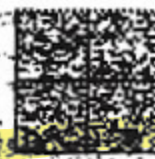


OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPT STATION, AUSTIN, TEXAS 78711

RE: Writ No. WR-69,338-02
STYLE: GAINES, BARTON RAY
TRIAL CT NO: C-213-007807-98
2/27/2008

REPORTED
FIRST CLASS



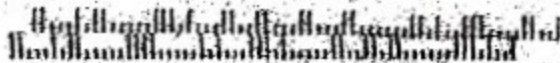
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This is to advise that the court has denied without
written order the application for writ of habeas corpus on the
findings of the trial court without a hearing.

Louise Pearson, Clerk

District Clerk Tarrant County
Thomas A. Wilder
401 W. Belknap
Ft Worth, TX 76196

407531 76196



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CAPTION

THE STATE OF TEXAS
COUNTY OF TARRANT

§
§

At a term of the 213TH DISTRICT COURT of Tarrant County, Texas, the Honorable ROBERT K. GILL sitting as Judge of said court, the following proceedings were had, to-wit:

Writ Number: C-213-007909-0836979-A

EX PARTE:

BARTON RAY GAINES

VS.

THE STATE OF TEXAS

1

Cause No. C-213-007907-0836979-A

COURT OF CRIMINAL APPEALS OF TEXAS

APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM FINAL FELONY CONVICTION UNDER CODE OF CRIMINAL PROCEDURE, ARTICLE 11.07

BARTON RAY GAINES
NAME OF APPLICANT

October 25, 1982
DATE OF BIRTH

- (1) What court entered the judgment of conviction you want relief from?
(Give the number and county of the court.)
213th Criminal District Court, Tarrant County, Texas
- (2) What was the cause number in the trial court? **0836979A**
- (3) What was the trial judge's name? **Judge Robert Gill**
- (4) What was the date of judgment? **December 12, 2002**
- (5) What was the length of sentence? **35 years**
- (6) Who assessed punishment? (Check one) (a) Judge () (b) Jury (X)
- (7) What offense or offenses were you were convicted of (all counts)?
Aggravated Robbery (two counts)
- (8) What was your plea? (check one)
(a) Not Guilty ()
(b) Guilty (X)
(c) Nolo Contendere ()

FILED
THOMAS A WILDER, DIST. CLERK
TARRANT COUNTY, TEXAS
NOV 01 2005
TIME 12:30
BY CA DEPUTY

(9) Did you have a jury trial? (check one)

(a) Jury (X)
(b) Judge Only ()

(10) Did you testify at the guilt/innocence phase of trial?

Yes () No (X)

(11) Did you testify at the sentencing phase of trial?

Yes () No (X)

(12) Did you appeal from the judgment of conviction?

Yes (X) No ()

(13) If you did appeal, answer the following questions:

- Which court of appeals? **Second Court of Appeals of Texas, Fort Worth, Texas**
- What was the cause number? **2-02-498-CR, NO. 2-02-499-CR**
- What was the decision? **Affirmed**
- What was the date of the decision? **October 14, 2004**
- Did you file a petition for discretionary review?
Yes (X) No ()
- If your answer to (e) was "yes," answer the following questions:
(g) What was the cause number in the Court of Criminal Appeals?
PD-1788-04
- What was the decision? **Appellant's Petition for Discretionary Review Denied**
- What was the date of decision? **May 18, 2005**

(14) Have you previously filed an application for writ of habeas corpus under Article 11.07 for relief from this conviction?
Yes () No (X)

(15) If your answer to (14) was "yes," answer the following questions:

- (a) What was the Court of Criminal Appeals writ number? _____
(b) What was the decision? _____
(c) What was the date of decision? _____
(d) What is the reason the current claims were not presented and could not have been presented in an earlier application?

(16) Do you have any petition or appeal pending in any court, either state or federal, attacking the same conviction?

Yes (X) No ()

(17) If you are presenting a claim for time credit, have you presented the claim to the time credit resolution system of the Texas Department of Criminal Justice-Institutional Division?

Yes () No ()

(a) If your answer to (17) was "yes," answer the following questions:

What was the date of decision? _____

Why are you not satisfied with the decision? _____

(b) If your answer to (17) was "no," why have you not presented the claim to the time credit resolution system of the Texas Department of Criminal Justice-Institutional Division?

(18) State concisely every ground on which you claim that you are being unlawfully confined. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting the grounds.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. The grounds you may raise are not limited to those listed below. However, you should raise in this application all available grounds (relating to this conviction) on which you base your allegations that you are being unlawfully confined.

If you claim one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not simply check any of the grounds listed below.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and empaneled.
(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

(k) Denial of time credits on sentence.

(l) Improper revocation of parole or mandatory supervision.

(m) Illegal sentence.

(n) Invalid or defective indictment.

(o) No evidence or insufficient evidence.

(A) What is your Ground Number One: Applicant was denied effective assistance of counsel.

What are the FACTS (tell your story briefly without citing cases or law):

Applicant was represented at trial by Gregory Westfall of Fort Worth, Texas. Mr. Westfall's representation fell far short of the standard required by the United States Constitution. Mr. Westfall conducted almost no discovery in preparation of Applicant's case. When one witness informed an investigator sent by Mr. Westfall that she was instructed by the District Attorney's office to not speak to any person sent by the defense attorney, Mr. Westfall did not inform Applicant or the court of this act by the District Attorney's office. Mr. Westfall spent very little time with any of the witnesses in Applicant's case, and prepared none of the witnesses for trial. Throughout a period of almost nine (9) months, from the time Mr. Westfall was retained until the date of conviction, Mr. Westfall spent a total ten (10) minutes with Applicant. Mr. Westfall knew of Applicant's severe learning disabilities, dyslexia, and low I.Q. Mr. Westfall knew that Applicant granted his mother a general power of attorney because Mr. Westfall knew that Applicant was unable to make reasoned decisions on his own. Despite these facts, and without consulting with either Applicant's mother or grandmother, Mr. Westfall had Applicant plead guilty to two counts of aggravated robbery. When the judge admonished Applicant, Mr. Westfall told Applicant to look at Mr. Westfall's co-counsel, and when the co-counsel nodded "yes," Applicant was to say "yes," when co-counsel nodded "no," Applicant was to say "no."

(B) What is your Ground Number 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

What are the FACTS (tell your story briefly without citing cases or law):

During the course of nine (9) months, Petitioner's trial counsel, Mr. Westfall, spent a total of ten (10) minutes with Petitioner. Mr. Westfall did not explain anything at all to Petitioner pertaining to the nature of the offenses and the consequences of pleading guilty. Mr. Westfall promised Petitioner that Petitioner would more than likely receive probation in exchange for pleading guilty. When the judge admonished Petitioner, Mr. Westfall told Petitioner to look at Mr. Westfall's co-counsel, and when the co-counsel nodded "yes," Petitioner was to say "yes," when co-counsel nodded "no," Petitioner was to say "no." Petitioner had no idea what a guilty plea means. When the judge admonished Petitioner, Petitioner did not know the nature of the admonishments, and did not know why he was even stating "yes" or "no." Had Petitioner not been misinformed by Westfall regarding the possibility of not receiving probation, Petitioner would have most certainly not plead guilty and would have instead gone to trial.

