EXHIBIT 2

AFFIDAVIT

STATE OF TEXAS,
COUNTY OF Tarrant

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
VERIFICATION

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]

[signature]

TIFFANI BROOKS
Notary Public, State of Texas
My Commission Expires
March 30, 2008

FILED
THOMAS A WILDER, DIST. CLERK
TARRANT COUNTY, TEXAS

JAN 18 2008

TIME 2:52

BY DEPUTY

NO. C-213-007907-0836979-A

EX PARTE	§	IN THE 213th JUDICIAL
	§	
	§	DISTRICT COURT OF
	§	
BARTON RAY GAINES	§	TARRANT COUNTY, TEXAS

STATE'S PROPOSED MEMORANDUM, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The State proposes the following Memorandum, Findings of Fact and Conclusions of Law regarding the issues raised in the present Application for Writ of Habeas Corpus.

MEMORANDUM

The applicant, BARTON RAY GAINES ("Applicant"), alleges his confinement is illegal for the following reasons: (1) he received ineffective assistance of counsel; (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 the plea; and (3) the District Attorney intimidated at least one witness from speaking to the defense. *See* Application, p. 5-6. Specifically, Applicant complains that his attorney was ineffective for the following reasons:

a. Counsel conducted almost no discovery in preparation of Applicant's case;
b. Counsel failed to inform Applicant or the court when one witness informed an investigator that she was instructed not to speak to the defense or any person sent by the defense;
c. Counsel spent very little time with any of the witnesses in Applicant's case;
d. Counsel prepared none of the witnesses for trial;
e. Counsel spent a total of ten minutes with Applicant;
f. Counsel, without first consulting with Applicant's mother or grandmother, had Applicant plead guilty when he knew that Applicant was unable to make reasoned decisions on his own;
g. Hon. Westfall improperly told Applicant to look at Hon. Minick for the answers to the trial court's questions because Applicant did not understand the admonishments and did not know why he was saying "yes" or "no";
h. Counsel failed to explain anything to Applicant at all regarding the nature of the charges or the consequences of the plea;

i. Counsel promised Applicant that he would more than likely get probation if he pled guilty;
j. Counsel never discussed the facts of the case or the law with Applicant;
k. Counsel failed to visit with Applicant for a period of almost six months;
l. Counsel failed to subpoena Dr. Mary Connell;
m. Hon. Westfall only met with Paula Adams-Thomas for one minute to prepare her for trial;
n. Hon. Minick only met with Paula Adams-Thomas for five minutes to prepare her for trial;
o. Counsel failed to prepare Paula Adams-Thomas for any questions or testimony nor did they inform her what the State would ask;
p. Counsel only met with Tiffani Phillips Brooks one time prior to trial and told her nothing about the case or what she could expect during testimony;
q. Counsel failed to prepare Tiffani Phillips Brooks for her testimony;
r. Counsel failed to investigate and had Applicant's mother contact various agencies, doctors, and schools to get information for him;
s. Counsel asked Applicant's mother to take photographs of the location;
t. Counsel spent approximately ten minutes at each location;
u. Counsel failed to discuss with Applicant's mother the type of questions that would be asked by defense or the State;
v. Counsel failed to return Applicant's mother's phone calls;
w. Counsel improperly advised Applicant's mother that there was nothing Applicant could do but "throw himself at the mercy of the jury" because the State had an "airtight" case;
x. Hon. Westfall requested a continuance in the case because he needed time to prepare Gail Inman; however, he used part of the time to work on a music CD;
y. Counsel never asked Applicant's mother about Applicant's mental disabilities;
z. Counsel allowed Applicant to plead even after Applicant's mother specifically told him that Applicant was not to enter into a guilty plea without first informing Applicant's mother;
aa. Counsel asked few to no questions of several of the State's witnesses; and
bb. Counsel failed to make proper objections.

See Application, p. 5-6; Memorandum, p. 20-30.

In response to an order from this Court, Applicant's trial counsel, Hon. Greg Westfall and Hon. Cheyenne Minick, have filed affidavits addressing Applicant's claims. In light of Applicant's contentions and the evidence presented in the Writ Transcript, the Court should consider the following proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Applicant pled guilty, pursuant to an open plea to the jury, to the first degree felony offense of aggravated robbery with a deadly weapon, to-wit: a firearm, on December 12, 2002. *See* Judgment, No. 0836979A.

2. The jury assessed punishment at thirty-five years confinement in the Texas Department of Criminal Justice and made an affirmative finding that a deadly weapon was used or exhibited during the commission of the offense or during the flight therefrom. *See* Judgment.

3. Applicant appealed his conviction. *See* Criminal Docketing Statement, No. 0836979A, p. 2.

4. The Second Court of Appeals affirmed the conviction on October 14, 2004. *See Gaines v. State*, 2004 WL 2320367, No. 02-02-498-CR (Tex. App. – Fort Worth Oct. 14 2004, pet. ref'd)(not designated for publication).

