No. 0819607

EX PARTE	§	COUNTY CRIMINAL COURT
	§	NUMBER EIGHT
BARTON R. GAINES	§	TARRANT COUNTY, TEXAS

APPLICANT'S PROPOSED MEMORANDUM,
FINDINGS OF FACT & CONCLUSIONS OF LAW

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

MEMORANDUM

Applicant, Barton R. GAINES ("Bart"), alleges his conviction was was unlawful for the following reasons: (1) he received ineffective assistance of trial counsel (IATC). See application, Pp. 4-5, & Pp. 7-9. Specifically, applicant complains that his attorney, Y. Leticia Sanchez-Vigil ("Vigil") was ineffective for the following reasons:

a. Vigil misadvised Bart that the trial Judge (Coffee) wouldn't grant a continunce to bench warrant Tony Durham from TDCJ to corroborate him (Bart) that the marijuana was Durham's and that Bart didn t know Durham stashed it in the console of his (Bart's) truck while the cops (Moore & Thetford) were busy roughing him up, i.e., that there was no legal ground upon which to request Coffee to do so;

b. Vigil misadvised Bart that there was no legal ground upon which to suppress the marijuana, i.e., that it was seized incident to a lawful arrest;

c. Vigil misadvised Bart that even if the marijuana wasn't seized incident to a lawful arrest, i.e., the arrest for being a party to the injury was unlawful, that respondent would just come back and arrest Bart for flipping Haynie off or for being intoxicated in public, thereby making the search and seizure incident to a lawful arrest again;

d. Vigil misadvised Bart that Coffee would stack the marijuana conviction, in such likely event as that, on top of his unrelated robbery conviction and sentence so that he would have to parole the robbery sentence before he could begin the marijuana sentence.

See application, Pp 4-5.

Bart also alleges that he is being unlawfull restrained in his liberty by virtue of this conviction. Although Bart dishcarged the sentence, he is still suffering the collateral consequences of the conviction, namely, it is being used to deny him parole in another office. See application, Pp. 1-2.

FINDING OF FACTS AND
CONCLUSION OF LAW

1. In a habeas corpus proceeding, the burden of proof is on the applicant. Ex parte Rains, 555 SW2d 478 (CCA 1977). An applicant "must prove by a preponderance of the evidence that the error contributed to his conviction or punishment." Ex parte Williams, 65 SW3d 656, 658 (CCA 2001).

2. In order to prevail, the applicant must present facts that, if true, would entitle him to the relief requested. Ex parte Maldonado, 688 SW2d 114 (CCA 1985). Relief may be denied if the applicant states only conclusions, and not specific facts. Ex parte McPherson, 32 SW3d 860, 861 (CCA 2000). In addition, an applicant's sworn allegations alone are not sufficient to prove his claims. Ex parge Empey, 757 SW2d 771, 775 (CCA 1988).

3. There is a presumption of regularity with respect to guilty pleas under Texas Code of Criminal Procedure art. 1.15. Ex parte Wilson, 716 SW2d 953, 956 (CCA 1986).

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

5. When a defendant complains that his plea was not voluntary due to ineffective assisance of counsel, "the voluntariness of the plea depends on (1) whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and if not, (2) whether there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Ex parte Moody, 991 SW2d 856, 857-58 (CCA 1999)(citations omitted).

6. Bart plead guilty to possession of marijuana under two ounces, a class B misdemeanor, on October 8, 2003, and was sentenced to the max, 180-days in jail. See Judgment, No. 0819607.

7. Bart did not appeal his conviction. See Criminal Docketing Statement, No. 0819607.

8. Right before trial the Court appointed Bart Y. Leticia Sanchez-Vigil to represent him for trial (1 EX 5:10-11). See Judgment No. 0819607.

9. The first and only time Bart talked to Vigil was on the day of trial; she met with him behind the courtroom where Bart was in a jail cell with a bunch of other defendants and advised Bart to plead guilty to time-served (1 EX 5:14-15).