(C) What is your Ground Number Three: The District Attorney intimidated at least one witness from speaking to the defense.

What are the FACTS (tell your story briefly without citing cases or law):

The defense sent a private investigator to speak with one of the alleged victims, Andrew Horvath. However, prior to the defense investigator arriving, 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. The State never disclosed this fact to Applicant.

Wherefore, applicant prays that the Court grant applicant relief to which he may be entitled in this proceeding.

VERIFICATION

(Complete either the Oath Before Notary Public or the Inmate's Declaration)
Oath Before Notary Public

STATE OF TEXAS, COUNTY OF _____, being first duly sworn, under oath, says: that he is the applicant in this action and knows the content of the above application and according to the applicant's belief, the foregoing allegations of the application are true.

Signature of applicant _____

SUBSCRIBED AND SWORN TO BEFORE ME this _____ day of this _____

Notary Public _____

INMATE'S DECLARATION

I, Barton Ray Gaines, TDCJ # 1139507, being presently incarcerated in the Allred Unit of the Texas Department of Criminal Justice, declare under penalties of perjury that according to my belief the foregoing information and allegations of the application are true and correct.

Signed on 11/1/06, 2006
(date)

Barton Gaines
Signature of applicant

M. Michael Mowla, PLLC

M. Michael Mowla

By: M. Michael Mowla

1318 South Main Street Suite 103B
Duncanville, TX 75137
Phone: 972-283-2600
Fax: 972-283-2601
State Bar # 24048680
Attorney for Applicant

WRIT NO: C-213-007907-0836979-A

TRIAL COURT NO. 0836979A and 0836985A

THE STATE OF TEXAS

VS.

BARTON RAY GAINES

IN THE DISTRICT COURT

213TH JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF HABEAS CORPUS

Submitted by:

M. Michael Mowla
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Duncanville, TX 75137
Phone: 972-283-2600
Fax: 972-283-2601
Texas Bar # 24048680
Attorney for Applicant

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

NOV 01 2006
TIME 12:30
BY CA DEPUTY

HEARING REQUESTED

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TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Applicant, BARTON RAY GAINES, and submits this Brief in Support of Application for Writ of Habeas Corpus:

II. PROCEDURAL HISTORY

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.

Applicant 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 Applicant'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 Applicant's Application for discretionary review. 2005 Tex. Crim. App. LEXIS 773.

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.

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III. SUMMARY OF TESTIMONY

On December 9, 2002, Applicant pleads guilty to two counts of aggravated robbery with a deadly weapon. (R. II, 3-6). After Applicant 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 Applicant's family members. (R. III, p. 13-14). Then Minick discusses Applicant's general demeanor, mental deficiencies and disabilities, and problems with drugs. (R. III, p. 14-15).

Minick discusses the medications Applicant was taking at the time of the alleged crime, including Paxil, and the way Paxil affected Applicant during the month leading up to the alleged crime. (R. III, p. 15-21). During this argument, Minick mentions a "Ph.D.-type psychologist" who "diagnoses (Applicant) as ADD/ADHD," and a "D.O. psychiatrist" who "diagnoses (Applicant) 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 "Applicant's mother was trying to figure out a way to get the Paxil paid for because (Applicant) 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 Applicant's problems with his girlfriend, especially Applicant's alleged paranoia regarding his girlfriend's infidelity. (R. III, p. 18). Minick then discusses what allegedly happened around the time of the shooting. (R. III, p. 19-22). In particular, Minick states "Saturday about 3:00 a.m. is when (Applicant) 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).

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Minick closed the opening argument with the following statement: "(Applicant) was out of his mind. Now (Applicant) 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).

The State first called Officer William Noah of the Fort Worth Police Department. (R. III, p. 23). Officer Noah testified that on February 21, 2002, he was dispatched to the corner of James and Southcrest streets at a Lucky Stop convenience store where he observed a young man who had multiple gunshot wounds. (R. III, p. 26). Officer Noah then stated that he went to the Peppertree Acres Apartment complex and then answered several questions regarding whether a shotgun is considered a deadly weapon. (R. III, p. 29-32). Neither Gregory Westfall nor Cheyenne Minick offered any objections to the testimony of Officer Noah.

On cross examination, Cheyenne Minick asked Officer Noah one question: "Officer Noah, when you got to the Lucky Stop, what position was the young man in? Was he laying down, standing up, sitting down?" (R. III, p. 34). Officer Noah responded, "Laying down." (R. III, p. 34). Neither Gregory Westfall nor Cheyenne Minick asked any further questions, and the cross-examination ended.

Next to testify for the State was Officer Roberta Romero of the Fort Worth Police Department. (R. III, p. 34). Officer Romero testified that she was dispatched to the Peppertree apartments, where she was to help process and protect the area. (R. III, p. 36-40). Neither Gregory Westfall nor Cheyenne Minick offered any objections nor cross-examined Officer Romero.

Next to testify on behalf of the State was Gerardo Moreno. (R. III, p. 40-41). Moreno testified that he lives at the Peppertree Apartments, where on the night of February 21, 2002, from

the inside of his apartment he heard a gunshot, and then within seconds heard two more gunshots. (R. III, p. 42-43, 47). Moreno also testified that he saw "this Caucasian that was running about." (R. III, p. 43). Moreno then testified that the individual approached him (Moreno) on the porch, and Moreno told him to get off his porch because he (Moreno) did not want to be "involved." (R. III, p. 43). Moreno testified that the individual was bleeding heavily, and that the individual was "hurting." (R. III, p. 46). The defense did not object to any of this testimony, nor did the defense ask Moreno any questions on cross-examination.

Next to testify was one of the alleged victims, Michael Williams. (R. III, p. 48). Williams testified as to how he and the other alleged victim, Andrew Horvath, happened upon the scene of the shooting. (R. III, p. 52-53). Williams testified that the objective was that he and Horvath were to sell marijuana to Applicant and the codefendants, Daniel Aranda and Jason Tucker. (R. III, p. 54). Williams stated that other than that Applicant sat up straight in his truck, Williams noticed nothing strange about Applicant. (R. III, p. 63). Williams then stated that after he made several trips to and from the apartment where the marijuana was allegedly kept, Applicant "patted down" Williams. (R. III, p. 66). Then Applicant allegedly jumped out of his truck, and Williams heard both Applicant and Jason Tucker say "give me your wallet." (R. III, p. 68). Williams stated that he saw Applicant holding a shotgun, and that he was "crowned" in the head three times with the shotgun. (R. III, p. 67). Williams also stated that while he was running away from Applicant and the codefendants, he heard "boom" and was shot in the arm. (R. III, 72-73). Williams did not state that he saw the person who shot him. Williams was not asked whether any other shots were fired.

Williams then discussed the extent of his injuries and identified pictures shown to him by the State. (R. III, p. 74-82). At no time did the defense object to any of this testimony.

During the cross-examination of Michael Williams, Westfall asked Williams about the location of the gun in the vehicle. (R. III, 87-88). Westfall did not ask Michael Williams any

questions regarding any other part of the statement that Williams made to the police on February 23, 2002. Westfall also 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). The defense did not ask Williams any other questions on cross-examination.

