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NORTHERN DISTRICT OF TEXAS
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Deputy

V.

3-08 CV 0371-K

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III. NATURE OF THE MATTER BEFORE THE COURT

Petitioner is illegally confined and restrained of his liberty by Nathaniel Quarterman, acting in his capacity as Director of the Institutions Division of the Texas Department of Criminal Justice. Petitioner's confinement and restraint is pursuant to Judgments of Convictions entered in the 213th Judicial District Court of Tarrant County, Texas. Petitioner was found guilty of two counts of aggravated robbery on December 12, 2002, under cause numbers 0836979A and 0836985A. Under both cause numbers, pleaded guilty before the court and submitted to a "slow plea" before the jury for punishment. Petitioner received 35 years Petitioner for each offense, sentences to run concurrently.

Petitioner respectfully requests that he be released from confinement, his convictions be set aside, and he be remanded to the trial court for a new trial on the indictments in cause numbers 0836979A and 0836985A.

Petitioner believes that he is entitled to release because (1) he was denied the Petitioner was denied the effective assistance of counsel because his trial counsel failed to investigate the case and present a reasonable defense; (2) 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 his plea, and (3) the District Attorney intimidated at least two witnesses from speaking to the defense.

IV. PROCEDURAL HISTORY AND ELIGIBILITY TO FILE PETITION

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. NO. 2-02-498-CR, NO. 2-02-499-CR 2004 (Tex. App. LEXIS 9147). An Application for

discretionary review filed. On May 18, 2005, the Texas Court of Criminal Appeals denied Petitioner's Application for discretionary review. 2005 Tex. Crim. App. LEXIS 773.

A petition for writ of habeas corpus was filed in the United States District Court, Northern District of Texas. Gaines v. Quarterman, 4-06-CV-0409-Y. In addition, on November 1, 2006, applications for writ of habeas corpus were filed with the trial court under cause numbers C-213-007907-0836979A and C-213-007908-0836985A. The federal court dismissed without prejudice the original petition for writ of habeas corpus filed under 4-06-CV-0409-Y for failure to exhaust claims. On February 27, 2008, under cause numbers WR-69,338-01 and WR-69,338-02, the Texas Court of Criminal Appeals denied relief for both applications without written order or hearing based upon the trial court findings. There are no other appeals or collateral attacks on the conviction pending.

Petitioner represents to the court that his claims were not adjudicated on the merits in State court proceedings because the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; and (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. See 28 U.S.C. § 2254(d); Lindh v. Murphy, 521 U.S. 320, 336 (1997). As Petitioner will show, the state court did not give Petitioner a fair review of the application and facts contained therein. Petitioner will further show that the state court identified the correct legal principle from Supreme Court precedent, but applied such principle unreasonably to the facts of the case. Specifically, Petitioner will show that the state court was not reasonable the determination of its conclusions in that (1) he received the effective assistance of counsel based upon the standards set forth in Strickland v. Washington; (2) his conviction was not 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 his plea as provided by Hill v. Lockhart; and (3) the District Attorney did not intimidate at least two witnesses from speaking to the defense as provided by United States v. Heller.

V. SUMMARY OF THE FACTS

On December 9, 2002, Petitioner pleaded guilty to two counts of aggravated robbery with a deadly weapon. (R. II, 3-6). After Petitioner plead guilty, voir dire proceedings began. 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).

After the State made its opening statement, the defense made its opening statement. Gregory Westfall did not make the opening statement. Rather, Cheyenne Minick made the statement. (R. III, p. 13-22). Minick begins by introducing Petitioner's family members. (R. III, p. 13-14). Then Minick discusses Petitioner's general demeanor, mental deficiencies and disabilities, and problems with drugs, referencing 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, a prescription of 20 milligrams a day of 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 also mentions a "Dr. Ouseph," who Minick states wrote the prescription for the Paxil. (R. III, p. 17).

Minick then introduces Petitioner's problems with his girlfriend and Petitioner's alleged paranoia regarding his girlfriend's infidelity. (R. III, p. 18). Minick also tells the jury "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 with the following statement: "(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. Thank you." (R. III, p. 22).