5. Hon. Greg Westfall and Hon. Cheyenne Minick represented Applicant during the trial proceedings. *See* Judgment; Westfall Affidavit, p. 1; Minick Affidavit, p. 1.

6. Hon. Westfall has been a licensed attorney in good standing with the State of Texas since 1993. *See* Texas Bar Directory: http://www.texasbar.com.

7. Hon. Westfall is certified in criminal law by the Texas Board of Legal Specialization. *See* Texas Bar Directory: http://www.texasbar.com.

8. Hon. Minick has been a licensed attorney in good standing with the State Bar of Texas since 1997. *See* Texas Bar Directory: http://www.texasbar.com; Minick Affidavit, p. 1.

9. Hon. Minick's primary practice of law has criminal defense since 1997. *See* Minick Affidavit, p. 1.

10. Hon. Minick sat second chair in this case. *See* Minick Affidavit, p. 2.

11. Hon. Westfall provided Hon. Minick with a copy of all discovery from the Tarrant County District Attorney's Office prior to trial. *See* Minick Affidavit, p. 2.

12. Hon. Westfall provided Hon. Minick with copies of all records, subpoenas, and notes of interviews with witnesses. *See* Minick Affidavit, p. 2.

13. Applicant's claim that Hon. Westfall met with him only four times and for a total of ten minutes total is not reasonable because that would average less than three minutes per meeting. *See* Westfall Affidavit, p. 2.

14. Hon. Westfall met with Applicant numerous times while Applicant was in jail. *See* Westfall Affidavit, p. 2.

15. Hon. Westfall spoke with Applicant on the phone. *See* Westfall Affidavit, p. 2.

16. Hon. Westfall received letters from Applicant. *See* Westfall Affidavit, p. 2.

17. Hon. Westfall discussed the facts with Applicant. *See* Westfall Affidavit, p. 2.

18. Hon. Westfall discussed the law with Applicant, including the law in connection with Applicant's guilty plea. *See* Westfall Affidavit, p. 2.

19. Hon. Westfall recalls that he may not have visited Applicant in jail for a period of six months, but there was never a six month period where Hon. Westfall needed to visit with Applicant and did not. *See* Westfall Affidavit, p. 2.

20. Hon. Westfall and Hon. Minick had several meetings with the Applicant's family. *See* Minick Affidavit, p. 2.

21. Hon. Minick recalls that the facts of the case, trial strategy, and evidence were discussed extensively with the family and Applicant. *See* Minick Affidavit, p. 2.

22. Hon. Minick recalls that he and Hon. Westfall answered questions from Applicant and his family. *See* Minick Affidavit, p. 2.

23. Hon. Minick is confident that Applicant's family and Applicant were well informed on all matters in this case including punishment range and possible outcome. *See* Minick Affidavit, p. 2.

24. Hon. Minick asserts that Applicant's decision to plead guilty was voluntary, made with knowledge of the possible consequences, and with the consent of his family. *See* Minick Affidavit, p. 2.

25. Hon. Minick did not promise Applicant any specific result and did not promise that Applicant would receive probation. *See* Minick Affidavit, p. 2.

26. Hon. Minick does not believe that Hon. Westfall ever promised Applicant a specific result and did not promise Applicant that he would receive probation. *See* Minick Affidavit, p. 2.

27. Hon. Minick did not direct the entry of Applicant's plea with a nod of his head in any direction. *See* Minick Affidavit, p. 2; Westfall Affidavit, p. 9.

28. Hon. Westfall asserts that had the trial court seen Applicant interact with Hon. Minick the way he alleges, the trial court would not have accepted the plea. *See* Westfall Affidavit, p. 9.

29. Applicant's plea was done in open court. *See* Westfall Affidavit, p. 9.

30. Hon. Westfall spoke with Paula Adams-Thomas on the phone. *See* Westfall Affidavit, p. 3.

31. Hon. Westfall spoke with Melissa Adams and/or Gail Inman about Paula Adams-Thomas, about her background, and about what she could testify to. *See* Westfall Affidavit, p. 3.

32. Hon. Minick directed the testimony of Paula Adams-Thomas. *See* Minick Affidavit, p. 2.

33. Prior to Ms. Adams-Thomas' testimony, Hon. Minick went over the elements of the testimony with her and concluded that she was well aware of the areas which were to be covered when she testified. *See* Minick Affidavit, p. 2-3.

34. Hon. Minick gave Ms. Adams-Thomas' directions as to where to appear and when as he does with every witness.

35. Hon. Westfall recalls that Ms. Adams-Thomas' testimony was "pretty good." *See* Westfall Affidavit, p. 3.

36. There is evidence that Ms. Adams-Thomas' preparation for trial was sufficient.

37. Applicant's claim that Hon. Minick failed to prepare Ms. Adams-Thomas for any questions or testimony is not credible.