10. Bart told her (Vigil) that the marijuana was not his, that it

was Tony Durham's, and that he slipped it into the console of his truck while the cops were busy roughing him (Bart) up, i.e., while they (the cops) were arresting him, and that he didn't know it was otherwise in his truck, and that Tony had told Bart prior to trial that he would come clean, i.e., that he (Tony) would take responsibility for it (1 EX 4:26-31, 5:15-17).

11. Vigil advised Bart that trial was scheduled to start that day and that the judge wasn't going to waste any more time and money on the case to bench warrant Tony, who was in the Texas Dep't of Criminal Justice (TDCJ) on another unrelated offense that precipitated Bart's arrest for the marijuana, back from TDCJ to corroborate Bart that he didn't know the marijuana was in his truck (1 EX 5:17-21).

12. Vigil also advised Bart a jury would not believe his (Bart's) uncorroborated, self-serving statement that he didn't know the marijuana was in his truck (1 EX 5:15-17).

13. The Criminal Court of Appeals (CCA) has not hesitated to declare a judge abused his discretion where the denial of a continuance (i.e., to bench warrant Tony back from TDCJ) has resulted in representation by counsel who is not prepared. Heiselbetz v. State, 906 SW2d 500, 511 (CCA 1995).

14. The Texas Health and Safety Code ("H&SC") § 481.121(a) required respondent to prove beyond a reasonable doubt that applicant knowningly and intentionally possessed a usuable quanity of marijuana in the amount of two ounces or less. In re R.R., 420 SW3d 301, 303-04 (CA8 2013, no pet).

15. Respondent would've been hard pressed to convince most, if not all, of a jury to within a near certainty that Bart knowingly and intentionally possessed a usuable quantity of marijuana in the amount of two ounces or less with (1) Tony swearing under oath that he stashed the marijuana in the console of Bart's truck while the cops (Moore & Thetford) were roughing him (Bart) up, and (2) Bart swearing under oath that he (Bart) didn't known the marijuana was in his truck or that Tony stashed it in the console of his truck (1 EX 4:24-31).

16. Vigil's advice, therefore, was not within the range of competence demanded of attorneys in criminal cases and ~~(2)~~ there is a reasonable probability that, but for Vigil's errors, Bart would not have pleaded guilty and would have insisted on going to trial.

17. Next, Bart essentially told Vigil that he was not a party to the assault on Haynie, i.e., that he didn't encourage anybody to do anything to him (Haynie), and that if anybody did, in fact, encourage Tony to assault Haynie, that it was probably Jason Tucker and Billy Hunt, who followed Tony over to where Haynie was, and that he (Bart) was on the other side of the building

completely unaware of the alleged assault until after he (Bart) was arrested and thrown in jail with Tony, which was when and where he (Bart) found out what happened and why he was arrested (1 EX 2:4 -4:31, 5:21-25).

18. Vigil essentially advised Bart that, even if he (Bart) didn't encourage Tony to assault Haynie, the marijuana was still seized incident to a lawful arrest* that he (Bart) was still a party to the assault on Haynie because he (Bart) was there and that the marijuana discovered thereafter was admissible ~~because it was...~~ (5:21-23)

19. Standing alone, proof that an accused was present at the scene of the crime or assisted the primary actor in making his getaway is insufficient [to hold the accused crimnally responsible for the conduct of another]. The evidence must show that at the time of the offense the parties were acting together, each contributing some part towards the execution of their common purpose. Evidence is legally sufficient to convict under the law of the parties when the defendant is physically present at the commission of the offense and encourages its commission by acts, words, or other agreement. Whether an accused participated as a party to an offense may be determined by examining the events occurring before, during, and after the commission of the offense and by the actions of the accused which show an understanding and common design to commit the offense. Wooden v. State, 101 SW3d 542, 546 (CA2 2003, pet. ref d).

