

CAUSE NOS. C-213-007907-0836979-A; C-213-007908-0836985-A

EX PARTE BARTON RAY GAINES

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IN THE 213TH DISTRICT COURT
OF TARRANT COUNTY, TEXAS

AFFIDAVIT OF GREG WESTFALL

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

STATE OF TEXAS §
COUNTY OF TARRANT §

JAN - 4 2007

Time 5:42
By [Signature] Deputy

BEFORE ME, the undersigned Notary, personally appeared Greg Westfall, who, after being given an oath by me to tell the truth, stated as follows:

My name is Greg Westfall, and I am one of the attorneys referenced in the above causes. From an organizational standpoint, I will address the allegations in the "Facts" sections of the brief and then I will address any remaining allegations in the affidavits attached to the brief. In many cases, I will address the allegations one by one. Where the allegations are redundant, in several instances I only address them the first time they come up and do not reaffirm my answers throughout. On other subjects, such as the power of attorney and the alleged promise of probation, I address the matter several times in the different contexts in which the allegation is raised.

Preliminarily, it should be noted that on August 8, 2005, I provided to Melissa Adams an approximately 10 inch stack of records that constituted Barton Gaines' file. In that file were all of the exhibits attached to this affidavit, as well as all the records collected in this case, all the subpoenas issued in this case and notes of interviews with witnesses. I would assume that the attorney who signed the writ, M. Michael Mowla, had access to and reviewed those materials prior to filing this writ. Some of the writ's central allegations, however, such as the allegation that I never spoke with Gail Inman or Melissa Adams about the case, are directly contradicted by those records.

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BRIEF IN SUPPORT OF
APPLICATION FOR WRIT OF HABEAS CORPUS

Brief, Page 20, lines 1-4:

Westfall spent a total of 10 minutes with client in four meetings and never discussed the facts and law. One time Westfall did not visit for six months.

I am not sure how many times I visited Gaines in the jail, but I know that even in the four meetings claimed, I spent more than 10 minutes. The allegation works out to 2 ½ minutes per visit. At least one of those visits was in Mansfield. He also called on the phone and wrote letters. As to not discussing the facts and law, that is false. I discussed the facts with him. I discussed the law with him especially in connection with his guilty plea. There may have been a six month period where I did not visit Gaines in jail, but there was never a six month period where I needed to visit with him and did not.

Brief, Page 20, lines 5-7: *Mary Connell & Ed Johnstone.*

During the first interview with Gaines' mother (Melissa) and stepfather (Cory) they stressed Gaines' mental condition. I engaged Dr. Connell on March 4, 2002 to examine Gaines for competence, etc. See Exhibit 1. Dr. Connell called me after her visit with Gaines and said that, in her opinion, he was frankly anti-social. Her verbal report was horrible for us, so I never had her boil it down to writing. Calling her to the stand in front of the jury would have been suicidal.

Dr. Johnstone had done a lot of research into the effects of a class of psychotropic medications called selective serotonin re-uptake inhibitors (SSRI), of which Paxil is one. That is why he was brought into the case. I assume that he interviewed Gaines for as long as he, in his professional opinion, felt like he needed to. I did not tell him how long to interview Gaines. Had also had access to all the psych and medical records I had, except for Dr. Connell's records.

Brief, Page 20, lines 8-11: *Horvaths being told not to talk to me.*

I have no knowledge of the Horvaths telling my investigator this. If they did, he did not pass that along to me.

Brief, Page 20, second paragraph: *Westfall having Gaines plead guilty without his permission and promising he would get probation.*

I fully explained the guilty plea to Gaines before I approached the DA about doing it. Gaines was charged in two cases with attempted capital murder. He had an extraneous offense which amounted to another attempted murder or aggravated assault case. In the cases which went to trial, Gaines had shot two guys in the back with a shotgun during a robbery springing out of a marijuana deal. A Wal-Mart store video from minutes before the shooting shows Gaines purchasing the double-aught buck shells to load into his shotgun. He is pointing out the shells he needs and then finally goes behind the counter and retrieves them, purchases them from the clerk and the leaves. He then shoots the guys in the back as they are running away out by a stock tank.