38. Hon. Westfall met with Tiffani Brooks one time in his office during the preparation for trial. *See* Westfall Affidavit, p. 4.

39. Hon. Westfall spoke with Ms. Brooks on the phone more than once. *See* Westfall Affidavit, p. 4.

40. Hon. Westfall asked Ms. Brooks whether there was anything she had forgotten to tell him because the State had just successfully objected to the hearsay he was trying to elicit from her. *See* Westfall Affidavit, p. 4.

41. Hon. Westfall and Melissa Adams worked on a list of persons and entities where they needed to get records. *See* Westfall Affidavit, p. 4.

42. Melissa Adams never voiced any complaints to Hon. Westfall about assisting him in getting the records and actually offered to do it. *See* Westfall Affidavit, p. 4.

43. Hon. Westfall explained to Melissa Adams that getting records via release instead of subpoena was a good trial strategy because then the State was not alerted to what

records they were getting unlike with a subpoena that is a matter of public record. *See* Westfall Affidavit, p. 4.

44. Hon. Westfall does not recall asking Melissa Adams to photograph the scenes. *See* Westfall Affidavit, p. 4.

45. Hon. Westfall retraced the driving route and visited the apartment complex that was relevant to the incident. *See* Westfall Affidavit, p. 4.

46. Hon. Westfall extensively interviewed Gail Inman and Melissa Adams. *See* Westfall Affidavit, p. 4.

47. Hon. Westfall tried to find out about Applicant's childhood and Melissa Adams' childhood as well. *See* Westfall Affidavit, p. 4.

48. Hon. Westfall believed that the child's life story can't be told with the story of the parent. *See* Westfall Affidavit, p. 4.

49. Hon. Westfall attempted to paint a picture for the jury of Applicant's childhood and his mental condition throughout. *See* Westfall Affidavit, p. 4.

50. Hon. Westfall chose not to have Gail Inman testify. *See* Westfall Affidavit, p. 4.

51. It is reasonable that Hon. Westfall would not have Gail Inman testify because part of the trial strategy was to show that Applicant's mother was not prepared by Gail Inman for motherhood. *See* Westfall Affidavit, p. 4.

52. Hon. Westfall denies that he did not return Melissa Adams' phone calls. *See* Westfall Affidavit, p. 5.

53. Hon. Westfall asserts that he never misrepresented the case to Applicant or his family. *See* Westfall Affidavit, p. 5.

54. Hon. Westfall never advised Applicant or his family that he would just have to throw himself on the mercy of the jury. *See* Westfall Affidavit, p. 5.

55. Applicant's mental competency was never in question. *See* Westfall Affidavit, p. 5.

56. Hon. Westfall believed, at the time he requested a continuance due to Gail Inman's illness, that Ms. Inman would be testifying at trial. *See* Westfall Affidavit, p. 5.

57. Hon. Westfall never thought about making a CD at the time of Applicant's trial. *See* Westfall Affidavit, p. 5.

58. Applicant's claim that Hon. Westfall used part of the time requested for a continuance to work on making a music CD is not credible.

59. Hon. Westfall discussed Applicant's mental condition with Melissa Adams extensively. *See* Westfall Affidavit, p. 5; Westfall Affidavit, Exhibit 3-6.

60. Hon. Westfall never felt that Applicant was unable to make important decisions. *See* Westfall Affidavit, p. 5-6.

61. Applicant presents no credible evidence that Applicant was not competent or able to make important decisions on his own.

62. Hon. Westfall made a power of attorney for Melissa Adams to allow Ms. Adams to attend to Applicant's personal and financial matters. *See* Westfall Affidavit, p. 6.

63. Melissa Adams never advised Hon. Westfall that Applicant was not to enter a guilty plea unless Melissa Adams was first informed. *See* Westfall Affidavit, p. 6.

64. Hon. Westfall made the opening statement. *See* Westfall Affidavit, p. 7; Minick Affidavit, p. 2.

65. Hon. Westfall did not force Applicant to hire Dr. Johnstone. *See* Westfall Affidavit, p. 7.

66. After Dr. Johnstone testified during the Rule 702(b) hearing that Applicant showed no remorse, Hon. Westfall considered not calling him to testify before the jury; however, he ultimately decided that Dr. Johnstone's testimony was still worth calling. *See* Westfall Affidavit, p. 7.

67. Hon. Westfall did not try to show that there was a reasonable doubt that Applicant shot the guys because such testimony would interfere with the trial strategy that Applicant was accepting personal responsibility. *See* Westfall Affidavit, p. 7-8.