Various witnesses testified for both the State and Defense. Prior to trial, Andrew Horvath and his mother, Rosie Horvath, were told by an investigator from the Tarrant County District Attorney's Office that they were not to speak to any investigators or lawyers. (SEE EXHIBIT 7). In addition, the District Attorney's office told the same to Tara Green. (SEE EXHIBIT 9).

Between the time Gregory Westfall was retained in February, 2002, and until December 12, 2002, when Petitioner was 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. Johnstone spoke to Petitioner for 20 minutes. (R. IV, 129). Westfall sent 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 Tarrant County 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 the court.

Westfall never discussed the case with Petitioner, and yet without Petitioner's permission, had Petitioner plead 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 met with Paula Adams-Thomas, a witness for the defense, for one minute to prepare her for trial. (EXHIBIT 2). Cheyenne Minick spent about five minutes with Ms. 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 Ms. Thomas. (EXHIBIT 2). Further, Ms. Thomas had no idea what would be asked of her by either the State 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). This fact is apparent during the direct examination of Ms. Brooks, when 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).

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 these entities generally 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 Adams whether she knew where Petitioner and his friends met on the night of the shooting. (EXHIBIT 4). Westfall asked Adams to go the location, take photographs, and bring the photographs to his office. (EXHIBIT 4). Adams took photographs of everything she felt was important, but states that she was not sure what she was supposed to photograph. (EXHIBIT 4). Shortly before trial, Westfall asked Adams to accompany

him to the same locations that Westfall previously sent 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 State. (EXHIBIT 4). Leading up to the trial, Adams attempted to contact Westfall on many occasions and Westfall did not return 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 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 used Gail Inman to receive a continuance in this case because he claimed that due to 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 spent at least part of the time granted for the continuance working on a music CD. (EXHIBIT 4).

During all of Adams's dealings with Westfall, he never asked Adams questions regarding Petitioner's mental disabilities, even though Adams and Westfall agreed that Petitioner was unable to make important decisions. (EXHIBIT 4). In fact, Westfall was well aware of Petitioner's mental disabilities, as Westfall agreed with Adams to have Petitioner sign a power of attorney, granting Adams the right to make important 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, Westfall 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 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, the Honorable 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 Inman not wear her wig when she met Judge Gill and that if she needed to throw up, she needed to do so in Judge Gill's courtroom. (EXHIBIT 5). After entering the courtroom, 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 over a month after Westfall was hired, each time that 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 that 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).

Immediately before trial, Westfall told 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 was not aware that Westfall performed any investigation of the case. (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 Inman to inform her that he had hired Dr. Johnstone to examine Petitioner at a cost of \$17,000 to Inman. (EXHIBIT 5). When Inman asked Westfall why he hired Dr. Johnstone, Westfall told her that Johnstone would testify that Paxil causes erratic behavior in young adolescent men with 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 soon after the trial, she learned that although Westfall was granted a continuance 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 a music CD. (EXHIBIT 5). Further, Inman met Westfall on two occasions, and Westfall told Inman nothing other than that Petitioner had little chance of success at trial. (EXHIBIT 5). When Inman asked Westfall why he believed so, 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 during the testimony of Dr. Johnstone, in the hallway outside the courtroom, Westfall told Inman that he did not believe he can use Dr. Johnstone's as a witness. (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 that Dr. Johnstone be hired. (EXHIBIT 5).

During the defense's opening statement, 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).

During the cross-examination of the first several State 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 did not specifically state 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 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.

On the cross-examination of Andrew Horvath, Westfall asked him 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 several more witnesses, and during cross-examination, Westfall and Minick asked few to no questions. (R. III, 125- 252).

William Gordon, president of Fort Worth City Credit Union, testified that he is the custodian of the records at his credit union. (R. IV, 5). Westfall soon 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).

When Westfall asked Melissa 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 as to 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 as to 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 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 conversation 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 Adams, Westfall made only one objection when the State asked Adams whether she 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).