Next to testify was Andrew Horvath, the second alleged victim. Horvath testified that he saw Applicant hit Williams with the barrel of the shotgun. (R. III, 103). Horvath also testified that he saw only Applicant carrying the shotgun that evening. (R. III, 105). On cross-examination, Westfall asked Andrew Horvath whether he knew anybody in a picture presented to Horvath. (R. III, 110). Horvath answered "no." Then Westfall asked Horvath whether he saw who lifted up Williams's shirt. Horvath answered that he did not. (R. III, 111). Westfall asked no further questions of Horvath.

Next to testify was Mary Rivas, an assistant loss prevention officer at Wal-Mart. (R. III, 114). Rivas testified that Applicant purchased shotgun shells from a Wal-Mart in Fort Worth, Texas. (R. III, 114-120). Westfall made no objections, nor did he ask any questions of Rivas.

Next to testify on behalf of the State was Patrick Gass, a Fort Worth police officer. (R. III, 137). Gass testified that he searched Applicant's vehicle and found a shotgun and ammunition. (R. III, 138-140). Westfall made no objections. On cross-examination, Westfall asked Gass whether Gass knows who actually owns the shotgun, and whether Gass tried to find out who owns it. (R. III, 147). Gass responded by stating that what Westfall is asking is not a task for which Gass and his department are responsible. (R. III, 147). Westfall asked no further questions of Gass.

Next to testify was Mindy Keisel. (R. III, 152). Keisel testified that on the day of the shooting, she met Applicant and several other individuals in an unimproved location in Crowley, Texas. (R. III, 158). Keisel also testified that she overheard Applicant ask Michael Williams for drugs. (R. III, 161). Keisel then testified that Applicant and the codefendants, left in Applicant's

truck. (R. III, 163). Keisel claimed that she was concerned that Applicant and the codefendants were going to "jump them (Williams and Horvath) or beat them up." (R. III, 165). Keisel testified that later that evening, she saw Applicant and codefendants at the home of Cody Morris. (R. III, 166). Keisel testified that she witnessed a wound on the hand of codefendant Aranda, which she washed. (R. III, 168).

Keisel then claimed that Applicant told her and Tara Green that he and codefendants robbed two persons, and that Applicant shot "Mike and Andy." (R. III, 170). Further, Keisel claimed that Applicant told her and Green to not tell anybody. (R. III, 170). Keisel also claimed that Applicant told her that he felt "a rush" when he allegedly shot Williams and Horvath. (R. III, 172). Then Keisel testified that Detective Charlotte Smith was the officer who came to speak to her and obtain a statement from her and show her a security video from Wal-Mart. (R. III, 175-177). During the State's direct examination of Keisel, Westfall made no objections.

On cross-examination, Gregory Westfall asked when Keisel first met Applicant and whether she is friends with Applicant. (R. III, 179-180). Then Westfall asked Keisel how often she was around Applicant and when was the last time she saw Applicant before the day of the shooting. (R. III, 181-182). Westfall asked no further questions of Mindy Keisel.

Next to testify on behalf of the State was Tara Green. (R. III, 183). Tara Green testified that she knew Applicant for many years, and that on the night of the shooting, she also saw Applicant and the codefendants at an unimproved area of land. (R. III, 184-188). Green testified that she heard Applicant ask the alleged victims for one pound of Marijuana. (R. III, 189). Green then testified that after Applicant left the area with the codefendants, she called Applicant to speak with him. (R. III, 191-192). Green claimed that Applicant told her that he purchased shotgun shells "in case anything happens." (R. III, 191).

Green then testified that she and Keisel spoke to Applicant some time later and that

Applicant told them that he shot two people. (R. III, 194-195). Green also stated that Applicant asked her to not say anything about the incident. (R. III, 197). During the direct examination of Green, Westfall made no objections.

On cross-examination, Westfall asked Tara Green when she first met Applicant and what she (Green) thought of Applicant. (R. III, 201-202). Westfall then asked Green about Applicant's job status, about Applicant's family, and how often Green "hanged out" with Applicant. (R. III, 203-204). Then Westfall asked Green whether Applicant was acting strangely around the time of the shooting. (R. III, 205). Green answered in the affirmative. (R. III, 205). Finally, Westfall asked Green whether she thought codefendant Tucker was intelligent and whether the shotgun belonged to one 'Brett Tucker.' (R. III, 206). Green answered that she thought Jason Tucker was "smart" and that she knew nothing about the ownership of the shotgun. (R. III, 207). Westfall then terminated the cross-examination of Tara Green.

Next to testify was Steven Ancira. (R. III, 207). Ancira testified that on the morning of February 23, 2002, he was driving from Fort Worth on Highway 377 in Granbury, Texas. (R. III, 211-212). Ancira stated that he was driving, his wife, Janet Ancira, was in the front passenger seat, Greg Peterson was behind Ancira in the back seat, Richard Weaver was in the back middle, and Joel Chandler was in the back passenger seat. (R. III, 211-212). Ancira stated he noticed that a vehicle behind him had its emergency lights on and was repeatedly switching its lights from low beam to high beam. (R. III, 213). Ancira further stated that he thought the vehicle was an emergency fire department vehicle. (R. III, 214). Ancira testified that he pulled to the side of the road, and the vehicle, which he recognized to be a truck, pulled over in front of Ancira's vehicle. (R. III, 214).

Ancira then testified that he exited his vehicle, and that the driver of the truck had already exited the truck. (R. III, 215). Ancira claimed that he a person that he believed to be a female in the passenger seat of the truck. (R. III, 216). Ancira claimed that the driver asked him for tools. (R.

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III, 216). Ancira stated that he did not have any tools, and then he entered his vehicle and drove away. (R. III, 216).

Ancira then stated that as he was driving away, he heard what he thought was a rock hitting his car. (R. III, 218). Ancira said he turned around and saw that Richard Weaver had been hit by something that turned out to be a bullet. (R. III, 219). Ancira said that later that evening that he found a bullet stuck to the hard plastic in the back seat of his car. (R. III, 221). Ancira never identified Applicant as the driver of the truck.

During the direct examination of Steven Ancira, Westfall made no objections. Westfall did not cross-examine Ancira.

Next to testify on behalf of the State was Richard Weaver. (R. III, 223). Weaver testified that he was asleep in the back of Steven Ancira's vehicle when he felt like he "had been punched in the kidneys or in the back." (R. III, 225). Weaver stated that he was taken by CareFite to Harris Hospital in Downtown Fort Worth. (R. III, 226). Weaver also testified that the bullet fragments were left in his back for medical reasons. (R. III, 227). During this direct testimony, Westfall made no objections. On cross-examination, Westfall asked Weaver whether he (Weaver) had made a full recovery. (R. III, 228). Weaver replied that he had. (R. III, 228). Westfall then terminated the cross-examination.

