorneys then left. (EXHIBIT 1). Throughout the course of the "representation," Westfall never discussed the case with Petitioner, and never asked Petitioner any questions regarding the charges.

One week later Westfall took Dr. Johnstone to meet with Petitioner. (EXHIBIT 1).

Johnstone spoke to Petitioner for approximately 20 minutes. (R. IV, 129). Westfall did not ask speak to Petitioner and did not ask Johnstone any questions in front of Petitioner. (EXHIBIT 1).

Westfall visited Petitioner right before trial and told Petitioner that he (Westfall) worked a deal with the prosecutors such that Petitioner is to plead guilty to two counts of aggravated robbery. (EXHIBIT 1). Westfall told Petitioner that by pleading guilty, he would receive probation. (EXHIBIT 1). Westfall told the same to Gail Inman (EXHIBIT 5). However, Westfall did not tell Petitioner what the penalty range is for aggravated robbery. (EXHIBIT 1). In addition, Petitioner would never have agreed to the plea had he known that he may not receive probation.

On December 10, 2002, the day Petitioner plead guilty, Westfall and Minick met with Petitioner. Westfall told Petitioner that while the judge spoke to Petitioner, Petitioner should look at Minick. (EXHIBIT 1). Westfall told Petitioner that when Minick nods "yes," as when Minick's head goes up and down, Petitioner should say to the judge "yes." (EXHIBIT 1). Westfall also told Petitioner that when Minick nods "no," as when Minick's head goes side to side, Petitioner should say to the judge "no." (EXHIBIT 1).

When Petitioner went before the judge, the judge read the court's admonishments to Petitioner. (EXHIBIT 1). Petitioner did as he was instructed by Westfall and looked at Minick, answering the judge's questions according to how Minick nodded his head. (EXHIBIT 1).

2. Applicable Law

When the trial record shows the court properly admonished a defendant, the record presents a prima facie showing the defendant entered his plea knowingly and voluntarily. Harris v. State, 887 S.W.2d 482, 484 (Tex. App. Dallas 1994); Soto v. State, 837 S.W.2d 401, 405 (Tex. App. Dallas 1992, no pet.). The burden then shifts to the defendant to show he did not understand the consequences of his plea. Soto, Id. at 405.

The Supreme Court has held that when a defendant is represented by counsel during the plea process and enters his or her plea on the advice of counsel, he or she may attack the voluntary and intelligent character of the plea by showing that the advice of counsel was not within the range of competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). In Hill v. Lockhart, a state prisoner filed a federal habeas corpus petition alleging that his guilty plea was involuntary because of ineffective assistance of counsel in that his attorney advised him that if he pleaded guilty, he would become eligible for parole after

serving one-third of his prison sentence. Id. at 53. However, under Arkansas law, the prisoner was required to serve one-half of his sentence before he is eligible for parole. Id. at 53. The United States District Court for the Eastern District of Arkansas denied habeas relief without a hearing, and the United States Court of Appeals for the Eighth Circuit affirmed by an equally divided court. 764 F.2d. 1279.

On certiorari, the United States Supreme Court affirmed. The Court ruled that the District Court properly denied the prisoner's habeas corpus claim because he did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. Id. at 58-59.

The Hill v. Lockhart test was adopted by the Texas Court of Criminal Appeals in Ex parte Pool. 738 S.W.2d 285 (Tex. Crim. App. 1987). In Pool, the defendant was convicted of felony D.W.I. upon his plea of guilty before the court. Id. at 286. Pursuant to the plea bargain agreement, the defendant was sentenced to five years in prison. Id. at 286. Petitioner filed an application for a state writ of habeas corpus, asserting that his trial attorney advised him that if he did not enter a plea of guilty and accept the State's offer of five years, the State would enhance the punishment in his case and he might face 25 years to 99 years or life as a habitual offender. Id. at 286. Petitioner further asserted that his trial counsel failed to investigate the status of his prior convictions, and instead relied on representations by the prosecutor that the defendant had been twice previously convicted of felony offenses and that the first of those offenses had become final prior to the commission of and conviction for the second offense. Id. at 286. In fact, the two prior convictions against the defendant became final on the same day. Id. at 286. Finally, the defendant asserted that he would not have agreed to plead guilty had he not been afraid that to do otherwise would have resulted in a minimum sentence of at least twenty-five years. Id. at 286.

Citing Butler v. State, 716 S.W.2d. 48 (Tex. Cr. App. 1986), and adopting Hill v. Lockhart, the Texas Court of Criminal Appeals held "it is fundamental that an attorney representing a defendant must acquaint himself not only with the law but also the facts of the case before he can render reasonably effective assistance of counsel, and that relying upon the facts of the case as represented by a prosecuting attorney is not sufficient." Id. at 286. The Court ruled that the defendant clearly satisfied the two-prong test of Strickland v. Washington, the trial attorney's representation clearly fell below an objective standard of reasonableness and as a result the plea bargain arrangement agreed to by the applicant was entered into unknowingly and involuntarily. Id. at 286.