20. Respondent would've been hard pressed to convince ~~judge~~ Coffee, ~~and~~ but if not Coffeen, the appeals courts, that the marijuana was admissible because it was seized incident to a lawful arrest. Aside from Bart himself saying he didn't ~~even~~ know why he was arrested until after he got to the county jail and Tony told him, nobody was said to have witnessed him (Bart) encourage Tony to assault Haynie. Instead, Thetford arrested Bart for ~~on~~ what he thought or felt or believed, but the law is clear that Thetford couldn't legally arrest Bart based off mere suspicion, inarticulate hunches, or good-faith perceptions. Jones v. State, 949 SW2d 509, 514 (CA2 1997, pet. ref'd).

21. Vigil's advice, therefore, was again not within the range of competence demanded of attorneys in criminal cases, and ~~(2)~~ there is a reasonable probability that, but for Vigil's errors, Bart would not have pleaded guilty and wouyld havve insisted on going to trial.

22. Vigil also advised Bart that, even if the marijuana ~~he (Bart) was not arres~~ was ~~not~~ seized incident to a lawful arrest, that the cops would just come back and arrest Bart for either flipping haynie off or public intoxication. (5:23-25) which'd make it legal.

23. The fact that evidence could ahve been "obtained" lawfully ~~anywaty~~ does not negate the fact that it was in fact "obtained" illegally. ~~Under Art. 38~~

Under Art. 38.23 the inquiry regarding the possible legal attainment of the evidence should never be reached. Once the illegality and its causal connection to the evidence have been established, the evience must be excluded." State v. Daugherty, 931 SW2d 268, 270 (CCA 1996).

24. Respondent would've been hard pressed to convince Coffee, ~~and~~ if not Coffee, then the appeal courts, that the marijuana was admissible because even if it was seized incident to an unlawful arrest that the cops would just come back and arrest Bart for flipping Haynie off or for being intoxicated in public. The fact that the marijuana could have been "obtained" lawfully does not negate the fact that it was "obtained" unlawfully. Under Art. 38.23 the inquiry regarding the possible legal attainment of the marijuana should never be reached. Once the illegality and its causal connection to the evidence have been established, the evidence must have been excluded.

25. Vigil's advice, therefore, was not within the range of competence demanded of attorneys in criminal cases, and ~~(2)~~ there is a reasonable probability that, but for Vigil's errors, Bart would not have pleaded guilty and would have insisted on going to trial.

26. Aside from that, even if respondent could somehow come back and arrest Bart for flipping Haynie off or for being intoxicated in public, the statute of limitation for doing so had already elapsed. Bart was arrested on August 18, 2001. Respondent didn't act to adjudicate the the marijuana case until October 8, 2003. Respondent was about two months over the time for doing so.

27. Vigil also advised Bart that, if he fought the marijuana charges that Coffee would stack his sentence on top of his robbery conviction in another unrelated case.

28 When an inmate is given stacked sentence and was simultaneously confined on more than one of those causes, pre-sentence credit under art. 42.02 applies to each of those sentences, and credit must be separetly awarded, since sentences are sequentially executed). Ex parte Wickware, 853 SW2d 571, 573 (CCA 1993).

29. Although Bart bonded out of jail on August 20, 2001, he was rearrested about six months later on another unrelated offense, and remained confined from 2-21-02 to 10-8-03 and beyond. The most Coffee or a jury could have sentenced him was 180-days. Bart had already done that several times over. So, any amount of time Coffee or a jury would have given Bart in the event he was convicted would've been eatten up by his backtime.

30. Vigil's advice, therefore, was not within the range of competence demanded of attorneys in criminal cases, and ~~(2)~~ there is a reasonable probability that, but for Vigi's erroneous advice

Bart would have not pleaded guilty and would have insisted on going to trial.

31. An applicant seeking habeas relief should allege with specificity the facts establishing his confinement--the details of his collateral consequences he sufferes--lest his application be dismissed for lack of jurisidiction. The terms "confinement" and "restraint" encompass incarceration, release on bail, or bond, release on community supervision or parole. or any other restraint on personal liberty. Ex parte Harrinton, 310 SW3d 452, 457-58 (CCA 2010)(Cochran, J., unanious).

32. Although Bart has discharged his sentence for the marijuana conviction, he is still experiencing the collateral consequences from the conviction, i.e., the marijuana conviction is being used to deny him parole in another, unrelated conviction.

33.