Next to testify on behalf of the State was Janet Ancira. (R. III, 228). Janet Ancira testified that she witnessed her husband exit his vehicle and go speak to the driver of the truck. (R. III, 231-232). Janet Ancira identified Applicant in court as the driver of the truck. (R. III, 232). Janet Ancira claimed that she saw Applicant go towards the toolbox that was located in the bed of the truck. (R. III, 233-234). Janet Ancira also stated that she heard a loud "pop" and realized that Richard Weaver was hurt. (R. III, 234). During this direct testimony, Gregory Westfall made no objections. On cross-examination, Gregory Westfall asked Janet Ancira whether she thought that

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the driver of the truck appeared to be "staggering around," and Janet Ancira responded "right." (R. III, 235). Westfall also asked Janet Ancira about where they were traveling and in what direction. (R. III, 235). Then Westfall asked Janet Ancira whether she saw a passenger in the truck. (R. III, 236). Janet Ancira responded by stating that she "was not focused on the passenger, only the truck itself." (R. III, 237). Westfall also asked how they left the scene. (R. III, 237). Westfall then terminated his cross-examination. On redirect examination by the State, Janet Ancira was asked whether she felt the driver of the truck was drunk, and she answered "yes." (R. III, 237-238). Westfall did not ask any further questions of Janet Ancira.

Next to testify was Juan DeLeon, an investigator with the Tarrant County District Attorney's Office. (R. III, 238). DeLeon testified that he received a bullet fragment from Steven Ancira and that he delivered the fragment to the Fort Worth Police crime lab. (R. III, 239-240). The report was admitted into evidence. (R. III, 240). Greg Westfall did not object to questions asked of DeLeon, nor did he cross-examine DeLeon. (R. III, 240).

Next to testify was Ron Fazzio, a forensic firearms examiner for the Fort Worth Police crime lab. (R. III, 241). Fazzio testified that he compared the shotgun fragments that were presented to him. (R. III, 246). Fazzio stated that he did not find any usable prints on the shells. (R. III, 247). Fazzio then stated that the shotgun shells had been chambered at "one particular point" in the shotgun that was used in the shooting. (R. III, 250). On cross examination, Westfall asked Fazzio whether there was any way to know the number of feet away from a shotgun how "big the spread is going to be if you don't have the shotgun." (R. III, 252). Fazzio answered that an estimation could be done. (R. III, 252). Westfall then terminated the cross-examination. The State then rested its case.

On December 11, 2002, Gregory Westfall presented the defense for Applicant. First to testify on behalf of Applicant was William Gordon, the president of Fort Worth City Credit Union.

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(R. IV, 3-4). Gordon testified that he brought with him information regarding the account of Applicant. (R. IV, 4-5). Westfall asked Gordon whether he is the custodian of the records, and Gordon answered that he is. (R. IV, 5). Westfall then terminated the direct examination.

On cross-examination, the State asked Gordon 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). The State terminated its cross-examination and Westfall had no further questions. (R. IV, 7).

The next witness to testify was Applicant's mother, Melissa Adams. (R. IV, 7). Westfall asked Adams questions regarding her past and about Applicant's father. (R. IV, 9-12). Then Westfall asked Adams about her past relationships with other men and how such relationships coincided with Applicant's early years. (R. IV, 12-24).

Then Westfall questioned Adams about Applicant's mental deficiencies, use of marijuana, general demeanor since childhood, and other events that happened during Applicant's childhood. (R. IV, 24-38). Adams testified that she had taken Applicant to several doctors for the purposes of drug counseling. (R. IV, 30-31). Adams stated that when Applicant wanted to write a check, she (Adams) usually completed the checks for Applicant and Applicant signed them. (R. IV, 41-42). Throughout Adams's testimony, the State repeatedly and successfully objected to her testimony as to hearsay and nonresponsive answers. (R. IV, 24-46).

Adams then testified that when Applicant was about 18 years of age, she took Applicant 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 Applicant'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 Applicant. (R. IV, 46-47). Adams also testified that she gave Paxil to Applicant from her husband's supply. (R. IV, 47).

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The Adams testified that Applicant's girlfriend, Tiffani Phillips, may have been unfaithful to Applicant, and that this caused Applicant to become very upset. (R. IV, 51-54). Adams also testified as to Applicant's demeanor at the time. Adams testified that Applicant's eyes were very wide, his legs were bouncing, that he was rambling about various issues, and that he asked that he wanted to be checked for sexually transmitted diseases. (R. IV, 54-55). The State repeatedly and successfully objected to Adams's testimony as to hearsay or nonresponsive answers. (R. IV, 46-56). Then Westfall asked questions that pertained to Applicant's activities leading up to and including the day following the shooting. (R. IV, 56-68). Again, the State repeatedly and successfully objected to Melissa Adams's testimony as to hearsay or nonresponsive answers. 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). Finally, Westfall asked Adams whether she received a phone call from Dr. Ouseph immediately following Applicant's arrest. (R. IV, 70). Adams answered in the affirmative. (R. IV, 70). Westfall then asked Adams what Dr. Ouseph said. (R. IV, 70). The State objected to hearsay and the objection was sustained. (R. IV, 71). Westfall ended the direct examination of Adams.

On cross-examination, the State questioned Adams about Applicant's truck, and it was established that Applicant's grandmother purchased the vehicle for Applicant. (R. IV, 73). The State asked Adams to explain why Applicant had a truck, but could not afford medication. (R. IV, 74). Then the State asked Adams about Applicant's grades. (R. IV, 75-76). The State continued by questioning Adams whether she had spent a lot of time with Applicant the week leading up to the shooting, and whether Michael Williams, Andy Horvath, Mindy Keisel, or Tara Green would be better judges of how Applicant appeared on the day of the shooting because Adams was not with Applicant on that particular day. (R. IV, 78-79). Then the State asked Adams whether she heard

"spurts of excited behavior where he was more energized, talking rapidly and loudly, and getting into people's faces with a kind of intensity and a wild look in his eye." (R. IV, 126-127). Dr. Johnstone also testified that Applicant exhibited signs of 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 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, the State asked Dr. Johnstone how many times he had met with Applicant, and Johnstone said one time for about 20 minutes. (R. IV, 129). Johnstone admitted that he received information as to Applicant's use of Paxil from another party, but could not identify which party gave him the information. (R. IV, 130, 131). Johnstone also admitted that he was not sure when Applicant started using Paxil. (R. IV, 130). Johnstone further admitted that during the 20 minutes he met with Applicant, he did not perform any testing or take notes. (R. IV, 131).

When asked by the State whether street drugs could cause the behavior that Applicant exhibited, Johnstone said such drugs could do so. (R. IV, 133). When asked by the State whether he knew that Applicant was using Paxil while in jail, Johnstone answered in the affirmative. (R. IV, 135). When asked by the State whether the combination of marijuana and Paxil could cause a manic episode, Johnstone replied that it could. (R. IV, 135). Finally, when asked whether Applicant has exhibited any manic behavior while in jail, Johnstone answered that Applicant has not. (R. IV, 136-138).

The State then asked Dr. Johnstone what he discussed with Applicant during the 20 minute meeting between Johnstone and Applicant. (R. IV, 138). Johnstone said that Applicant told him that he did not "really regard what he had done as a robbery because he didn't get much money when he took the wallet from the person that he robbed." (R. IV, 138). Johnstone said that

Dr. Ouseph tell Applicant that he had to maintain complete sobriety while using Paxil, and Adams responded that she heard Dr. Ouseph say this. (R. IV, 84-85). Westfall made 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). The objection was sustained. (R. IV, 85). The State immediately asked the question again, and Westfall did not object. (R. IV, 85).

On redirect examination, Westfall asked Adams to publish Applicant's Iowa Test Scores by reading them aloud to the court. (R. IV, 89-90). With exception of Visual Materials, Applicant scored between the 2nd and 32nd percentiles when compared to other children nationally. (R. IV, 89-90).