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logically impossible

on some fairly remote property in south Fort Worth. There was all kinds of evidence that the marijuana sale was a put-up just to get in a position to rob the two young men. In the extraneous, Gaines is parked along side a highway late at night flashing his lights at oncoming motorists as though he needed assistance. Finally a car stops - it is a volunteer fire fighter and some friends in a car. When they pull up, Gaines jumps out of the bed of his pickup with a Chinese SKS (the Chinese version of the Russian AK-47 assault weapon). The car takes off and Gaines shoots at it. The bullet goes through the trunk and hits the back seat passenger in the back. Miraculously, the bullet stops and just drops down the seat.

Attempted Capital Murder requires an intent to kill. I think the video from Wal-Mart would have provided that. I did not want the jury to have just made a finding of an intent to kill and then start the punishment phase. I spoke with Gaines about pleading guilty to aggravated robbery if the state would waive the attempted capital and then we go open to the jury. I figured the chances of a conviction were 100%, whether attempted capital murder or aggravated robbery.

In addition, the "Paxil defense," which we were going to use, would not apply during the guilt/innocence phase to either attempted capital murder or aggravated robbery. The "Paxil defense" did not negate the intent to kill, it only went to explain it. Thus, our psych evidence would have been inadmissible at guilt or innocence in any event. Thus, it made a lot of sense to first admit responsibility (while taking "intent to kill" out of the equation) and then float the "Paxil defense" during punishment. I not only talked with Gaines about this, I also had a conference with Melissa and Gail at my office and they agreed also. The DA then agreed.

Another consideration was getting the state to try both the pending cases at once. They had the option to try only one of the cases and hold the other one back for another trial if the first trial did not go as well as they hoped. This is a common tactic where there are multiple cases. With the plea, we were able to get both cases tried together.

The state's offer was 40 years. The state's offer never, ever came down from 40 years. I never guaranteed Gaines of probation. Quite the opposite.

Page 20, last paragraph: Paula Adams-Thomas.

I believe she was one of Cheyenne Minick's witnesses. Therefore, I would not have prepared her much at all to testify. I did speak to her on the phone and Adams and/or Inman gave us background on her and what we could anticipate she could testify to. As I recall, her testimony was pretty good, so the amount of preparation she had must have been about right.

If by commensurate with her role Westfall means the charge error, then yes, he had that figured out enough to pull it off

Page 21, paragraph 1: *Tiffany Brooks*

I did meet with Ms Brooks one time - at my office, during preparation for trial. I had also spoken to her more than once on the phone. We met for a time commensurate with her role as the defense. The reason I asked her the highlighted question is because the state had successfully objected to the hearsay I was trying to elicit from her.

Page 21, paragraph 2: *Gaines' medical & psych records, etc.*

Melissa Adams and I got together and came up with a list of persons and entities we needed records from. Some were obtained with a subpoena, some were obtained with a release from Gaines. We talked about this and she never voiced any complaints and in fact offered to do it. If we get records via subpoena, the subpoena is public record. The DA knows all the subpoenas we have out and we know about all of theirs. If we get records via a release, then the DA never knows, which is handy if we are talking about the kinds of records we were getting here and the use we had for them (e.g. psychiatrist with a novel defense). Melissa knew all this because I explained it all to her. Just before trial, I did subpoena all the providers to get the records in admissible form and a good number of the records went into evidence.

Page 21, paragraph 3: *Going to the scene*

I do remember Adams photographing the scene. I do not recall asking her to do so. She and I together went to all the scenes during preparation for trial. I did some other crime scene work, such as retracing the driving route and going to an apartment complex that figured into the story. I cannot recall whether Adams was with me or not.

Page 21-22, continuation of paragraph 3: *Conversations, interviews, phone calls, etc., with Adams and Inman*

I extensively interviewed Adams and extensively interviewed Inman. I needed to get the full story (to the extent possible) of how Gaines grew up and I needed to know how Adams grew up as well. You can't tell the child's life story without telling the parent's. Gaines' childhood contained some trauma (father killed) and some neglect, as Adams was young when she had Gaines and had not really been prepared by Inman for motherhood. Between Adams, Gaines' friends, and his records, we attempted to paint a picture of his childhood and his mental condition throughout. The fact is, he has low average intelligence and did not do well in school, probably because of ADHD that went undiagnosed and untreated for years and years. He was first treated within two years that the incidents occurred. I prepared her to testify and she did testify. Inman did not testify. See Exhibits 3, 4, 5 & 6, all of which came from information received from Adams and Inman, among other sources.