During the testimony of Tiffani Phillips, the State successfully objected to questions as to 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).

Dr. 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 terminated his direct examination of Dr. Johnstone.

On cross-examination, Johnstone testified that he had met with Petitioner 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, and that during the 20 minutes he met with Petitioner, he did not perform any testing and did not take any notes. (R. IV, 130, 131).

In the presence of the jury, Johnstone testified that 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).

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).

Gregory Westfall first met with Petitioner the day after Petitioner's arrest in February 2002. (EXHIBIT 1). During this meeting, other than asking about an armband that was on Petitioner's arm, Westfall did not ask Petitioner any questions or otherwise speak to Petitioner. (EXHIBIT 1). One month later, Westfall again met with Petitioner, bring along Dr. Mary Connell. (EXHIBIT 1). Westfall did not speak with Petitioner. (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). 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).

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). 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 speak to 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 fact, Westfall did not discuss the facts or the law with Petitioner. (EXHIBIT 1). Petitioner would never have agreed to the plea had he known that he may not receive probation. (EXHIBITS 1 and 5).

On the day Petitioner pleaded 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).

VI. GROUNDS FOR RELIEF

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

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). 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 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). However, *a single error may be so substantial that it alone causes counsel's performance to fall below the Sixth Amendment standard* (emphasis added). See Cooper v. State, 769 S.W.2d 301, 305 (Tex. App. Houston [1st Dist.] 1989, pet. ref.)

It is clear from the record and the affidavits attached to this Application that Gregory Westfall's performance at trial fell far below what is required by law. Between the time Westfall was retained in February, 2002, and until December 12, 2002, 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). Clearly, Westfall could not have discussed anything of substance when each meeting averaged approximately two and a half minutes. During one period of time, Westfall did not visit Petitioner for almost six months. (EXHIBIT 1). Petitioner did not know the status of 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 failed to prepare witnesses. This conclusion is ascertained from the trial record and the attached Affidavits. Dr. Edwin Johnstone spoke to Petitioner for 20 minutes. (R. IV, 129). Westfall failed to prepare Johnstone both for trial.

Westfall did not even ask Johnstone to prepare a formal report regarding Petitioner's case. (R. IV, 186). Johnstone received information as to Petitioner's use of Paxil from another party, yet could not identify the party. (R. IV, 189-190). Johnstone also was not sure when Petitioner started using Paxil. (R. IV, 188-189).

Westfall met with Paula Adams-Thomas for one minute. During his one meeting with Tiffani Brooks, 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 fact was evident 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 attempted to conduct an investigation were delegated to a private investigator and Petitioner's mother. First, 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). This was never disclosed to Petitioner or the Court.

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 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). Westfall effectively asked an individual who knew nothing about crime scene investigation to take photographs for purposes of trial. Shortly before the trial, and nearly ten months after Petitioner's arrest, 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 discuss the case with Petitioner or his family. (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). However, Westfall in fact entered such

guilty plea without informing Ms. Adams.

Westfall also told 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, Westfall told Inman that Judge Gill asked that Inman drive 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 Westfall, he 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 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 just such a defense by presenting Dr. Johnstone's testimony, and then failed to prepare Johnstone. Despite testifying that Petitioner has various psychiatric problems, and knew that Petitioner used Paxil, Johnstone could not identify the party. (R. IV, 129-131). Johnstone was not sure when Petitioner started using Paxil. (R. IV, 130). It is evident that Westfall failed to give Johnstone any important information regarding Petitioner and failed to discuss with Johnstone the testimony that was to be offered during trial.

Further evidence of Westfall's failure to prepare Dr. Johnstone was revealed during a break in the testimony of Dr. Johnstone, where 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 his testimony was Petitioner's only chance. (EXHIBIT 5).

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 the shooting near Granbury, and little evidence was presented that connected Petitioner with the shooting.

Perhaps the most damning evidence of Westfall's failure to provide effective trial counsel comes from the transcripts. Regardless of whether those giving testimony were witnesses for the

State or defense, Westfall 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. When Westfall cross-examined Andrew Horvath, 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 show that Westfall did not prepare any 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 testimony 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 this witness is his failure to interview the witness.