The next witness was Tiffani Phillips, Applicant's girlfriend of several years. (R. IV, 99-100). Phillips testified as to her relationship with Applicant and his demeanor leading up to the day of the shooting. (R. IV, 100-109). During this testimony, the State made five objections as to hearsay, speculation, and nonresponsive answers, all of which were sustained. (R. IV, 100-109). At one point, Westfall said the following:

"Hold on. I don't know how to ask the question. Is there anything you have forgotten to tell me?"

(R. IV, 109). The State objected as to the vagueness of Westfall's question, which was sustained. (R. IV, 109).

The next witness for the defense was Dr. Edwin Johnstone, a psychiatrist that Westfall hired to testify as an expert witness. (R. IV, 121). Outside of the presence of the jury, Dr. Johnstone testified that after examining Applicant and reviewing his records, it was his opinion that Applicant has features of borderline personality disorder, which Johnstone described as "emotional instability, irrational sensitivity or fear of abandonment that lead to intense relationships that are full of conflict." (R. IV, 125). Johnstone also stated that after Applicant began using Paxil, Applicant had

Applicant "had an obvious disregard for the impact of his behavior on other people." Johnstone also stated that he did not prepare any report for his meeting with Applicant because he "wasn't asked to." (R. IV, 139). The State then moved to object to Johnstone's testimony, claiming that Johnstone had not personally tested Applicant, and that Johnstone was not basing his opinion upon factual data. (R. IV, 142-143). The judge ruled that Johnstone's testimony goes to the weight rather than the admissibility of his testimony. (R. IV, 143).

In the presence of the jury, Dr. Johnstone testified that Dr. Warren had not determined whether Applicant had a personality disorder, but found that Applicant had Attention Deficit Hyperactivity Disorder ("ADHD"). (R. IV, 159-161). Johnstone also testified that persons with ADHD were subject to distractible attention, and often act on impulse with a tendency to "respond rampantly with strong emotional responses to things they encounter." (R. IV, 160). Johnstone also testified that Dr. Warren had found Applicant's full scale IQ to be 84, plus or minus 5 points. (R. IV, 164).

Johnstone then testified that Dr. Ouseph's and Dr. Warren's reports differed because unlike Dr. Warren, Dr. Ouseph took Applicant's statements to her as though Applicant knew what he was talking about with regards to his problems. (R. IV, 173-174). Johnstone testified that Applicant told Dr. Ouseph that he had "depression" and that Dr. Ouseph "accepted that as if that were sufficient to make a diagnosis of the clinical condition depression." (R. IV, 173). Then Johnstone stated that Dr. Ouseph prescribed Paxil, which Johnstone described as a category of antidepressant known as an SSRI (selective serotonin reuptake inhibitor). (R. IV, 174-175). Johnstone also stated that he would not prescribe Paxil to someone with ADD unless the person was already on a mood-stabilizing agent. (R. IV, 176). Johnstone concluded that based upon the available information, Applicant was in a hypomanic state at the time of the shooting, and that Paxil contributed to the hypomanic state. (R. IV, 179-180). Johnstone also believed that the reason that Applicant was not

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

On cross-examination, Johnstone admitted that he met with Applicant once for 20 minutes, and that he did not conduct any tests on Applicant. (R. IV, 183-184). Johnstone also stated that he was not asked to prepare a formal report regarding Applicant's case, he never spoke to any of Applicant's other doctors, and that he only read their reports. (R. IV, 186). Johnstone admitted that he received information as to Applicant's use of Paxil from another party, but could not identify which party gave him the information. (R. IV, 189-190). Johnstone also admitted that he was not sure when Applicant started using Paxil. (R. IV, 188-189).

The next witness was Paula Adams-Thomas. Under direct examination by Cheyenne Minick, Thomas testified regarding Applicant's demeanor, that Applicant was a "loving person." (R. IV, 144-147). Thomas then that on the Sunday prior to the shooting, Applicant was behaving strangely in church. (R. IV, 147-149). After asking Thomas a few more questions regarding Applicant's personality and what Ms. Thomas thought of Applicant, Minick terminated the direct examination. (R. IV, 150-151).

On cross-examination, Thomas testified that she did not see Applicant around the day of the shooting, and could not tell the jury anything about Applicant's behavior on or about that day. (R. IV, 154). Neither Westfall nor Minick asked any questions on redirect examination.

(EXHIBIT 2). Further, Ms. Thomas had no idea what would be asked of her by either the State or Westfall. (EXHIBIT 2).

4 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).

5 For the purpose of investigation and attaining records for the case, Westfall had Applicant'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 Applicant. (EXHIBIT 4). Adams encountered tremendous difficulty attaining the records for Westfall because these entities generally refused to speak to her because Applicant 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).

6 Several months prior to Applicant's trial, Westfall asked Adams whether she knew where Applicant 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).

IV. GROUNDS FOR RELIEF

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

1. Facts

1 Between the time Gregory Westfall was retained in February, 2002, and until December 12, 2002, when Applicant was sentenced, Westfall spent a total of ten (10) minutes during four meetings with Applicant (EXHIBIT 1). During these meetings, Westfall never discussed the facts of the case or the law with Applicant. (EXHIBIT 1). During one period of time, Westfall did not visit with Applicant for almost six months. (EXHIBIT 1). Westfall hired two psychiatrists to speak to Applicant. Dr. Mary Connell briefly spoke to Applicant, yet Westfall did not subpoena her to testify during trial. (EXHIBITS 1 and 5). Dr. Johnstone spoke to Applicant 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 Applicant or the court. P.O.A.

2 Westfall never discussed the case with Applicant, and yet without Applicant's permission, had Applicant plead guilty to two counts of aggravated robbery. (EXHIBIT 1). Further, Westfall promised Applicant that Applicant would receive probation if he pleads guilty. (EXHIBIT 1).

3 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 for any questions or testimony.

Westfall asked Adams about her childhood and what kind of mother Adams thought she was for Applicant. (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 Applicant and that it was apparent that Applicant was guilty. (EXHIBIT 4). Westfall also told the same to Gail Inman, Applicant's grandmother. (EXHIBIT 5). Westfall then told Adams that he planned to prepare for the punishment phase of the trial because there was nothing Applicant could do but "throw himself at the mercy of the jury." (EXHIBIT 4).

7 Westfall had 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 Applicant'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).

8 During all of Adams's dealings with Westfall, he never asked Adams questions regarding Applicant's mental disabilities, even though Adams and Westfall agreed that Applicant was unable to make important decisions. (EXHIBIT 4). In fact, Westfall was well aware of Applicant's mental disabilities, as Westfall agreed with Adams to have Applicant sign a power of attorney, granting Adams the right to make important decisions for Applicant. (EXHIBITS 4 and 6). Adams specifically told Westfall that under no circumstances was Westfall to enter a guilty plea on behalf of Applicant without first informing Adams, and Westfall agreed. (EXHIBIT 4). However, Westfall entered a guilty plea on behalf of Applicant without informing Adams.

9 Gail Inman, Applicant'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).

10 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 Applicant's case. (EXHIBIT 5). Westfall also told Inman that he had not had the chance to speak to Applicant, but that he intended to do so. (EXHIBIT 5). When Inman spoke to Westfall about Applicant's use of Paxil, Westfall dismissed the idea of using Applicant's mental condition as a defense, telling Inman that "no jury in Texas would ever entertain the idea of Applicant's mental condition as a defense." (EXHIBIT 5).