Page 22, continuation: *Adams attempted to contact Westfall on many occasions and he did not return her phone calls.*

False.

Page 22, continuation: *"Air-tight case," mercy of jury, etc.*

I never misrepresented the status of Gaines' case to either him or his mother or grandmother. His case was tough. The State's 40-year best offer is a testament to that. The brief has "airtight" in quotes. I never said that, just as I never said, "throw himself at the mercy of the jury." These are not terms that I use. I always told them it was a tough case. Both of them, but particularly Inman, seemed to think that ADHD should be a defense to attempted capital murder and both always portrayed Gaines to be a lot more disturbed and mentally retarded than he ever appeared to me face-to-face. I also had him seen by two different mental health professionals and he was continuously treated by mental health personnel in the jail. Never was there a question about competency, mental retardation, etc. These facts also figured in to how good the state's case was.

Page 22, second paragraph: *"Westfall used Gail Inman to get a continuance."*

Gail Inman suffered cancer and had a radical mastectomy and was undergoing chemotherapy. I requested a continuance so she could finish her chemo and be truly available if we needed to use her for a witness at trial, which at that time, I thought we would. Ultimately we did not, but she was at least able to sit through the trial, which was because the continuance gave her time to get her health back. She attended the entire trial. See Exhibit 8, which is the actual motion for continuance, along with the letter from the oncologist.

Page 22, second paragraph: *Westfall used the continuance to make a music CD.*

I did make a CD. The release date was December 1, 2003, almost exactly a year after this trial. At the time of the trial, I had not even thought about making a CD.

Page 22, third paragraph: *Adams and Westfall never discussed Gaines' mental condition.*

False. We discussed it extensively. See Exhibits 3-6.

Westfall agreed that Gaines was unable to make important decisions.

False. I never agreed to that and in fact I never believed

that. Further, neither Cornell nor Johnstone ever said that.

Power-of-Attorney.

We did a power of attorney for Adams. Gaines signed it. It was made initially to facilitate Adams being able to attend to Gaines' personal and financial matters because he was in jail. In addition, Gaines had a trust fund that both Adams and Inman wanted to get to so that they could defray the costs of defense.

Adams specifically told Westfall that under no circumstances was he to enter a guilty plea on behalf of applicant without first informing Adams and he agreed.

False. She never said this. Besides, it is not her decision, but the defendant's. Further, Adams, Inman and Westfall did discuss the guilty plea at length before he did it. Gaines did the guilty plea in open court at his trial and everyone was there. It was an open plea to the jury.

Page 22, last paragraph, continuing to Page 23: *Inman's cancer and the continuance.*

The continuance has already been addressed. I did ask for and receive a letter from Inman's oncologist to attach to the motion for continuance I filed. See Exhibit 8. She did say that she had to wear a wig and was taking anti-nausea medication while she went through chemotherapy. Those were reasons for a continuance. She did have to come to court and she was released. The judge granted the continuance. In other words, it worked, right?

Page 23, first full paragraph: *Preparations on the case; Paxil defense.*

Exhibit 1 contains my engagement letter with Dr. Mary Connell and reflects that I engaged her on March 4, 2002. This was within a week of Gaines' arrest, as I recall. In fact, Gaines' affidavit states that I came to Mansfield to see him the day after he was arrested. We used the Paxil defense. Gaines' mental condition was the cornerstone of our defense.

Page 23, last paragraph: *Dr. Johnstone; my fee.*

See Exhibit 2, which is an accounting of the hours and fee of Dr. Johnstone. I made periodic payments to him out of my trust account as he spent time on the case. My fee was

And God said, "Let there be light"; and there was light. So, Westfall says let there be guilt and there was guilt, all without any explanation thereto. The basic premise is accepted. And, Jesus cried out, "Why have you forsaken me?"

have made no sense to try to show there was a reasonable doubt that he shot these guys. Not only would that have failed, it would have cut against the whole reason we pled guilty in the first place, which was personal responsibility.

Pages 26-28: *Various excerpts of testimony.*

The trial record will show the testimony.

Page 38 (Facts), paras 1 & 2: *Mary Connell.*

Exhibit 1 reflects that Dr. Connell visited Gaines May 3, 2002. I do not recall why there was a delay between her engagement and her visit with Gaines. Dr. Connell's assessment has already been discussed.