A plea of guilty is not knowingly and voluntarily entered if it is made as a result of ineffective assistance of counsel. Ex parte Bratchett, 513 S.W.2d 851 (Tex. Cr. App. 1974). In Bratchett, the attorney did not ask the defendant if he had any witnesses, made no investigation, and did not research the law governing the case. Id. at 852. The attorney advised the defendant to plead guilty to the maximum sentence upon the assurance that a pending Dallas County charge would be dismissed. Id. at 852. It was later established that the attorney never verified the assurance of dismissal on the outstanding charge with the Dallas District Attorney, and that the defendant was subsequently tried and convicted on the outstanding charge. Id. at 852. The court found that the defendant had been deprived of the effective assistance of counsel and that his plea of guilty was not a voluntary or knowledgeable act. Id. at 854.

In Ex parte Gallegos, Petitioner pled guilty and was convicted of robbery by assault after he had participated in an assault on a county jailer by taking from the jailer jail keys by force. 511 S.W.2d 510, 511 (Tex. Cr. App. 1974). Petitioner's trial lawyer had been appointed on the day of trial and spent no time determining the facts of the case. Id. The court held that had the trial lawyer familiarized himself, he would have known that the offense of robbery required intent to permanently appropriate the property and deprive the owner of its value. Id. The lawyer's failure to advise Petitioner as to how the facts of his case related to the Texas law of robbery prevented the guilty plea from being knowingly and voluntarily entered. Id. Petitioner filed an application for writ of habeas corpus, claiming that he was denied ineffective assistance of counsel. Id. The court granted the writ. Id.

3. Application

If ever was a case proper for reversal based upon a guilty plea not entered into knowingly and voluntarily, it is the case at hand. Between February 2002 and December 2002, Gregory Westfall never discussed the case with Petitioner. (EXHIBIT 1). Petitioner signed a General Power of Attorney, giving his mother, Melissa Adams, the power to make important decisions on his behalf. (EXHIBITS 1, 4, and 6). Adams and Westfall mutually agreed this was necessary because Petitioner could not make important decisions for himself. (EXHIBIT 4). Westfall was fully aware of why the General Power of Attorney was executed because the notary who notarized the document, Michelle Pitt, was an employee of Westfall. (EXHIBIT 4).

As the trial approached, Westfall visited Petitioner and told Petitioner that he (Westfall)

worked a deal with the prosecutors such that Petitioner will plead guilty to two counts of aggravated robbery. (EXHIBIT 1). Westfall told Petitioner that by pleading guilty, he would receive probation. (EXHIBIT 1). Westfall told the same to Gail Inman (EXHIBIT 5). However, Westfall never explained to Petitioner what the penalty range is for aggravated robbery. (EXHIBIT 1). And despite knowing that Petitioner could not make important decisions for himself, Westfall never told Petitioner's mother, Melissa Adams, of the guilty plea. (EXHIBIT 4). In addition, Petitioner would never have agreed to plead guilty had he known that he may not receive probation. Petitioner's family also would have never agreed to such plea.

Despite the facts stated above, the most glaring fact of Petitioner not pleading guilty knowingly and voluntarily took place on December 10, 2002, when Westfall told Petitioner that while the judge spoke to Petitioner, Petitioner should look at Minick and say "yes" when Minick's head goes up and down, and "no" when Minick's head goes side to side. (EXHIBIT 1). Petitioner did as he was instructed by Westfall by answering the judge's questions according to how Minick nodded his head. (EXHIBIT 1).

It is clear that Petitioner did not understand the consequences of his plea. In fact, because of Petitioner's state of mind and Westfall's failure to tell Petitioner *anything* about the case, Petitioner had no concept of what was taking place. A plea is not entered into knowingly and voluntarily when the plea is based upon erroneous claims by the attorney of the promise of probation, or a result of the defendant stating "yes" or "no" based upon the direction of the nod of a head by co-counsel.

Westfall also entered the plea of guilty for Petitioner without telling Petitioner or his family about the consequences of doing so. Westfall erroneously told Petitioner and Petitioner's grandmother that Petitioner would receive probation in exchange for pleading guilty, although Westfall had no basis for making such a claim. Westfall failed to discuss the law with Petitioner and his family, and based upon the information provided *supra* in Ground One, conducted no investigation into the case and interviewed no witnesses. As a result, Petitioner's plea of guilty was not knowingly and voluntarily entered because it was made as a result of ineffective assistance of counsel. Like the facts in Ex Parte Bratchett, Westfall conducted almost no investigation, spoke to petitioner for a total of ten minutes, and simply threw Petitioner at the mercy of the court. Petitioner could not have known what aggravated robbery is because Westfall never spoke to Petitioner in order to tell Petitioner the elements of aggravated Robbery. In fact, Westfall never spoke to anybody regarding the case or the elements of the case.