11 Immediately before trial, Westfall told Inman that the State had an "airtight case" against Applicant, that it "was apparent that Applicant was guilty," and that he would start working on the punishment phase of the trial because there was "nothing Applicant 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 Applicant in jail only four times, and each time Westfall did not spend more than a few moments with Applicant. (EXHIBIT 5).

12 Shortly before trial, Westfall contacted Inman to inform her that he had hired Dr. Johnstone to examine Applicant 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 Applicant, despite the fact that Westfall originally quoted a total fee of \$15,000. (EXHIBIT 5).

13 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 Applicant 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).

14 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 Applicant would plead guilty. (EXHIBIT 5). Westfall told Inman that by pleading guilty, Applicant 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).

15 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 Applicant'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).

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

and the way Paxil affected Applicant. (R. III, p. 15-21). During this argument, Minick refers to a "Ph.D.-type psychologist" who "diagnoses (Applicant) as ADD/ADHD," and a "D.O. psychiatrist" who "diagnoses (Applicant) as having depression and puts him on Paxil..." (R. III, p. 15). Minick then states that "Applicant's mother was trying to figure out a way to get the Paxil paid for because (Applicant) 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 Applicant's problems with his girlfriend, especially Applicant's paranoia regarding his girlfriend's infidelity. (R. III, p. 18). Minick then states "Saturday about 3:00 a.m. is when (Applicant) 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).

17 Minick closed the opening argument by stating "(Applicant) was out of his mind. Now (Applicant) 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).

18 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.

19 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.

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

21 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).

22 When Westfall asked Melissa Adams questions regarding her past, about Applicant's father, and about her past relationships with other men. (R. IV, 9-24). Then Westfall questioned Adams about Applicant's mental deficiencies, use of marijuana, general demeanor since childhood, and other events that happened during Applicant's childhood. (R. IV, 24-38). Adams also testified that when Applicant wanted to write a check, she (Adams) usually completed the checks and Applicant 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).

23 Adams testified that when Applicant was 18 years of age, she took Applicant 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 Applicant'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 Applicant, and that she gave Applicant Paxil from the supply of her husband. (R. IV, 46-47).

24 Then Adams testified that when Applicant learned that Applicant's girlfriend, Tiffani Phillips, may have been unfaithful to Applicant, Applicant 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 Applicant'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 Applicant's arrest, the State successfully objected to hearsay. (R. IV, 70-71).

25 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).

26 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).

27 Dr. Johnstone testified that after examining Applicant and reviewing his records, it was his opinion that Applicant 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 Applicant began using Paxil, Applicant 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).

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127). Johnstone testified to Applicant'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.

28 On cross-examination, Johnstone testified that he had met with Applicant one time for about 20 minutes. (R. IV, 129). Johnstone admitted that he received information regarding Applicant'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 Applicant started using Paxil, and that during the 20 minutes he met with Applicant, he did not perform any testing and did not take any notes. (R. IV, 130, 131).

29 In the presence of the jury, Johnstone testified that Dr. Warren found that Applicant had ADHD and that Applicant's full scale IQ is 84, plus or minus 5 points. (R. IV, 164). Johnstone concluded that based upon the available information, Applicant 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 Applicant was not in a hypomanic state in jail was that Applicant was in a tightly controlled environment, which eliminates most stimuli that may induce the hypomanic state. (R. IV, 181-182).

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

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2. Applicable Law

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

2 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).

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

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

5 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. *Yasquez 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

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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).

6 In *Flores v. State*, the trial counsel arranged to have a private investigator to investigate a case. 576 S.W.2d 632, 633. Three months later, after receiving nothing from the investigator, the trial counsel requested a complete written report from the investigator. *Id.* at 633. Trial counsel received no response from the investigator. *Id.* at 633. Trial counsel again asked the investigator for a written report, was again promised one, but received nothing. *Id.* at 633. Later, the trial counsel testified under oath that he had not conducted a factual investigation, had not spoken to any witnesses, and had not previously brought to the trial court's attention the lack of cooperation on the part of the appointed investigator. *Id.* at 633.

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

3. Application

1 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 Applicant (EXHIBIT 1). During these meetings, Westfall never discussed the facts of the case or the law with Applicant. (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 Applicant for almost six months. (EXHIBIT 1). Applicant did not know the status of his case, and could not understand why Westfall entered a plea of guilty on his behalf.

2 Westfall failed to investigate the facts of the case and utterly failed to prepare his witnesses. This conclusion is ascertained from the trial record and the attached Affidavits: one psychiatrist, Mary Connell, was not subpoenaed by Westfall. Another, Edwin Johnstone, spoke to Applicant for 20 minutes. (R. IV, 129). In fact, Westfall failed to prepare Johnstone both for the investigation and for trial. Westfall did not even ask Johnstone to prepare a formal report regarding Applicant's case. (R. IV, 186). Johnstone received information as to Applicant's use of Paxil from another party, yet could not identify the party. (R. IV, 189-190). Johnstone also was not sure when Applicant started using Paxil. (R. IV, 188-189).

3 Westfall met with Paula Adams-Thomas for a total of 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 was 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).

4 The few instances in which Westfall may have attempted to conduct an actual investigation were delegated to a private investigator and Applicant'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 issue will be discussed at greater length later in this brief, but there is no evidence that Westfall ever disclosed this fact to Applicant or to the Court.

5 Then, Westfall had Melissa Adams contact various entities, including the Texas Rehabilitation Commission, Crowley School District, Wells Fargo Bank, Fort Worth City Credit Union, and various doctors who examined and diagnosed Applicant. Several months before Applicant's trial, Westfall asked Adams whether she knew the location of where Applicant and his friends met on the night of the incident that led to his trial, and asked Adams to take photographs. (EXHIBIT 4). In short, Westfall 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 the shooting, Westfall asked Adams to accompany him to the same locations, where Westfall spent approximately 10 minutes at each location taking pictures. (EXHIBIT 4).

6 Applicant, Applicant's mother, Adams, and Applicant'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 "alright" case against Applicant and that it was apparent that Applicant was guilty, Westfall did not discuss the case with Applicant 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 Applicant'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).

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

guilty plea without informing Ms. Adams.

8 Westfall also told Inman that she would be a very important witness in Applicant'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 Applicant's case. (EXHIBIT 5). Westfall also told Inman that he had not had the chance to speak to Applicant but he intended to do so. (EXHIBIT 5).

9 When Inman spoke to Westfall about Applicant's use of Paxil, Westfall dismissed using Applicant's mental condition as a defense, telling Inman that "no jury in Texas would ever entertain the idea of Applicant's mental condition as a defense." (EXHIBIT 5). However, Westfall presented just such a defense by presenting Dr. Johnstone's testimony. Yet, Westfall failed to prepare Johnstone. Despite testifying that Applicant has various psychiatric problems, (R. IV, 125-128), Johnstone met with Applicant one time for about 20 minutes. He received information as to Applicant's use of Paxil from another party, but could not identify the party. (R. IV, 129-131). Johnstone was not sure when Applicant started using Paxil. (R. IV, 130). It is evident that Westfall failed to give Johnstone any important information regarding Applicant and failed to discuss with Johnstone the testimony that was to be offered during trial.