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, Thomas admitted 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).

What little evidence Westfall presented had little to no relevance to the case. For instance,

William Gordon, president of Fort Worth City Credit Union, Gordon testified that he brought with him information regarding the account of Petitioner. (R. IV, 4-5). Westfall asked Gordon whether he is the custodian of the records, and Gordon answered that he is. (R. IV, 5). Gordon also provided that he did not have the signature card of the account in his possession but that he would provide it at a later time. (R. IV, 7). It is unclear what relevance this testimony had to the case.

Westfall's trial strategy seems to have been to plead Petitioner guilty to the charges, then present mitigating evidence to the jury in order to attain a favorable sentence. In the opening statement, Westfall, using Minick, made it clear that he intended to use some type of insanity defense as mitigating circumstances. However, Westfall did not present such mitigating evidence. Because Westfall undermined his own trial strategy, this mistake alone rendered Westfall's performance ineffective. Cooper, 769 S.W.2d 301 at 305.

Westfall failed to properly investigate the case and presented very little evidence. He failed to prepare any defense witnesses, including the expert, Dr. Johnstone. He did not even bother to ask Dr. Johnstone to prepare a report of his meeting with Petitioner. He did not subpoena any of the other specialists who evaluated Petitioner. He asked few relevant questions of the other witnesses. Without the consent of Petitioner or Petitioner's family, he had an inexperienced attorney give the opening statement, during which the attorney made several misstatements of fact and stated that Petitioner committed a shooting for which Petitioner was never charged. Finally, he did not disclose to Petitioner that at least two State witnesses were told not to speak to any member of the defense. Had he properly investigated the case and presented the case, the jury may have heard sufficient evidence and not sentenced Petitioner to such a harsh sentence. Further, he may have found additional evidence that may have changed the outcome of the case or at least the trial strategy. Based upon the types of questions he asked witnesses, his failure to conduct any meaningful cross-examination and his undermining the trial strategy by failing to present mitigating evidence regarding Petitioner's mental state, Westfall's performance is a prima facie case of ineffective assistance of counsel.

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

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 Application 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 Application 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 Petitioner 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.

In this case, between February 2002 and December 2002, Westfall met with Petitioner for a total of ten minutes and 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). 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 told Petitioner and Petitioner’s grandmother that Petitioner would receive probation in exchange for pleading guilty, although Westfall clearly could not guarantee that the jury would grant probation. Westfall failed to discuss the law with Petitioner and his family, and as provided in Ground One of this Brief, 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. Westfall conducted almost no investigation, spoke to Petitioner for a total of ten minutes, and using Westfall’s own words, simply threw Petitioner at the mercy of the court. Petitioner could not have known what aggravated robbery is because Westfall never spoke to Petitioner for a sufficient amount of time in order to tell Petitioner the elements of aggravated Robbery. In fact, Westfall never told Petitioner anything regarding the case.

C. Ground Three: The District Attorney intimidated at least two witnesses from speaking to the defense.

Intimidation by the police or prosecution to dissuade a witness from testifying or to persuade a witness to change his testimony, when combined with a showing of prejudice to the defendant, violates a defendant's due process rights. United States v. Heller, 830 F.2d 150, 152-53 (11th Cir. 1987). See also Webb v. Texas, 409 U.S. 95, 34 L. Ed. 2d 330, 93 S. Ct. 351 (1972). The government does not have the unfettered right to interfere with any witness, particularly, in making the choice to testify or not. United States v. Hammond, 598 F.2d 1008, 1012-13 (5th Cir. 1979). Where interference occurs by the police, police actions that intimidate witnesses may be imputed to

the state in its prosecution. Fulford v. Maggio, 692 F.2d 354, 358 n.2 (5th Cir. 1982), rev'd on other grounds, 462 U.S. 111, 76 L. Ed. 2d 794, 103 S. Ct. 2261 (1983). The state also has a duty to disclose such conduct. This duty is imposed not only upon its prosecutor, but upon on the state as a whole, including its investigative agencies. Therefore, if a confession is in the possession of a police officer, constructively, the state's attorney has both access to and control over the document. Id.