68. Hon. Westfall prepared Ms. Brooks to testify. *See* Westfall Affidavit, p. 9.

69. Hon. Westfall probably did encourage Gail Inman and Melissa Adams to not talk to Applicant about the case because those conversations would not have been privileged. *See* Westfall Affidavit, p. 9.

70. Hon. Westfall hired Dr. Connell to examine Applicant on March 4, 2002 and Dr. Connell's diagnosis was that Applicant was merely anti-social. *See* Westfall Affidavit, p. 2.

71. Hon. Westfall concluded that Dr. Connell's verbal report was not favorable to the defense so he did not have her produce a written report. *See* Westfall Affidavit, p. 2.

72. Hon. Westfall concluded that calling Dr. Connell to the stand would have been "suicidal" to Applicant's defense. *See* Westfall Affidavit, p. 2.

73. Hon. Westfall did not tell Dr. Johnstone how long to interview Applicant and believed that Dr. Johnstone interviewed Applicant as long as Dr. Johnstone felt necessary. *See* Westfall Affidavit, p. 2.

74. Dr. Johnstone had access to all the psych and medical records Hon. Westfall had except Dr. Connell's records. *See* Westfall Affidavit, p. 2.

75. Hon. Westfall's investigator never told Hon. Westfall that the Horvaths were advised to not talk to defense. *See* Westfall Affidavit, p. 2.

76. Hon. Westfall explained the guilty plea to Applicant before he approached the State about doing it. *See* Westfall Affidavit, p. 2.

77. Hon. Westfall recalls that there was a lot of evidence to support the allegations that Applicant committed attempted capital murder. *See* Westfall Affidavit, p. 2-3.

78. Hon. Westfall concluded that the Wal-Mart video of Applicant purchasing the shells used in the robbery provided the required intent to kill for attempted capital murder. *See* Westfall Affidavit, p. 3.

79. Hon. Westfall felt that having the jury make a finding of intent to kill before starting the punishment phase would not be best for Applicant. *See* Westfall Affidavit, p. 3.

80. Hon. Westfall advised Applicant that the chances for conviction were 100%, based on the evidence against Applicant, whether the charge was attempted capital murder or aggravated robbery. *See* Westfall Affidavit, p. 3.

81. Hon. Westfall persuaded the State to waive the attempted capital murder charge and allow Applicant to plead guilty to aggravated robbery. *See* Westfall Affidavit, p. 3.

82. Hon. Westfall also advised Applicant to plead guilty because his "Paxil" defense would not apply during a guilt/innocence phase of trial. *See* Westfall Affidavit, p. 3.

83. Hon. Westfall concluded that it made more sense to admit responsibility and then make the "Paxil" defense during punishment. *See* Westfall Affidavit, p. 3.

84. Hon. Westfall conferenced with Applicant, Melissa Adams, and Gail Inman about the trial strategy of pleading guilty. *See* Westfall Affidavit, p. 3.

85. Hon. Westfall recalls that Applicant, Melissa Adams, and Gail Inman all agreed with Hon. Westfall's strategy. *See* Westfall Affidavit, p. 3.

86. Hon. Westfall also recommended Applicant plead guilty so that the State could not try only one case against Applicant while holding the other back just in case the

State didn't get the outcome they wanted in the first trial. *See* Westfall Affidavit, p. 3.

87. Hon. Westfall never guaranteed Applicant probation. *See* Westfall Affidavit, p. 3.

88. The State's offer never came down from forty years confinement. *See* Westfall Affidavit, p. 3.

89. The following exchange occurred at the time of Applicant's plea:

THE COURT: In Count 2 of each of these indictments you are charged with the offense of aggravated robbery with a deadly weapon. Do you understand what you're charged with in Count 2 of each indictment?

THE DEFENDANT: Yes, sir.

THE COURT: And to that charge in each indictment you may plead guilty or not guilty.

THE DEFENDANT: Guilty, Your Honor.

THE COURT: Are you pleading guilty in each of the two indictments?

THE DEFENDANT: Yes, sir.

THE COURT: Are you pleading guilty because you are guilty in each case and for no other reason?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone held out any hope of pardon or promise of reward in order to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Are you pleading guilty because of fear or persuasion?

THE DEFENDANT: No, sir.

THE COURT: If your plea free or voluntary?

THE DEFENDANT: Yes, sir.

THE COURT: Is your guilty plea induced by any representation made to you by your attorney, the district attorney or anyone else?

THE DEFENDANT: No, sir.

THE COURT: Do you understand you have the right to a jury trial on the issue of whether you are guilty or not guilty?

THE DEFENDANT: Yes, sir.
THE COURT: Do you waive that right?

THE DEFENDANT: Yes, sir.

THE COURT: You understand you have a right to confront and cross-examine witnesses as to whether you are guilty or not guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Do you waive that right also?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you have a right to not incriminate yourself by a plea or testimony?