True, I would've never let him Hussy me out of it, had I been. And he's lucky my grandma was sick with cancer, or else she wouldn't have either. He took full advantage of an inopportune time for me.

Page 39, first para: *Power of attorney.*

I drafted the power of attorney, so I am very familiar with it. It is the same one I give any family of a client who is incarcerated so that they can withdraw money out of the inmate's accounts, if needed, pay bills, get utilities turned on or off. In this case, Adams (and Inman) wanted the power of attorney so they could withdraw money from Gaines' trust fund and draw money out of his bank account. They also needed it to sell his pickup truck once they got it back from the county, which had initially seized the truck in a forfeiture proceeding. Gaines obviously signed the power of attorney and Adams apparently does not question his competency to do that. Giving Adams and Inman unfettered access to his trust fund would be exactly the type of "important decision" that Adams now believes Gaines was not competent to make.

Page 39, para 3: *Cheyenne Minick.*

Cheyenne Minick is a young local attorney who I had known, as a lawyer, for probably a couple years at the time of this trial. I asked Cheyenne if he wanted to try this case with me and he said yes. We worked together quite a bit to get the case ready for trial, but his involvement was limited to directing a couple of witnesses at trial. I did not pay Cheyenne, he volunteered to be my co-counsel.

Page 39, para 3: *Never discussed the case with Gaines.*

what made it so fairly apparent early on that I was not going to testify?

This is false, I did discuss the case with Gaines. I did not prepare Gaines to testify, because it was more than apparent fairly early on that Gaines was not going to testify. I therefore spent a lot more time with Adams and Inman, but I spent as much time as I needed to spend with Gaines. Adams and Inman were my main historians for the punishment case.

Page 39, para 4: *Guaranteed probation.*

I did not tell Gaines, Inman, or anyone else that Gaines would get probation. The state's offer is a good indication that probation was a long shot.

Page 40, first full paragraph: *The Plea proceeding.*

This is completely false. First of all, it didn't happen. Secondly, if the judge had seen Gaines and Cheyenne having this interaction, he would not have accepted the plea. Gaines understood what he was doing. It was also done in open court, so it was no secret.

II.

THE AFFIDAVITS

BARTON GAINES AFFIDAVIT (EXHIBIT 1)

Para. 11: I do not know about any armband on Gaines' arm.

Para. 14-18: This has already been discussed, but I would not go to the Tarrant County Jail, let alone the Mansfield Law Enforcement Center, to just say a couple of words and then leave. These statements are simply not true.

Para. 21: Not only did I tell him the range of punishment, so did the judge.

TIFFANI BROOKS AFFIDAVIT (EXHIBIT 3)

Paras. 7, 15-16: I am certain that Ms Brooks testified to this at trial. I prepared Ms Brooks to testify and she did testify.

MELISSA ADAMS AFFIDAVIT (EXHIBIT 4)

Para. 15: This is false. I kept both Inman and Adams informed about the case. While I do not specifically recall doing so, I probably did encourage them to not speak with Gaines about the facts of the case, as such conversations are not privileged.

Para. 16: Aside from the fact that this is simply false, neither Melissa Adams nor - in

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particular - Gail Inman would have let me get away with either not speaking to them on the phone or just saying the DA has an airtight case and nothing more.

- Para. 17: This is true. And the fact that they actually upped Gaines' Paxil dosage once he got to jail was a major problem with our defense, since Gaines had been well-behaved in jail.
- Para. 22: I never said Melissa and I were smoking a dooby and getting high or anything even remotely close to it. This is false.
- Para. 24: I always advise family to not come when we are picking a jury, since all the seats in the gallery of the courtroom are taken with venirepersons. Cheyenne did not pick the jury - I did.
- Para. 27: Between June, 1999 and September, 2003, I did not try a death penalty case. I was not preparing a death penalty case in 2002.