10 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 Applicant's only chance. (EXHIBIT 5). Westfall did not ascertain that Johnstone's testimony was not as he hoped during trial, which is not the best time to determine such facts. Clearly, Westfall did not prepare Dr. Johnstone as Westfall had no idea what Johnstone was going to say during testimony.

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 (Applicant) 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). Applicant was never charged the shooting near Granbury, and little evidence was presented that connected Applicant with the shooting.

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

Applicant'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 Tiffani is his failure to prepare Tiffani for testimony.

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

Westfall's trial strategy seems to have been to plead Applicant guilty to the charges, then present mitigating evidence to the jury in order to attain a favorable sentence. However, Westfall did not investigate the case and presented very little evidence. He failed to prepare any of the defense witnesses, including the expert, Dr. Johnstone. He did not even bother to ask Dr. Johnstone to prepare a report of his meeting with Applicant. He did not subpoena any of the other specialists who evaluated Applicant. He asked very few relevant questions of the trial witnesses. Without the

consent of Applicant or Applicant's family, he had an inexperienced attorney give the opening statement, during which the attorney made several misstatements of fact and stated that Applicant committed a shooting for which Applicant was never charged. Finally, he did not disclose to Applicant that at least one of the State witnesses was 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 Applicant to such a harsh sentence. Had Westfall properly investigated the case, he may have found additional evidence that may have completely changed the outcome of the case or at least the trial tactic.

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In fact, based upon the types of questions he asked witnesses, his failure to conduct any meaningful cross examination, and his obvious failure to prepare for the trial, Westfall's performance during the trial is a prima facie case of ineffective assistance of counsel.

4. Conclusion

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 Applicant. Westfall never discussed the facts of the case or the law with Applicant. During one period of time, Westfall did not visit with Applicant for almost six months. As a result, Applicant 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 Applicant'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 Applicant 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. Applicant only speculates as to what Westfall's trial strategy was.

As a result, the standards of *Strickland v. Washington* have been met: Applicant 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, Applicant should be granted relief and the conviction should be vacated.

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

1. Facts

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

One month later, Westfall again met with Applicant. (EXHIBIT 1). Westfall brought with him Dr. Mary Connell, who met with Applicant briefly. (EXHIBIT 1). Westfall did not speak with Applicant. (EXHIBIT 1).

Later that month, Applicant 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 Applicant could make important decisions for himself. (EXHIBIT 4). Westfall was fully aware of the General Power of Attorney because the notary who notarized the document, Michelle Pitt, was an employee of Westfall. (EXHIBIT 4).

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

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

One week later Westfall took Dr. Johnstone to meet with Applicant. (EXHIBIT 1). Johnstone spoke to Applicant for approximately 20 minutes. (R. IV, 129). Westfall did not speak to Applicant. (EXHIBIT 1).

Westfall visited Applicant right before trial and told Applicant that he (Westfall) worked a deal with the prosecutors such that Applicant is to plead guilty to two counts of aggravated robbery. (EXHIBIT 1). Westfall told Applicant that by pleading guilty, he would receive probation. (EXHIBIT 1). Westfall told the same to Gail Inman. (EXHIBIT 5). However, Westfall did not tell Applicant what the penalty range is for aggravated robbery. (EXHIBIT 1). In fact, Westfall did not discuss the facts or the law with Applicant at all. (EXHIBIT 1). In addition,

Applicant would never have agreed to the plea had he known that he may not receive probation.

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

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

2. Applicable Law

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

The Supreme Court has held that when a defendant is represented by counsel during the plea process and enters his or her plea on the advice of counsel, he or she may attack the voluntary and intelligent character of the plea by showing that the advice of counsel was not within the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). In *Hill v. Lockhart*, a state prisoner filed a federal habeas corpus 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. Applicant 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. Applicant further asserted that his trial counsel failed to investigate the status of his prior convictions, and instead relied on representations by the prosecutor that the defendant had been twice previously convicted of felony offenses and that the first of those offenses had become final prior to the commission of and conviction for the second offense. *Id.* at 286. In fact, the two prior convictions against the defendant became final on the same day. *Id.* at 286. Finally, the defendant asserted that he would not have agreed to plead guilty had he not been afraid that to do otherwise would have resulted in a minimum sentence of at least twenty-five years. *Id.* at 286.

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

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

In *Ex parte Gallegos*, Applicant 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). Applicant'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 Applicant 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.* Applicant filed an application for writ of habeas corpus, claiming that he was denied ineffective assistance of counsel. *Id.* The court granted the writ. *Id.*

3. Application

If ever was a case proper for reversal based upon a guilty plea not entered into knowingly and voluntarily, it is the case at hand. Between February 2002 and December 2002, Westfall met with Applicant for a total of ten minutes and never discussed the case with Applicant. (EXHIBIT 1). Applicant 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 Applicant 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 Applicant and told Applicant that he (Westfall) worked a deal with the prosecutors such that Applicant will plead guilty to two counts of aggravated robbery. (EXHIBIT 1). Westfall told Applicant that by pleading guilty, he would receive probation. (EXHIBIT 1). Westfall told the same to Gail Inman (EXHIBIT 5). However, Westfall never explained to Applicant what the penalty range is for aggravated robbery. (EXHIBIT 1). Despite knowing that Applicant could not make important decisions for himself, Westfall never told Applicant's mother, Melissa Adams, of the guilty plea. (EXHIBIT 4). In addition, Applicant would never have agreed to plead guilty had he known that he may not receive

amount of time in order to tell Applicant the elements of aggravated Robbery. In fact, Westfall never told Applicant anything regarding the case.

4. Conclusion

Applicant'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 Applicant, did not explain the consequences of the plea to Applicant or his family, entered a plea of guilty although Westfall knew that Applicant could not enter such a plea, promised Applicant that he would receive probation if he plead guilty, and because Applicant 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 Applicant 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, Applicant should be granted relief and the conviction should be vacated.

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

1. Facts

The defense sent a private investigator to speak with one of the alleged victims, Andrew Horvath. However, prior to the defense investigator arriving, Horvath and his mother, Rosie

probation. Applicant's family also would have never agreed to such plea.

Despite the facts stated above, the most glaring fact of Applicant not pleading guilty knowingly and voluntarily took place on December 10, 2002, when Westfall told Applicant that while the judge spoke to Applicant, Applicant 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). Applicant 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 Applicant did not understand the consequences of his plea. In fact, because of Applicant's state of mind and Westfall's failure to tell Applicant anything about the case, Applicant 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 Applicant without telling Applicant or his family about the consequences of doing so. Westfall told Applicant and Applicant's grandmother that Applicant 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 Applicant 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, Applicant'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 Applicant for a total of ten minutes, and using Westfall's own words, simply threw Applicant at the mercy of the court. Applicant could not have known what aggravated robbery is because Westfall never spoke to Applicant for a sufficient

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). It is unknown, yet doubtful, that the State disclosed this fact to the defense. Westfall never disclosed this fact to Applicant or the court. At the time of the filing of this Application and Brief, it is unknown whether the State similarly instructed other witnesses.