THE DEFENDANT: Yes, sir.

THE COURT: And are you giving up that right also?

THE DEFENDANT: Yes, sir.

THE COURT: Are you a citizen of the United States?

THE DEFENDANT: Yes, sir.

THE COURT: Counsel, is your client competent to stand trial?

MR. WESTFALL: Yes, Your Honor.

THE COURT: Mr. Gaines, do you understand that if you persist in your plea of guilty in front of the jury, I'm going to instruct them to find you guilty in each of these two cases and to set your punishment within the range of punishment set out by law in each case, which is for not less than five or more than 99 years or life confinement in the penitentiary, and in addition, a fine of up to $10,000 can be assessed in each case?

THE DEFENDANT: Yes, sir.

THE COURT: And knowing all these things, do you wish to persist in your plea of guilty in front of the jury?

THE DEFENDANT: Yes, sir.

[2 RR 4-6]

90. Applicant was admonished in accordance with article 26.13 of the Texas Code of Criminal Procedure. *See* Tex. Crim. Proc. Code Ann. art. 26.13; [2 RR 4-6].

91. Applicant presents an affidavit from the victim's mother that she was "told by an investigator from the Fort Worth District Attorney's Office that [they] were not to speak to any other investigators or attorneys that approached [them] to speak about the case." *See* Memorandum, Horvath Affidavit, p. 2.

92. Mrs. Horvath's affidavit does not allege what information she would have provided had she spoken with the defense investigator. *See* Memorandum, Horvath Affidavit, p. 2.

93. Applicant does not allege what information he would have received from Mrs. Horvath, how it would have helped his defense, or how his defense was prejudiced by the defense investigator not talking with Mrs. Horvath.

94. Applicant presents an affidavit from Tara Green that she "was instructed by an investigator from the Tarrant County District Attorney's Office not to speak to any other investigators or attorneys that approached [her] to speak about the case." *See* First Supplemental Brief in Support of Application for Writ of Habeas Corpus, Exhibit 2.

95. Ms. Green's affidavit does not allege what information she would have provided had she spoken with the defense investigator. *See* First Supplemental Brief in Support of Application for Writ of Habeas Corpus, Exhibit 2.

96. Applicant does not allege what information he would have received from Ms. Green, how it would have helped his defense, or how his defense was prejudiced by the defense investigator not talking with Ms. Green.

97. Applicant does not allege who the investigator was who allegedly told witnesses that they were not allowed to talk with anyone else.

98. It is not reasonable that if the witnesses wanted to speak with the defense investigator but were told they could not to by the State's investigator that they would not have advised the defense investigator of this fact.

99. It is not reasonable that the defense investigator would not have advised defense counsel if the witnesses told him they could not speak to him because they were told they could not by the State's investigator.

100. Applicant's defense investigator never told Applicant's counsel that they told him they could not speak to him. *See* Westfall Affidavit, p. 2.

101. John C. Hubbard was the investigator that investigated this case. *See* Attachment A: Hubbard Affidavit, p. 1.

102. Mr. Hubbard retired from the Fort Worth Police Department in February 2001 after successfully completing twenty-five and one-half years of service with that Department. *See* Attachment A, p. 1.

103. Mr. Hubbard coordinated police security for the Fort Worth Independent School District supervising over one hundred and twenty-five officers from February 2001 until December 2001. *See* Attachment A, p. 1.

104. Mr. Hubbard has been working as an investigator for the Tarrant County District Attorney's Office since December 2001. *See* Attachment A, p. 1.

105. Mr. Hubbard spoke with Ms. Horvath as well as other witnesses in this case. *See* Attachment A, p. 1.

106. Mr. Hubbard does not tell witnesses to not talk to the defense team. *See* Attachment A, p. 1.

107. Mr. Hubbard advises witnesses that it is their choice to who the wish to talk to. *See* Attachment A, p. 1.

108. Mr. Hubbard advises witnesses they do not have to talk to him or any other person representing the State. *See* Attachment A, p. 1.

109. Mr. Hubbard specifically tells witnesses that it is unethical for him to tell them they cannot talk to the Defense. *See* Attachment A, p. 1.

110. Mr. Hubbard does advise that they do have the choice to not talk to the Defense if they so choose. *See* Attachment A, p. 1.

111. Mr. Hubbard does not remember his exact words to Mr. Horvath; however, he knows that he did not tell her, or anyone else, that they could not speak to the Defense, Defense's investigator, or anyone else. *See* Attachment A, p. 1.

112. Mr. Hubbard asserts that he "did not intimidate the witnesses from speaking with the Defense." *See* Attachment A, p. 1-2.