4. Conclusion

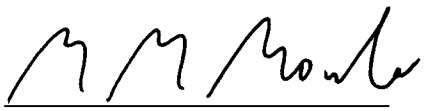
Petitioner's plea of guilty was not entered knowingly and voluntarily because Gregory Westfall, the trial attorney, spent a total of 10 minutes over the course of 10 months with Petitioner, did not explain the consequences of the plea to Petitioner or his family, entered a plea of guilty although Westfall knew that Petitioner was in no state to enter such a plea, and because Petitioner answered the court's admonishments by answering "yes" or "no" based upon the nod of the head by the co-counsel. Further, it is evident that Petitioner entered the plea without an understanding of the nature of the charge and consequences of the plea. This behavior by Gregory Westfall is precisely the behavior by attorneys that state and federal courts have sought to prevent by rulings in cases such as Harris v. State, Hill v. Lockhart, and Ex Parte Pool. If ever was a case proper for reversal based upon a guilty plea not entered into knowingly and voluntarily, it is the case at hand. As a result, Petitioner should be granted relief and the conviction should be vacated.

V. CONCLUSION

The evidence and pleadings in this case clearly establish that Petitioner was denied the effective assistance of counsel. Further, the evidence and pleadings clearly establishes that Petitioner did not enter a plea of guilty knowingly and voluntarily, and entered the plea without an understanding of the nature of the charge and consequences of the plea. As a result, Petitioner has been illegally confined for the past four years. Therefore, Petitioner respectfully demands that an evidentiary hearing be held such that Petitioner may present evidence supporting the Petition for Writ of Habeas Corpus. In the alternative, if this Court chooses not to grant an evidentiary hearing, Petitioner prays that he be granted relief and the conviction in this case be vacated.

Respectfully Submitted,

M. Michael Mowla, PLLC



By: M. Michael Mowla

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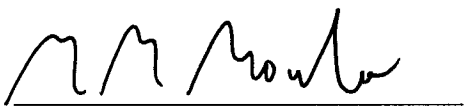
Phone: 972-283-2600
Fax: 972-283-2601
Texas Bar # 24048680

Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Memorandum in Support of Petition for Writ of Habeas Corpus was delivered by first class mail, postage prepaid, on the Office of the Texas Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, on this the 5th day of July, 2006.



By: M. Michael Mowla

EXHIBIT 1

AFFIDAVIT

STATE OF TEXAS,)
)
COUNTY OF Wichita)
)

BEFORE ME, the undersigned authority, on this day personally appeared BARTON RAY GAINES, who, after being duly sworn, on oath says:

1. I am BARTON RAY GAINES.
2. My date of birth is October 25, 1982.
3. My Texas Department of Criminal Justice Number is 1139507.
4. I am presently incarcerated at the Allred Unit in Iowa Park, Texas.
5. I have personal knowledge of the facts stated in this affidavit.
6. I was indicted for attempted capital murder.
7. My attorney during my trial for two counts of aggravated robbery was Gregory Westfall of Fort Worth, Texas.
8. I plead guilty to both counts of aggravated robbery.
9. On December 12, 2002, I was convicted of both two counts of aggravated robbery.
10. From the time of my arrest in February, 2002, until my conviction on December 12, 2002, I had very little contact with my attorney, Gregory Westfall.
11. The first time I met Gregory Westfall was on the day after my arrest while I was at Mansfield Jail. Gregory Westfall told me that he was hired by my family. He asked me about an armband that was on my arm, then left. He did not ask me any other questions or otherwise speak to me.
12. Gregory Westfall visited me again about one month later while I was still at Mansfield Jail. He brought Dr. Mary Connell, the psychiatrist. I spoke to Mary Connell briefly. I did not speak to Gregory Westfall at all.
13. I remember that sometime in March 2002, I signed a General Power of Attorney, giving my mother, Melissa Adams, the general power of attorney. My mother told me this was necessary because she did not think I was able to make important decisions for myself.
14. After I was transferred to the Tarrant County Jail, sometime in May 2002 Gregory Westfall visited me again. He asked me one question regarding another incident for

which I was being investigated. He did not ask me any questions about the alleged aggravated robbery. He left within two or three minutes.