GAIL INMAN AFFIDAVIT (EXHIBIT 5)

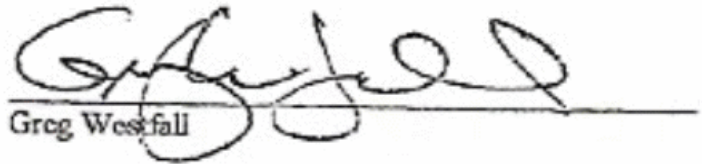
- Para. 9: To my knowledge, Inman's chemotherapy treatment was over by the time of trial. She attended the entire trial.
- Para. 11: I did not tell Inman to pay Dr. Connell directly. See Exhibit 1. In fact, I paid Dr. Connell and she sent her bills to me. Further, as mentioned earlier, Dr. Connell's diagnosis was quite adverse to our case, so I did not request a written report. Dr. Connell's billing statement is attached as part of Exhibit 1. There is no charge for a written report.
- Paras. 14-16: I do not recall this conversation, except that I do remember asking for a letter from Inman's oncologist substantiating her condition and that we discussed her condition, including that she had lost her hair and was taking anti-nausea drugs because of the chemotherapy. I do not remember whether Inman wore her wig to court on that day or not, but I feel certain that she did not throw up in the courtroom. On the issue of Inman being an important witness, Inman considered herself a critical witness in the trial. At the time, based upon what she had been telling me, I believed she would be an important witness. I ultimately decided not to use her at trial for a number of reasons. This decision was made virtually on the eve of trial. The actual motion for continuance is attached hereto as Exhibit 8.

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- Para. 24: Attached as Exhibit 2 is a hand-written billing statement from Dr. Johnstone. That statement reflects that Johnstone began work on this case October 17, 2002, approximately two months prior to trial. Communication with Johnstone was obviously begun even before October 17. I did not hire Johnstone without Inman's knowledge. She paid for him and had to get the money to me so I could send it to Johnstone along with the records. Johnstone testified at trial. Incidentally, it was no small feat finding a doctor who was willing to testify that Paxil had anything to do with these offenses. I had consulted one local psychiatrist (Cathal Grant, MD) as well as a local psychologist and both refused to even consider such a theory. Johnstone had been doing work on civil cases against the drug companies who made SSRIs. I located him through a civil lawyer friend of mine in Houston.
- Para. 27: This is false. Inman and Adams met with me substantially more than two times.
- Paras 29-31: The reasoning and discussions that went into the plea of guilty have already been discussed. I did not represent to Adams that Gaines would get probation, just as I never represented that to him.
- Para. 32: It is a continuing theme in this writ that I never discussed Gaines' case with Inman or Adams. Attached as Exhibit 3 is a timeline I constructed of Gaines' life. Exhibit 4 is the PowerPoint presentation I used to convey that timeline to the jury. Exhibit 5 is the photographs of Gaines I asked for and received from Adams. The information in these materials came from both women as well as the numerous records we collected. The originals of the photos were given back to Adams after the trial was finished. Attached as Exhibit 6 is the outline of Adams' direct testimony. This was also provided to her on August 5, 2005 along with all the attorneys' notes.
- Para. 33: I am sure I said to not come during jury selection, as there would be no place to sit. I am equally sure I did not instruct the entire family to not attend opening statements, and indeed much of the family did. I cannot remember whether the rule was invoked or not, but if it was, that would explain my instructions to Adams to stay out during opening statements.
- Para. 34: I picked the jury. The trial record would show that. Presumably the attorney filing this writ read it.
- Para. 35: I prepared Dr. Johnstone extensively. I sent him the entire case file. Exhibit 2 reflects that on Dec. 9-10, 2002, Johnstone spent 10 hours in "case review" in Fort

Worth. Much of this was time spent with me, preparing to testify. Exhibit 7 is the outline for his direct examination. I do not remember cutting into Johnstone's answer and requested a break. I do recall that we took a break at the end of the Rule 705(b) hearing. The hesitation in putting Johnstone on in front of the jury was because he made some statements during the hearing regarding Games' lack of remorse. In the end, he did testify.

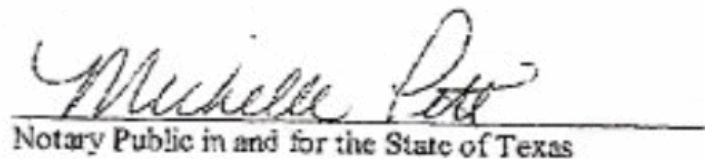
Further, affiant sayeth not.


Greg Westfall

VERIFICATION

SUBSCRIBED AND SWORN BEFORE ME, the undersigned Notary, on this, the 3 day of January, 2007.




Notary Public in and for the State of Texas

seal.

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