113. Mr. Hubbard's affidavit is credible.

CONCLUSIONS OF LAW

1. In a habeas corpus proceeding, the burden of proof is on the applicant. *Ex parte Rains*, 555 S.W.2d 478 (Tex. Crim. App. 1977). An applicant "must prove by a preponderance of the evidence that the error contributed to his conviction or punishment." *Ex parte Williams*, 65 S.W.3d 656, 658 (Tex. Crim. App. 2001).

2. In order to prevail, the applicant must present facts that, if true, would entitle him to the relief requested. *Ex parte Maldonado*, 688 S.W.2d 114 (Tex. Crim. App. 1985). Relief may be denied if the applicant states only conclusions, and not specific facts. *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000). In addition, an applicant's sworn allegations alone are not sufficient to prove his claims. *Ex parte Empey*, 757 S.W.2d 771, 775 (Tex. Crim. App. 1988).

3. The two-prong test enunciated in *Strickland v. Washington* applies to ineffective assistance of counsel claims non-capital cases. *Hernandez v. State*, 988 S.W.2d 770, 771 (Tex. Crim. App. 1999). To prevail on his claim of ineffective assistance of counsel, the applicant must show counsel's representation fell below an objective standard of reasonableness, and there is a reasonable probability the results of the proceedings would have been different in the absence of counsel's unprofessional errors. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

4. The Court of Criminal Appeals will presume that trial counsel made all significant decisions in the exercise of reasonable professional judgment. *See Delrio v. State*, 840 S.W.2d 443 (Tex. Crim. App. 1992).

5. The totality of counsel's representation is viewed in determining whether counsel was ineffective. *See Cannon v. State*, 668 S.W.2d 401 (Tex. Crim. App. 1984).

6. Support for Applicant's claim of ineffective assistance of counsel must be firmly grounded in the record. *See Johnson v. State*, 691 S.W.2d 619, 627 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 865 (1985).

7. Applicant has failed to prove that counsel conducted almost no discovery in preparation of Applicant's case.

8. Applicant has failed to prove that a witness informed the defense investigator that she was instructed not to speak to the defense or any person sent by the defense.

9. Applicant has failed to prove that counsel spent insufficient time with any of the witnesses in Applicant's case.

10. Applicant has failed to prove that counsel prepared none of the witnesses for trial.

11. Applicant has failed to prove that counsel only spent a total of ten minutes with Applicant.

12. Applicant has failed to prove that Applicant was unable to make reasoned decisions on his own.

13. Applicant has failed to prove that Applicant's mother and grandmother were not consulted before Applicant pled guilty.

14. Applicant has failed to prove that he did not understand the trial court's admonishments when he pled guilty.

15. Applicant has failed to prove that he was advised to just look at Hon. Minick for answers to the trial court's questions.

16. Applicant has failed to prove that counsel failed to explain anything to Applicant at all regarding the nature of the charges or the consequences of the plea.

17. Applicant has failed to prove that counsel promised Applicant that he would more than likely get probation if he pled guilty.

18. Applicant has failed to prove that counsel never discussed the facts of the case or the law with Applicant.

19. Applicant has failed to prove that counsel failed to visit with Applicant for a period of almost six months when he needed to.

20. Applicant has failed to prove that counsel did not meet with Applicant sufficiently.

21. Counsel's decision to not subpoena Dr. Mary Connell was the result of reasonable trial strategy because her testimony would not have helped Applicant's defense.

22. Applicant has failed to prove that Paula Adams-Thomas was not sufficiently prepared for trial.

23. Applicant has failed to prove that counsel failed to prepare Paula Adams-Thomas for any questions or testimony.

24. Applicant has failed to prove that counsel failed to advise Paula Adams-Thomas as to what the State may ask.

25. Applicant has failed to prove that counsel did not meet with Tiffani Phillips Brooks sufficiently.

26. Applicant has failed to prove that counsel did not advise Tiffani Phillips Brooks as to what she could expect during testimony.

27. Applicant has failed to prove that counsel failed to properly prepare Tiffany Phillips Brooks.

28. Applicant has failed to prove that counsel failed to investigate the case.

29. Applicant has failed to prove that counsel's representation was deficient because he allowed Applicant's mother to assist him in contacting various agencies, doctors, and schools to get information for him.

30. Applicant has failed to prove that counsel's representation was deficient because Applicant's mother took photographs of the location.

31. Applicant has failed to prove that counsel spent an insufficient amount of time at each location of the offense.

32. Applicant has failed to prove that counsel failed to discuss with Applicant's mother the type of questions that would be asked by defense or the State.

33. Applicant has failed to prove that counsel failed to return Applicant's mother's phone calls.

34. Applicant has failed to prove that counsel advised Applicant's mother that there was nothing Applicant could do but "throw himself at the mercy of the jury" because the State had an "airtight" case.