15. I did not see Gregory Westfall again for almost six months.
16. In November 2002, Gregory Westfall visited me in the Tarrant County Jail. Gregory Westfall only told me that I was "in trouble." I was confused and I did not know what to say to him or what to ask him. Gregory Westfall then left.
17. About one week later Gregory Westfall came to visit me. He brought with him another lawyer named Shane Minnick. Gregory Westfall told me that Shane Minnick was going to help him represent me. Gregory Westfall then left, along with Shane Minnick. I did not talk about the case at all with Gregory Westfall. Gregory Westfall did not ask me any questions at all.
18. About one week later Gregory Westfall brought Dr. Johnstone with him. I spoke to Dr. Johnstone for about ten minutes. Gregory Westfall did not ask me any questions and did not ask Dr. Johnstone any questions in front of me. Gregory Westfall did not say anything to me at all.
19. At the time of the trial, Gregory Westfall visited me one last time while I was in jail. He told me he worked out a deal where I would plead guilty to two counts of aggravated robbery.
20. Gregory Westfall told me that by pleading guilty, I would get probation.
21. Gregory Westfall did not tell me what the penalty range was for aggravated robbery.
22. On the day I pled guilty, Gregory Westfall and Shane Minnick came to see me behind the courtroom. I was with the other prisoners.
23. Gregory Westfall told me that while the judge spoke to me, I should look over at Shane Minnick. Gregory Westfall told me that when Shane Minnick nods "yes," like where his head goes up and down, I should say to the judge "yes." Gregory Westfall also told me that when Shane Minnick nods "no," like where his head goes side to side, I should say to the judge "no."
24. Gregory Westfall then left and Shane Minnick was with me. Shane Minnick told me that everything would be okay.
25. When I went before the judge, the judge asked me questions. I looked at Shane Minnick and I answered the judge's questions according to the way Shane Minnick nodded his head.

26. During the time that the evidence was presented, Gregory Westfall never said anything to me. A few times, Shane Minnick told me that I am doing a good job and that everything would be fine.
27. After I was sentenced by the jury and given 35 years in prison, Gregory Westfall came to me and told me and said "you have a long road ahead of you." That was the last time I ever saw Gregory Westfall.

STATE OF TEXAS)
)
COUNTY OF Wichita)VERIFICATION
)
)

This Affidavit was acknowledged before me on 11 April, 2006

by BARTON RAY GAINES.

Barton Ray Gaines
[*signature of Affiant*]

Notary Public in and for
The State of Texas

11 April 2006 [*date*]

David W. Johnson [*signature*]

[SEAL]

NOTARY PUBLIC STATE OF TEXAS
DAVID W. JOHNSON
Notary Public, State of Texas
My Commission Expires 12-30-2007
WITHOUT BOND

EXHIBIT 2

AFFIDAVIT

STATE OF TEXAS,)
)
COUNTY OF TARRANT)
)

BEFORE ME, the undersigned authority, on this day personally appeared PAULA ADAMS-THOMAS, who, after being duly sworn, on oath says:

1. I am PAULA ADAMS-THOMAS.
2. I reside in Fort Worth, Texas.
3. I have personal knowledge of the facts stated in this affidavit.
4. I testified on behalf of Barton Gaines at his trial in December of 2002 in the 213th District Court in Fort Worth, Texas.
5. I had known Barton Gaines for most of his life and I have personal knowledge that he was diagnosed with ADHD and dyslexia.
6. Shortly before the trial, Melissa Adams took me to meet Gregory Westfall for the purpose of preparing me for my testimony.
7. Gregory Westfall spent about one minute with me, introducing himself.
8. Gregory Westfall's assistant, Cheyenne Minick, spent about five minutes with me, telling me about where I needed to show up for court and who would be questioning me.
9. Neither Gregory Westfall nor Cheyenne Minick prepared me whatsoever for the questions I would be asked by the defense.
10. Neither Gregory Westfall nor Cheyenne Minick prepared me whatsoever for the questions that I would be asked on cross-examination by the prosecutor.
11. I had no idea what questions would be asked of me by the defense or the prosecutor.
12. I had no idea whether it would be Gregory Westfall or Cheyenne Minick who would be questioning me at trial.

STATE OF TEXAS)
)
COUNTY OF TARRANT)VERIFICATION
)
)

This Affidavit was acknowledged before me on 4-24-, 2006

by PAULA ADAMS-THOMAS.

Paula Adams-Thomas
[*signature of Affiant*]

Notary Public in and for
The State of Texas

4-24-06 [*date*]

John W. Strawther [*signature*]

[SEAL]

JOHN W. STRAWTHER
Notary Public, State of Texas
My Commission Expires
June 03, 2006

EXHIBIT 3

AFFIDAVIT

STATE OF TEXAS,)
)
COUNTY OF TARRANT)
)

BEFORE ME, the undersigned authority, on this day personally appeared TIFFANI BROOKS, who, after being duly sworn, on oath says:

1. I am TIFFANI BROOKS.
2. My date of birth is July 14, 1984
3. I have personal knowledge of the facts stated in this affidavit.
4. I was called as a witness on behalf of Barton Ray Gaines, who was indicted for attempted capital murder and convicted of two counts of aggravated robbery.
5. Barton's trial lawyer was Gregory Westfall of Fort Worth, Texas.
6. Barton Gaines was convicted on December 12, 2002.
7. I dated Barton Gaines for many years when we were in school.
8. I met with Gregory Westfall, only one time when I accompanied Melissa Adams to Gregory Westfall's office.
9. Gregory Westfall told me that I would be an important part of Barton's defense because I knew Barton so well.
10. During the meeting, Gregory Westfall did not tell me much of anything else regarding the case.
11. At no other time did Gregory Westfall speak to me.
12. At no other time did anybody else employed by Gregory Westfall speak to me.
13. Gregory Westfall did not prepare me for my testimony in court.
14. At one point when Gregory Westfall was questioning me, he confused me and said "I don't know how to ask the question," and asked me "is there anything you have forgotten to tell me?"
15. For as long as I have known Barton Gaines, I knew that he had learning disorders, and at times had severe depression.
16. I know that for weeks leading up to when the shooting occurred that resulted in his trial and conviction, he was taking Paxil and he was not himself at all. He was acting very

strangely. He would use profanity even though he did not usually use a lot of profanity. He was very paranoid and he even accused me of cheating on him, which was not true.

STATE OF TEXAS)
)
COUNTY OF TARRANT)VERIFICATION
)
)

This Affidavit was acknowledged before me on April 5, 2006

by TIFFANI BROOKS.

Tiffani Brooks
[*signature of Affiant*]

Notary Public in and for
The State of Texas

April 5, 2006 [*date*]

Dawn H Joiner [*signature*]

[SEAL]

Dawn H Joiner
My Commission Expires
03/05/2010

EXHIBIT 4

AFFIDAVIT

STATE OF TEXAS,)
)
COUNTY OF DALLAS)
)

BEFORE ME, the undersigned authority, on this day personally appeared MELISSA ADAMS, who, after being duly sworn, on oath says:

1. I am MELISSA ADAMS.
2. I reside in Fort Worth, Texas.
3. I have personal knowledge of the facts stated in this affidavit.
4. My son, Barton Ray Gaines, was indicted for attempted capital murder.
5. On behalf of my mother, Gail Inman, I hired Gregory Westfall of Fort Worth, Texas to represent Barton Gaines. Gregory Westfall discussed a fee totaling $15,000.
6. On December 12, 2002, Barton Gaines was convicted of two counts of aggravated robbery as a result of a plea deal struck by Gregory Westfall.
7. In March 2002, I spoke to Gregory Westfall regarding Barton's mental condition. Gregory Westfall agreed with me that Barton was in no condition to make any type of decision. As a result, we executed a General Power of Attorney, granting me the right to make important decisions for Barton.
8. After we hired Gregory Westfall, he asked me to contact various governmental agencies, including the Texas Rehabilitation Commission, Crowley School District, Wells Fargo Bank, Fort Worth City Credit Union. Gregory Westfall also had me contact various doctors who had examined and diagnosed Barton.
9. Gregory Westfall told me that he needed me to get Barton's records from these agencies and doctors.
10. I had tremendous difficulty attaining the records. None of the organizations would speak to me because Barton was no longer a minor. I was asked by all of the agencies and doctors "why isn't your lawyer handling this?" They told me that the normal process of attaining these documents was for a lawyer to file for a subpoena through the court system.

11. A few months before my Barton's Trial, Gregory Westfall asked me whether I knew the location of where Barton and his friends met on the night of the incident that led to his trial. I told Gregory Westfall that I did.
12. Prior to this trial and the incident that lead to this trial, Barton had been diagnosed with severe ADHD, dyslexia, and chronic depression.
13. Gregory Westfall asked me to go the location, take photographs, an bring the photographs to his office.
14. I took photographs of everything I could see. However, I was not trained in criminal defense and I was not sure what I was supposed to photograph.
15. I never was kept updated regarding Barton's case because Gregory Westfall would not speak to me about the case. He also always told me not to speak about the case with Barton when we visited him in jail.
16. On many occasions when I asked Gregory Westfall about my son's case, he replied to me that "the D.A. has an airtight case" and would say no more.
17. Barton had been taking 20 milligrams of Paxil up until the time of his arrest. I learned that after his arrest and incarceration in jail, he was taking 30 milligrams of Paxil.
18. Barton always seemed to be in a dazed state of mind when I visited him in jail.
19. In late November, my family and I went to Gregory Westfall's office to discuss my trial testimony. Dr. Johnstone of Houston was also present. Gregory Westfall introduced me to Cheyenne Minnick, who was a newly-licensed lawyer. Gregory Westfall asked us whether it was okay for Minnick to sit in on the meeting and take notes.
20. Gregory Westfall never told us that he had hired Cheyenne Minnick to conduct part of Barton's defense. Gregory Westfall never received my authorization to hire Minnick and delegate work to him. To the best of my knowledge, Gregory Westfall never told my mother, Gail Inman, that he had hired Minnick in order to delegate work to him.
21. During this meeting, Dr. Johnstone told us that the Paxil had thrown Barton into an induced manic episode. Dr. Johnstone told all of us who were present, including Gregory Westfall, that he did not believe that Barton was capable of making any important decisions, especially the decision to plead guilty to the charges.
22. A few days after this meeting, and shortly before the start of the trial, Gregory Westfall asked me if I would accompany him to where Barton met with his friends on the day of the incident and to where the shooting actually occurred. Gregory Westfall said he