The Tarrant County District Attorney's office act of instructing Andrew Horvath, his mother, and Tara Green to not speak to any other investigators or lawyers amounts to illegal intimidation of a trial witness. The State did not disclose this act to the defense, and Westfall did not disclose this fact to Petitioner. Under the law, this act of interfering with witnesses is imputed to the State. As discussed above in this Brief, Westfall's performance was insufficient due to his failure to investigate the case and prepare witnesses. The District Attorney's office further violated Petitioner's constitutional rights by intimidating witnesses the one apparent time that Westfall attempted to meet his obligation of investigating the case.

It is clear that the State instructed State witnesses Andrew Horvath, his mother, and Tara Green to not speak to any defense investigators or lawyers. Such actions by the State amount to illegal intimidation of trial witnesses. The State did not disclose such acts to the defense, and Westfall states that he did not know about such acts. Therefore, the District Attorney's office violated Petitioner's constitutional rights by intimidating witnesses that were to testify on behalf of the State. Such actions by the State make it impossible for a defense attorney to execute his constitutional obligation of providing effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 694.

VII. CONCLUSION

The evidence in this case clearly establishes that Petitioner was denied the effective assistance of counsel. Evidence of Westfall's ineffective performance is evident from both the attached sworn affidavits and from the trial record. During a span of ten months, Westfall spent a total of ten (10) minutes during four meetings with Petitioner. 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 failed to prepare his witnesses. He delegated investigation to Petitioner's mother and a private investigator. When the investigator was told by witnesses that they were instructed not to speak to any person from the defense, Westfall did not inform Petitioner or the Court of this fact.

An attorney who fails to investigate the case, interview witnesses, and communicate with his client does not render effective assistance of counsel. Westfall cannot even claim that he was not compensated, as he was paid \$40,000 for his services. This fee did not include the expense of expert witnesses. As held in Smith v. State, failure to investigate cannot be considered sound trial strategy because no strategy can be formulated until the counsel has investigated facts and witnesses. Petitioner only speculates as to what Westfall's trial strategy was.

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 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.

Further, the evidence 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. Petitioner's plea of guilty was not entered knowingly and voluntarily because over the course of 10 months, Westfall spent a total of 10 minutes 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 could not enter such a plea, promised Petitioner that he would receive probation if he plead guilty, and because Petitioner answered the court's admonishments by answering "yes" or "no" based upon the nod of the head by the co-counsel. 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 Westfall is precisely the kind 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.

Finally, prior to trial, the State intimidated a witness from speaking to the defense. The Tarrant County District Attorney's office violated Petitioner's constitutional rights by instructing Andrew Horvath, his mother, and Tara Green to not speak to any other investigators or lawyers. This instruction is an act of intimidation that should not be tolerated by the Court.

As a result, Petitioner's constitutional rights have been violated, and Petitioner has been illegally confined for the past five years. Therefore, Petitioner prays that he be granted relief and the conviction in this case be vacated. In the alternative, Petitioner prays that an evidentiary hearing be held such that Petitioner may present testimonial evidence supporting this Petition for Writ of Habeas Corpus.

Respectfully Submitted,

M. Michael Mowla, PLLC

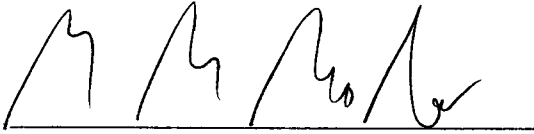
A handwritten signature in black ink, appearing to read 'M. Michael Mowla', written over a horizontal line.

By: M. Michael Mowla

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Texas Bar # 24048680
Attorney for Petitioner

VIII. CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Brief in Support of Petition for Writ of Habeas Corpus was delivered on this the 3rd day of March, 2008, by USPS FIRST CLASS MAIL to the Attorney General of the State of Texas.

A handwritten signature in black ink, appearing to read 'M. Michael Mowla', is written over a horizontal line.