35. Applicant has failed to prove that counsel's motion for continuance was not proper.

36. Applicant has failed to prove that counsel never asked Applicant's mother about Applicant's mental disabilities.

37. Applicant has failed to prove that counsel's cross-examination of State's witnesses was insufficient.

38. Applicant has failed to prove that his counsel's representation fell below an objective standard of reasonableness.

39. A party fails to carry his burden to prove ineffective assistance of counsel where the probability of a different result absent the alleged deficient conduct sufficient to undermine confidence in the outcome is not established. *See Washington v. State*, 771 S.W.2d 537, 545 (Tex. Crim. App. 1989), *cert. denied*, 492 U.S. 912.

40. Applicant has failed to prove that he would have been acquitted but for the alleged misconduct.

41. Applicant has failed to prove that he would have received a lesser sentence but for the alleged misconduct.

42. Applicant has failed to show that there is a reasonable probability that, but for the alleged acts of misconduct, the result of the trial proceedings would be different.

43. Applicant received effective assistance of trial counsel.

44. This Court recommends that Applicant's first ground for relief be **DENIED**.

45. There is a presumption of regularity with respect to guilty pleas under Texas Code of Criminal Procedure art. 1.15. *Ex parte Wilson*, 716 S.W.2d 953, 956 (Tex. Crim. App. 1986).

46. Before accepting a guilty plea, the court must admonish the defendant as to the consequences of his plea, including determining whether the plea is freely, voluntarily, and knowingly given. *See* Tex. Crim. Proc. Code Ann. art. 26.13.

47. Applicant was properly admonished.

48. When a defendant complains that his plea was not voluntary due to ineffective assistance of counsel, "'the voluntariness of the plea depends on (1) whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and if not, (2) whether there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Ex parte Moody*, 991 S.W.2d 856, 857-58 (Tex. Crim. 1999)(citations omitted).

49. Counsel's advice that Applicant plead guilty to the jury was based on reasonable trial strategy.

50. Applicant has failed to prove that counsel's advice fell below the range of competence demanded of criminal attorneys.

51. In light of the evidence against Applicant, Applicant has failed to prove that he would have insisted on going to trial.

52. Applicant has failed to prove that he did not understand the trial court's admonishments.

53. Applicant has failed to prove that he "had no idea what a guilty plea mean[t]."

54. Applicant has failed to prove that he did not understand the nature of the charges.

55. Applicant has failed to prove that he did not understand the consequences of his plea.

56. Applicant has failed to overcome the presumption that his plea was freely, voluntarily, and knowingly given.

57. Applicant has failed to prove that his plea was not freely, voluntarily, or knowingly made.

58. This Court recommends that Applicant's second ground for relief be **DENIED**.

59. Witnesses have the right to refuse to be interviewed. *United States v. Fischel*, 686 F.2d 1082, 1092 (5th Cir. 1982); *see also Desdesma v. State*, 806 W.W.2d 928, 932 (Tex. App. – Corpus Christi 1991, pet. ref'd)(A victim is not required to speak with defense counsel absent the trial court's approval).

60. "No right of a defendant is violated when a potential witness freely chooses not to talk." *United States v. Pinto*, 755 F.2d 150, 152 (10th Cir. 1985).

61. It is not improper for the prosecution to inform a witness that he may decline an interview by State or defense. *United States v. Black*, 767 F.2d 1334, 1338 (9th Cir.), *cert. denied*, 474 U.S. 1022, 106 S.Ct. 574, 88 L.Ed.2d 557 (1985); *United States v. Pinto*, 755 F.2d 150, 152 (10th Cir. 1985); *United States v. White*, 454 F.2d 435, 438-39 (7th Cir. 1971), *cert. denied*, 406 U.S. 962, 92 S.Ct. 2070, 32 L.Ed.2d 350 (1972).

62. Unless for "the clearest and most compelling considerations," the prosecution may not interfere with the free choice of a witness to speak with the defense. *United States v. Pinto*, 755 F.2d 150, 152 (10th Cir. 1985).

63. Applicant has failed to prove that the witnesses wanted to talk with his defense investigator but felt they could not because the State's investigator told them they could not.

64. Applicant has failed to prove that the State's investigator instructed the witnesses that they were not allowed to talk to the defense.

65. Applicant has failed to prove that the State intimidated at least one witness from speaking to the defense.

66. An applicant "must prove by a preponderance of the evidence that the error contributed to his conviction or punishment." *Ex parte Williams*, 65 S.W.3d 656, 658 (Tex. Crim. App. 2001).

67. Applicant has failed to prove that his defense was prejudiced by the defense investigator not interviewing Mrs. Horvath or Ms. Green.

68. Applicant has failed to prove by a preponderance of the evidence that the fact that the defense investigator did not interview Mrs. Horvath or Ms. Green contributed to his conviction or punishment.

WHEREFORE, the State prays that this Court adopt these Proposed Findings of Fact and Conclusions of Law and recommend that Applicant's grounds for relief be **DENIED**.