wanted to take more pictures. Gregory Westfall and I spent about 10 minutes at each location. While we were at the location where Barton met his friends, Gregory Westfall receives a phone call. I heard Gregory Westfall say on the phone, "Melissa and I are here at the (rice patty) smoking a dooby and getting high."

23. Shortly before the trial, Gregory Westfall called me and told me he was going to use me as a witness for Barton. He asked me about my childhood, and what kind of mother I thought I was. Gregory Westfall did not tell me anything about what kind of questions he would ask me. Nor did Gregory Westfall tell me anything about what to expect from the district attorney.
24. Gregory Westfall told me to not be in the courtroom while the jury was being selected or when opening arguments were made. I later learned that Gregory Westfall had used Cheyenne Minnick to pick the jury. Gregory Westfall had never asked me for permission to use Cheyenne Minnick. To the best of my knowledge, Gregory Westfall never asked my mother for permission to use Cheyenne Minnick.
25. My mother, Gail Inman, was diagnosed with cancer in April 2001. During Barton's trial, she was undergoing chemotherapy treatment.
26. My mother underwent surgery for my cancer in May 2002. She had a double mastectomy.
27. In July 2002, Gail Inman told me that she had contacted Gregory Westfall and that Gregory Westfall told her that he was winding down a death penalty case and that he needed more time to prepare for Barton's case. I called Gregory Westfall and he verified this.
28. I know that Gregory Westfall told my mother to come to Judge Gill's courtroom in the 213th District Court so that he could convince Judge Gill to postpone the trial. I also know that Gregory Westfall told my mother not wear her wig when she met Judge Gill. Gregory Westfall also told her that if she needed to throw up, she should do so in Judge Gill's courtroom.
29. After this incident, I attempted to contact Gregory Westfall on many occasions. Gregory Westfall never returned my phone calls.
30. I spoke to Gregory Westfall right before the trial, and he told me that the State had an airtight case against Barton. He told me that it was apparent that Barton was guilty. Gregory Westfall also told me that he would start working on the punishment phase of

the trial because there was nothing Barton could do but throw himself at the mercy of the jury.

31. To the best of my knowledge, Gregory Westfall had visited Barton in jail only four times, and each time he did not spend more than a few moments with Barton.
32. I learned that despite getting the trial delayed until December 2002 so that he could prepare for Barton's case, Gregory Westfall spent the extra time working on a music CD.
33. During the entire time of my dealings with Gregory Westfall, he never asked me anything about Barton's mental state or anything about what I knew about what happened on the day of the shooting.
34. When I had discussed the power of attorney with Gregory Westfall, he told me that it allowed me to make the important decisions for Barton. I told Gregory Westfall that under no circumstances was he to enter a guilty plea on behalf of Bart without telling me.
35. However, without telling me, Gregory Westfall entered a guilty plea on behalf of Barton.

STATE OF TEXAS)
)
COUNTY OF DALLAS)VERIFICATION
)
)

This Affidavit was acknowledged before me on April 3rd, 2006

by MELISSA ADAMS.

Melissa Adams
[*signature of Affiant*]

Notary Public in and for
The State of Texas

4 APRIL 2006 [*date*]

[*signature*]

[SEAL]

TIMOTHY R. BUSH
Notary Public, State of Texas
My Commission Expires
May 06, 2009

TIMOTHY R. BUSH
Notary Public, State of Texas
My Commission Expires
May 06, 2009

EXHIBIT 5

AFFIDAVIT

STATE OF TEXAS,)
)
COUNTY OF YOUNG)
)

BEFORE ME, the undersigned authority, on this day personally appeared GAIL INMAN, who, after being duly sworn, on oath says:

1. I am GAIL INMAN.
2. I reside in Graham, Texas.
3. I have personal knowledge of the facts stated in this affidavit.
4. My grandson, Barton Ray Gaines, was indicted for attempted capital murder.
5. I hired Gregory Westfall of Fort Worth, Texas to represent Barton Gaines.
6. On December 12, 2002, Barton Gaines was convicted of two counts of aggravated robbery as a result of a plea deal struck by Gregory Westfall.
7. To the best of my knowledge, from the time I hired Gregory Westfall in February, 2002, until Barton Gaines's conviction on December 12, 2002, Gregory Westfall hardly ever spoke to Barton Gaines.
8. My daughter, Melissa Adams, met with Gregory Westfall. Gregory Westfall told her that he would represent Barton for a total of $15,000.
9. I was diagnosed with cancer in April 2001. During Barton's trial, I was undergoing chemotherapy treatment.
10. Prior to this trial and the incident that lead to this trial, Barton had been diagnosed with severe ADHD, dyslexia, and chronic depression.
11. Gregory Westfall contacted me and told me to pay Dr. Mary Connell directly to examine Barton so that she can provide a written report on Barton's mental condition. I paid Dr. Connell and I received the report. I know that Gregory Westfall received the report as well. Gregory Westfall never discussed the report, nor did he ever use it in court.
12. I underwent surgery for my cancer in May 2002. I had a double mastectomy.
13. I contacted Gregory Westfall in July 2002. Gregory Westfall told me that he was winding down a death penalty case and that he needed more time to prepare for Barton's case.

14. Gregory Westfall told me that I would be a very important witness in Barton's case. Gregory Westfall asked me if I could get a letter from my Oncologist stating that I was too sick to participate in the trial and that I was a key witness in Barton's case.
15. Gregory Westfall received the letter from my Oncologist. However, Judge Gill of the 213th District Court insisted that I drive 200 miles to the Tarrant County District Court so that he (the judge) could interview me.
16. Gregory Westfall told me to not wear my wig when I met Judge Gill. Gregory Westfall also told me that if I needed to throw up, to do so in Judge Gill's courtroom.
17. I entered the courtroom. This was a very humiliating experience for me. A bailiff came to me and told me I could leave because Judge Gill had seen me and realized the degree of my illness.
18. As a result of my appearing in the courtroom, Gregory Westfall managed to get the trial postponed until December 2002.
19. Every time I spoke to Gregory Westfall, he told me that he had not begun preparations for Barton's case. He also told me that he had not had the chance to speak to Barton but he intended on doing so soon.
20. I spoke to Gregory Westfall about Barton's SSRI medication, Paxil, which was given to Barton by the Texas Rehabilitation Commission. Within minutes, Gregory Westfall dismissed the idea of using Barton's mental condition as a defense and told me that no jury in Texas would ever entertain the idea of Barton's mental condition as a defense.
21. When I spoke to Gregory Westfall right before the trial, he told me that the State had an airtight case against Barton. Gregory Westfall told me that it was apparent that Barton was guilty. Gregory Westfall also told me that he would start working on the punishment phase of the trial because there was nothing Barton could do but throw himself at the mercy of the jury.
22. I told Gregory Westfall that I did not understand this because I was not aware that Gregory Westfall performed any type of investigation or asked any questions.
23. To the best of my knowledge, Gregory Westfall had visited Barton in jail only four times, and each time he did not spend more than a few moments with Barton.
24. Shortly before the trial, Gregory Westfall contacted me and told me he hired Dr. Johnstone to examine Barton. I asked Gregory Westfall why he did this, and Gregory Westfall told me that Johnstone would testify that the drug Paxil would cause erratic

behavior in young adolescent men with ADHD. Gregory Westfall also told me that Johnstone's testimony would cost an additional $17,000.

25. In total, I gave Gregory Westfall over $50,000 to represent Barton.
26. I learned after the trial that even though Gregory Westfall got the trial delayed until December 2002 by claiming to the court that I was an important witness and that my cancer illness prevented me from helping on the case, Gregory Westfall in fact had the trial delayed so that he can work on getting his music CD completed.
27. I met with Gregory Westfall on two occasions. Gregory Westfall nothing to say about the case other than Bart had little chance of success at trial. When I asked Gregory Westfall why he believed this, he told me that the proof was in the file of the district attorney.
28. The last meeting I had with Gregory Westfall was a few days before the trial. At this meeting, I met Dr. Johnstone and a lawyer named Cheyenne Minnick. Gregory Westfall told me that Minnick would be assisting him in the case.
29. Gregory Westfall told me that he made a deal with the office of the District Attorney to drop the charges from attempted capital murder to aggravated robbery if Barton would plead guilty.
30. Gregory Westfall told me that by pleading guilty, Barton would get probation.
31. Gregory Westfall further assured me that he had a good case.
32. During the entire time of my dealings with Gregory Westfall, he never asked me anything about Barton.
33. Before the trial, Gregory Westfall told me that he did not want any family members present during jury selection or the opening statement.
34. After the trial, I learned that Gregory Westfall had Cheyenne Minnick pick the jury. Cheyenne Minnick presented a lot of the facts incorrectly. I did not hire Cheyenne Minnick to represent Barton. I never gave Gregory Westfall authorization to delegate his obligation to Barton to any other lawyer.
35. During the trial I learned that Gregory Westfall did not prepare Dr. Johnstone. Gregory Westfall suddenly cut in during one of Johnstone's answers and requested a break. In the hallway, Gregory Westfall told me that he did not believe he can use Johnstone's testimony. I told Gregory Westfall that he had to use Johnstone's testimony because I

believed that his testimony was our only chance. In addition, I had already paid Johnstone $17,000 as a result of Gregory Westfall's recommendation.