By: M. Michael Mowla
Attorney for Petitioner

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

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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]

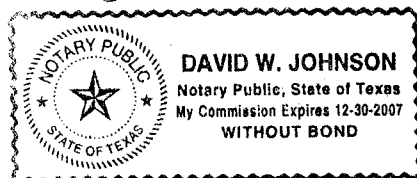


EXHIBIT 2

AFFIDAVIT

STATE OF TEXAS,

COUNTY OF TARRANT)
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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

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) VERIFICATION
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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]

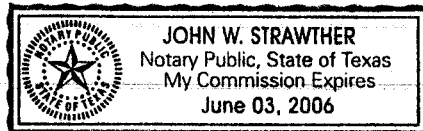


EXHIBIT 3

AFFIDAVIT

STATE OF TEXAS,

COUNTY OF TARRANT

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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

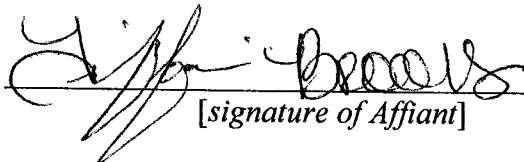
strangely. He would use profanity even though he did not usually use a lot of profanity.
He was very paranoid and he even accused me of cheating on him, which was not true.

STATE OF TEXAS

COUNTY OF TARRANT

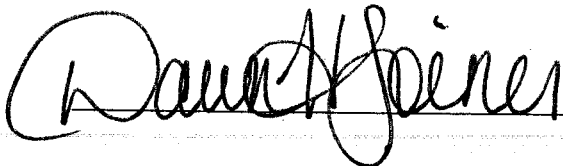
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This Affidavit was acknowledged before me on April 5, 2006
by TIFFANI BROOKS.


[signature of Affiant]

Notary Public in and for
The State of Texas

April 5, 2006 [date]


[signature]

[SEAL]



EXHIBIT 4

AFFIDAVIT

STATE OF TEXAS,

COUNTY OF DALLAS)
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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

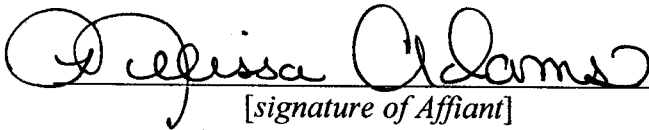
COUNTY OF

DALLAS

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

by MELISSA ADAMS.


[signature of Affiant]

Notary Public in and for
The State of Texas

4 APRIL 2006 [date]

 [signature]

[SEAL]

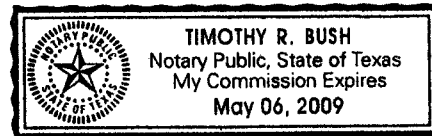
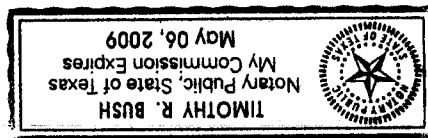


EXHIBIT 5

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

COUNTY OF Young

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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]

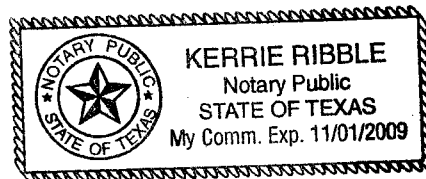


EXHIBIT 6

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 Ray Gaines
BARTON RAY GAINES, JR.

[Signature]
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

EXHIBIT 7

AFFIDAVIT

STATE OF TEXAS,

COUNTY OF TARRANT

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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 Fort 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.

STATE OF TEXAS

COUNTY OF Tarrant

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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

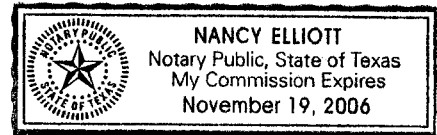


EXHIBIT 8

WRIT NOs. C-213-007907-0836979-A and C-213-007908-0836985-A

TRIAL COURT NO. 0836979A and 0836985A

EX PARTE

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IN THE DISTRICT COURT

213TH JUDICIAL DISTRICT

BARTON RAY GAINES

TARRANT COUNTY, TEXAS

SUPPLEMENTAL AFFIDAVIT OF GAIL INMAN

STATE OF TEXAS,

COUNTY OF YOUNG

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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, Young County, Texas.
3. I have personal knowledge of the facts stated in this affidavit.
4. This affidavit supplements my original affidavit.