Respectfully submitted,

TIM CURRY
Criminal District Attorney
Tarrant County
Andréa Jacobs, Asst.
State Bar No. 24037596
401 West Belknap
Fort Worth, TX 76196-0201
Phone: 817/884-1687
Facsimile: 817/884-1672

CERTIFICATE OF SERVICE

A true copy of the above has been mailed to Applicant, Mr. Barton Ray Gaines, by and through his attorney of record, Mr. M. Michael Mowla, 1318 South Main Street, Suite 103B, Duncanville, Texas 75137 on or before the 18th day of January, 2008.

Andréa Jacobs

NO. C-213-007907-0836979-A
NO. C-213-007908-0836985-A

EX PARTE	§	IN THE 213th JUDICIAL
	§	
	§	DISTRICT COURT OF
	§	
BARTON GAINES	§	TARRANT COUNTY, TEXAS

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF TARRANT §

BEFORE ME, the undersigned authority, on this day personally appeared JOHN C. HUBBARD, who by me duly sworn, made the following statements and swore they were true:

"My name is JOHN C. HUBBARD. I am over the age of twenty-one, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein.

"I am a retired Fort Worth Police Officer with varied experience and an emphasis on investigations. I retired in February 2001 after twenty-five and one half years with the Department.

"I am currently employed by the Tarrant County District Attorney's Office as a Criminal Investigator to the Felony Court Section and have been so employed since December 2001. Prior to this employment, I coordinated police security for the Fort Worth Independent School District athletic and special events supervising over 125 officers from February 2001 until December 2001.

"I was the investigator that talked with Mrs. Rosie Horvath and Mr. Andrew Horvath.

"I do not tell witnesses not to talk to the Defense team. I advise them that it is their choice to who they wish to talk. I tell them they don't have to talk to me or anyone else representing the State. I tell witnesses it is unethical for me to tell them not to talk to the Defense. I do advise them that they have a choice not to talk to Defense if they so desire.

"I don't specifically recall the exact words I said to Mrs. Rosie Horvath and Mr. Andrew Horvath; however, I know that I did not tell them they could not speak to the

220

Attachment A

Right. So your own personal witness is making this up against you. And besides, Ft. Worth PD Det. Charla B. Smith was the investigator, not you (Hubbard).

Defense, the Defense's investigator, or anyone else. I did not intimidate the witnesses from speaking with the Defense."

JOHN HUBBARD

SWORN TO AND SUBSCRIBED before me on this the 19TH day of December, 2007 2007.

KATHERINE D. ANDERSON
NOTARY PUBLIC
STATE OF TEXAS
My Comm. Exp. 02-04-2010

NOTARY PUBLIC
STATE OF TEXAS

221

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

TRIAL COURT NO. 0836979A and 0836985A

EX PARTE	§	**IN THE DISTRICT COURT**
	§	
	§	
	§	**213TH JUDICIAL DISTRICT**
	§	
	§	
BARTON RAY GAINES	§	**TARRANT COUNTY, TEXAS**

APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED
THOMAS A WILDER, DIST. CLERK
TARRANT COUNTY, TEXAS
JAN 29 2008
TIME 8:53
BY DEPUTY

Submitted by:

M. Michael Mowla
1414 W. Wheatland Suite 250
Duncanville, TX 75116
Phone: 972-283-2600
Fax: 972-283-2601
Texas Bar # 24048680

Attorney for Applicant

Applicant proposes the following findings of fact and conclusions of law in support of his Application for Writ of Habeas Corpus. These findings are supported by the record and by the evidence submitted with the Application.

I. PROPOSED FINDINGS OF FACT

1. Applicant is restrained in his liberty by Nathaniel Quarterman, Director of the Institutional Division of the Texas Department of Criminal Justice.
2. Applicant is serving a sentence of 35 years to the Texas Department of Criminal Justice at the Allred Unit in Iowa Park, Texas.
3. Applicant was charged with two counts of attempted capital murder by indictment that alleged that during the course of or attempting to commit robbery, Applicant 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.
4. Applicant entered a plea of guilty to lesser charges of two counts of aggravated robbery with a deadly weapon. (R. II, 3-6). A jury was empanelled, and on December 10, 2002, a trial by jury on punishment commenced. After presentation of evidence, the jury set Applicant's punishment at 35 years in the Institutional Division of the Texas Department of Criminal Justice.
5. 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).
6. A petition for discretionary review was filed. On May 18, 2005, the Texas Court of Criminal Appeals denied Applicant's Application for discretionary review. 2005 Tex. Crim. App. LEXIS 773.
7. A federal writ of habeas corpus was filed in the United States District Court, Northern District of Texas. Gaines v. Quarterman, 4-06-CV-0409-Y. There are no other appeals or collateral attacks on the conviction pending.
8. 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).

222

223