STATE OF TEXAS)
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COUNTY OF Young)VERIFICATION
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This Affidavit was acknowledged before me on April 6, 2006 by GAIL INMAN.

Gail Inman
[*signature of Affiant*]

Notary Public in and for
The State of Texas

4-6-06 [*date*]

Kerrie Ribble [*signature*]

[SEAL]

NOTARY PUBLIC STATE OF TEXAS
KERRIE RIBBLE
Notary Public
STATE OF TEXAS
My Comm. Exp. 11/01/2009

EXHIBIT 6

GENERAL POWER OF ATTORNEY

I, Barton Ray Gaines, Jr. have made, constituted and appointed,

And do make, constitute and appoint, Melissa Adams of 1001 Edgewood Trail,

Benbrook, Texas 76126 my true Agent and lawful attorney in fact, for me and

In my name and stead, and to my use, to

(1) To demand, sue for, collect, and receive all money,
Debts, accounts, legacies, bequests, interest, dividends,
Annuities, and demands as are now or shall hereafter
Become due, payable, or belonging to principal, and take
All lawful means, for the recovery thereof and to
Compromise the same and give discharges for the same;

(2) To buy and sell land, make contracts of every kind
Relative to land, any interest therein or the possession
Thereof, and to take possession and exercise control over
The use thereof;

(3) To buy, sell, mortgage, hypothecate, assign, transfer,
And in any manner deal with goods, wares and merchandise,
Chooses in action, certificates or shares of capital stock,
And other property in possession or in action, and to make,
Do, and transact all and every kind of business of whatever
Nature;

(4) To execute, acknowledge, and deliver contracts of
Sale, escrow instructions, deeds, leases including leases
For minerals and hydrocarbon substances and assignments of
Leases, covenants, agreements and assignments of agreements,
Mortgages and assignments of mortgages, conveyances in trust,
To secure indebtedness or other obligations, and assign the
Beneficial interest there under, subordinations of liens or
Encumbrances, bills of lading, receipts, evidences of debt,
Releases, bonds, notes, bills, requests to re-convey deeds
Of trust, partial or full judgments, satisfactions of
Mortgages, and other debts, and other written instruments
Of whatever kind and nature, all upon such terms and
Conditions, as my agent shall approve.

Hereby giving to Melissa Adams full authority and power to do everything Whatsoever requisite or necessary to be done, as fully as I could or might Do if personally present. All that my agent Melissa Adams shall lawfully Do or cause to be done under the authority of this power of attorney is Expressly approved.

Dated: 3-20-02

Barton Gaines
BARTON RAY GAINES, JR.

Witness

I, declare under penalty of perjury that the foregoing is true and correct and That this declaration is executed before me, Michelle Pitt a Notary, on The 20 day of March, 2002 at Tarrant County, Fort Worth, Texas.

MICHELLE PITT NOTARY PUBLIC STATE OF TEXAS COMMISSION EXPIRATION 01-28-2005

Michelle Pitt
Notary

STATE OF TEXAS)
)
COUNTY OF Tarrant)VERIFICATION
)
)

This Affidavit was acknowledged before me on June 22, 2006

by ROSIE HORVATH.

Rosemary Horvath
[*signature of Affiant*]

Notary Public in and for
The State of Texas

June 22, 2006 [*date*]

Rosemary Horvath [*signature*]

Nancy Elliott

NANCY ELLIOTT
Notary Public, State of Texas
My Commission Expires
November 19, 2006

AFFIDAVIT

STATE OF TEXAS,)
)
COUNTY OF TARRANT)
)

BEFORE ME, the undersigned authority, on this day personally appeared ROSIE HORVATH, who, after being duly sworn, on oath says:

1. I am ROSIE HORVATH.
2. I reside in Fort Worth, Texas.
3. I have personal knowledge of the facts stated in this affidavit.
4. My son, Andrew Horvath, was a victim in an attempted robbery that occurred on or about February 21, 2002 in Forth Worth, Texas.
5. The defendants in the case were Barton Gaines, Jason Tucker, and Daniel Aranda.
6. Prior to the trial of Barton Gaines, a private investigator came to see me and my son, Andrew Horvath.
7. I was present the entire time when the private investigator attempted to speak to my son, Andrew Horvath.
8. Andrew Horvath and myself did not provide any information to the private investigator.
9. The reason for this is because we were told by an investigator from the Fort Worth District Attorney's Office that we are not to speak to any other investigators or attorneys that approached us to speak about the case.