5. Throughout all my dealings with Gregory Westfall I never heard him say anything that was not precipitated with "oh yeah! He did it! They have an airtight case against him."
6. On several occasions, Westfall admonished me and my daughter to not ask Barton Gaines any questions regarding his case when we visited him in jail.
7. Contrary to what Westfall states on page 3 of his affidavit, I never gave him any background information on Paula Adams.
8. Contrary to what Westfall states on page 4 of his affidavit, Westfall never conducted any extensive interview of me. In fact, he and I barely spoke about the case prior to trial because he was almost never available.
9. Contrary to what Westfall states on page 5 of his affidavit, I know he used my bout with cancer to get a continuance not because he wanted to use me as a witness, but because he admitted to me that he did not have time to work on Barton's case because he was working on a murder case that was "complicated and time-consuming."
10. Westfall states on page 5 of his affidavit, where he states "I did make a CD. The release date was December 1, 2003, almost exactly a year after this trial. At the time of trial, I had not even thought about making a CD." However, in an article posted in the Star Telegram on December 12, 2003, Westfall is describe as "He really got motivated in July 2002 after he went to a three-week trial lawyer college in Wyoming, where the focus was on storytelling as a well to help attorneys connect with Jurors." The article also quotes Westfall as saying, "I started tinkering around with songwriting," "I started writing the songs, telling the stories in song." The article also provides that "In October 2002, he took his

acoustic guitar to the 6th Street Grill on open-mike night and signed up, trying out some of the songs he had written.” If there is truth to this article, I do not understand how he could not “even thought about making a CD” at the time of Barton’s trial, considering that the trial took place during December 2002.

11. Contrary to what Westfall states on pages 6 and 8 of his affidavit, Westfall did **not** prepare Barton’s power of attorney. My daughter called me and told me that Westfall wanted an extraordinary amount of money to type up the POA. I told my daughter that we did not need him to do so. I had already paid Robert Virden to type one for my use and I would simply change the names and get it to my daughter so she could have Westfall obtain Barton’s signature on it. She needed to handle his business and get records that Westfall wanted. We did not need it to obtain money to pay Barton’s legal bills. It was the understanding of my daughter that she would have to be present if any decisions were made regarding Barton’s welfare, which included a plea of guilty.

STATE OF TEXAS

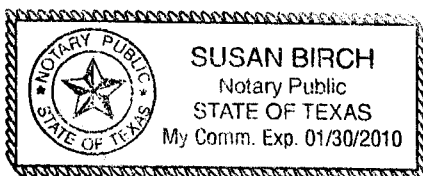
COUNTY OF YOUNG


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GAIL INMAN

SIGNED under oath before me on MARCH 12th, 2007.





Notary Public, State of Texas

EXHIBIT 9

AFFIDAVIT

STATE OF TEXAS,

COUNTY OF Tarrant

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

1. I am TARA GREEN.
2. I reside in Crowley, Texas.
3. I have personal knowledge of the facts stated in this affidavit.
4. I testified against Barton Gaines in his aggravated robbery trial in December 2002.
5. Prior to the trial of Barton Gaines, a private investigator came to see me.
6. I did not provide any information to the private investigator. I was instructed by an investigator from the Tarrant County District Attorney's Office not to speak to any other investigators or attorneys that approached me to speak about the case.

STATE OF TEXAS

COUNTY OF Tarrant

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) VERIFICATION
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This Affidavit was acknowledged before me on March 9, 2007
by TARA GREEN.

Tara Green
[signature of Affiant]

Notary Public in and for
The State of Texas

March 9, 2007 [date]

Tiff Brooks [signature]