2. Applicable Law

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 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.*

3. Application

The Tarrant County District Attorney's office act of instructing Andrew Horvath and his mother 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 Applicant. 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 enough due to his failure to investigate the case and prepare witnesses. The District Attorney's office further violated Applicant's constitutional rights by intimidating witnesses the one apparent time that Westfall attempted to meet his obligation of investigating the case.

4. Conclusion

The Tarrant County District Attorney's office violated Applicant's constitutional rights by instructing Andrew Horvath and his mother to not speak to any other investigators or lawyers. This instruction is an act of intimidation that should not be tolerated by the Court. To date, only Andrew Horvath's mother has agreed to come forward and expose the actions of the Tarrant County District Attorney's office. As a result, Applicant should be granted relief and the conviction should be vacated.

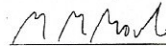
V. CONCLUSION

The evidence in this case clearly establishes that Applicant was denied the effective assistance of counsel. Further, the evidence clearly establishes that Applicant 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. Finally, prior to trial, the State intimidated a witness from speaking to the defense. As a result, Applicant's constitutional rights have been violated, and Applicant has been illegally confined for the past four years. Therefore, Applicant prays that he be granted relief and the conviction in this case be vacated. In the alternative, Applicant prays that an evidentiary hearing be held such that Applicant may present testimonial evidence supporting this Application for Writ of Habeas Corpus.

EXHIBIT 1

Respectfully Submitted,

M. Michael Mowla, PLLC


By: M. Michael Mowla

1318 South Main Street Suite 103B
Duncanville, TX 75137
Phone: 972-283-2600
Fax: 972-283-2601
Texas Bar # 24048680
Attorney for Applicant

VI. CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Memorandum in Support of Application for Writ of Habeas Corpus was delivered on this the 1st day of November, 2006 by hand delivery to the Criminal District Attorney of Tarrant County, Texas, 401 W. Belknap Street, Fort Worth, Texas 76196.

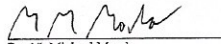

By: M. Michael Mowla
Attorney for Applicant

EXHIBIT 1

AFFIDAVIT

STATE OF TEXAS,

COUNTY OF WILCOX

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 TARRANT

VERIFICATION

This Affidavit was acknowledged before me on 11 April, 2006

by BARTON RAY GAINES.

Barton Ray Gaines
(signature of Affiant)

Notary Public in and for
The State of Texas

11 April 2006 [date]

David W. Johnson [signature]

[SEAL]

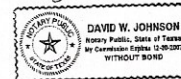


EXHIBIT 2

AFFIDAVIT

STATE OF TEXAS,

COUNTY OF TARRANT

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

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

COUNTY OF TARRANT

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) VERIFICATION
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by PAULA ADAMS-THOMAS.

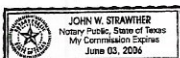
Paul Adams-Shuman
[signature of Affiant]

Notary Public in and for
The State of Texas

4-24-06 [date]

John W. Swanner [signature]

[SEAL]



AFFIDAVIT OF PAULA ADAMS-THOMAS
Page 2 of 2

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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

AFFIDAVIT OF TIFFANI BROOKS
Page 1 of 2

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STATE OF TEXAS
COUNTY OF TARRANT

) VERIFICATION
)
)

by TIFFANI BROOKS.

[signature of Affiant]

Notary Public in and for
The State of Texas

April 5, 2006 [date]

Paul Hines [signature]

[SEAL]



AFFIDAVIT OF TIFFANI BROOKS
Page 2 of 2

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EXHIBIT 4

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EXHIBIT 4

AFFIDAVIT

STATE OF TEXAS,
COUNTY OF DALLAS

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

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

AFFIDAVIT OF MELISSA ADAMS
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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 led 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, and 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. I was effectively put out to pasture
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

AFFIDAVIT OF MELISSA ADAMS
Page 2 of 5

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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 party) 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

AFFIDAVIT OF MELISSA ADAMS
Page 3 of 5

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

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

STATE OF TEXAS

COUNTY OF Dallas

VERIFICATION

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

by MELISSA ADAMS.

Melissa Adams
[signature of Affiant]

Notary Public in and for
The State of Texas

4 APRIL 2006 [date]

AKK [signature]

(SEAL)

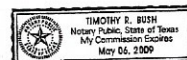
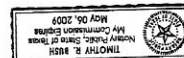


EXHIBIT 5

STATE OF TEXAS,

COUNTY OF YOUNG

AFFIDAVIT

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.

EXHIBIT 5

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 } VERIFICATION
}

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]

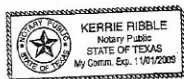


EXHIBIT 6

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,
Bentbrook, 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.

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EXHIBIT 7

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

Dated: 3-20-02

Barton Gaines
BARTON RAY GAINES, JR.

Witness

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



Notary

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EXHIBIT 7

AFFIDAVIT

STATE OF TEXAS,
COUNTY OF TARRANT

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

1. I am ROSIE HORVATH.
2. I reside in Fort Worth, Texas.
3. I have personal knowledge of the facts stated in this affidavit.
4. My son, Andrew Horvath, was a victim in an attempted robbery that occurred on or
about February 21, 2002 in 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.

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STATE OF TEXAS

COUNTY OF Tarrant

VERIFICATION

This Affidavit was acknowledged before me on June 22, 2006

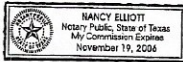
by ROSIE HORVATH.

Rosie Horvath
[signature of Affiant]

Notary Public in and for
The State of Texas

June 22, 2006 [date]

Rosie Horvath [signature]
Nancy Elliott [signature]



AFFIDAVIT OF ROSIE HORVATH
Page 2 of 2

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

NO. C-213-007907-0836979-A

NOV 20 2006

TIME 8:55
DEPUTY

EX PARTE

IN THE 213th JUDICIAL DISTRICT

DISTRICT COURT OF

BARTON RAY GAINES

TARRANT COUNTY, TEXAS

MEMORANDUM

The applicant, BARTON RAY GAINES ("Applicant"), alleges that he received ineffective assistance of trial counsel and that his plea was not voluntarily or knowingly given. To determine the merits of these claims, an affidavit will be ordered from Applicant's trial counsel, Hon. Greg Westfall and Hon. Cheyenne Minick, addressing Applicant's allegations.

ORDER

1. Applicant's application is **DESIGNATED** for future resolution.
2. An affidavit is **ORDERED** from Hon. Greg Westfall and Hon. Cheyenne Minick concerning Applicant's allegations of ineffective assistance of trial counsel in cause number 0836979A. The affidavits shall discuss counsel's representation of Applicant in addition to addressing Applicant's specific claims.
3. Mr. Westfall and Mr. Minick shall submit an original and three copies of his affidavit to the post-conviction writ clerk by January 5, 2007. The clerk shall then mail a copy of the affidavits to Applicant and forward a copy of the affidavit to the appellate section of the Tarrant County Criminal District Attorney's Office.
4. The clerk of the court is ordered to send a copy of this order 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 (or Applicant's current address) and to send a copy of this order to the appellate section of the District Attorney's Office.

SIGNED AND ENTERED this the 16 day of Nov, 2006.

Thomas A. Wilder
JUDGE PRESIDING

A CERTIFIED COPY

ATTEST: 9-26-16
THOMAS A. WILDER
DISTRICT CLERK
TARRANT COUNTY, TEXAS
BY: Michael J. Hollen
DEPUTY

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