HB 959

EX PARTE	§	**IN COUNTY CRIMINAL**
	§	
	§	**COURT NO. 8 OF**
	§	
BARTON RAY GAINES	§	**TARRANT COUNTY, TEXAS**

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

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

MEMORANDUM

The applicant, BARTON RAY GAINES ("Applicant"), alleges that he received ineffective of assistance of counsel. *See* Application, p. 3. Specifically, Applicant alleges counsel was ineffective for the following reasons:

a. Counsel failed to request a motion for continuance so Applicant could procure his witness,
b. Counsel failed to move to suppress the marihuana, and
c. Counsel improperly advised Applicant that, if he fought the admission of the marihuana, the trial court would stack this sentence on his robbery sentence.

See Application, p. 4-5.

Based on Applicant's contentions and the evidence presented in the Writ Transcript, this Court should consider the following proposed findings of fact and conclusions of law.

FINDINGS OF FACT

General Facts

1. Applicant pled guilty, pursuant to a plea agreement, to the Class B misdemeanor of possession of marihuana two ounces or less on October 8, 2003. *See* Judgment and Sentence ("Judgment"), No. 0819607; Waiver of Jury Trial – Waiver of Ten Days to Prepare for Trial – Court's Admonishment – Waiver of Pre-Sentence Report and Plea Agreement ("Admonishments"), No. 0819607.

2. In accordance with the plea agreement, the trial court sentenced Applicant to 180 days' confinement in the Tarrant County Jail with credit for time served. *See* Judgment; Admonishments; Plea Docket, No. 0819607.

3. Applicant did not appeal his conviction. *See* Plea Docket; Criminal Docket, No. 0819607.

Confinement

4. Applicant discharged his sentence the day he pled guilty. *See* Judgment; Plea Docket; Admonishments.

5. Applicant alleges that this conviction is being used to deny him parole in his two aggravated robbery convictions. *See* Application, p. 2.

6. Applicant was denied parole, in part, because his "record indicates excessive substance abuse *involvement*" not criminal history. *See* Application, Exhibit 2: Notice of Parole Panel Decision, No. 01139507 (emphasis added).

7. Applicant was convicted of two aggravated robberies that were committed during a drug deal transaction involving one pound of marijuana. *See* State's Response, Attachment A: *Gaines v. State*, Nos. 02-02-498-CR, 02-02-499-CR, p. 2.

8. Applicant's aggravated robbery trial was on December 2, 2002, and before this conviction. *See* State's Response, Attachment B: Offender Information Details, No. 01139507, p. 2; Judgment.

9. During his aggravated robbery trial, "[e]vidence was also introduced showing [Applicant's] prior use of alcohol, mari[j]uana, Xanax, cocaine, and methamphetamine." *See* State's Response, Attachment A, p. 3.

10. There is no evidence that Applicant's denial of parole because his "record indicates excessive substance abuse involvement" was, in part, because of this conviction.

11. There is no evidence that Applicant is suffering collateral consequences as a result of this conviction.

Laches

12. Applicant complains that trial counsel was ineffective regarding advice she gave him *before* his plea in 2003. *See* Application, p. 3-4; Judgment.

13. Applicant does not explain why he waited over sixteen years to attack his counsel's representation. *See* Application.

14. Applicant does not explain why he could not have filed an application alleging that he received ineffective assistance of counsel before his plea any time after he was convicted over sixteen years ago. *See* Application; Judgment.

15. The fact that Applicant had plenty of opportunity to complain about counsel but chose not to prejudices the credibility of his ineffective assistance of counsel claim.

16. Applicant committed the offense on August 18, 2001, over eighteen years ago. *See* Judgment.

17. The Tarrant County Criminal District Attorney's Office retains files of these types of cases for only ten years. *See* State's Response, Attachment C: Tarrant County Criminal District Attorney's Office Retention Schedule.

18. It is reasonable that the marihuana in question has been destroyed.

19. The State asserts that Applicant's over sixteen year delay prejudices the State's ability to retry this case because assembling the documentation and witness evidence after more than sixteen years to prove Applicant committed the offense of possession of marihuana beyond a reasonable doubt would be a tremendously difficult, if not impossible, task. *See* State's Response, p. 6-7.

20. The State has demonstrated prejudice as a result of Applicant waiting over sixteen years to allege he received ineffective assistance of counsel.

CONCLUSIONS OF LAW

General Writ Law

1. "In a writ of habeas corpus hearing, the burden is on the applicant to prove his factual allegations by a preponderance of the evidence and to demonstrate that an error contributed to his conviction or punishment." *Ex parte Karlson*, 282 S.W.3d 118, 128 (Tex. App. – Fort Worth 2009, pet. ref'd).

2. "Sworn pleadings provide an inadequate basis upon which to grant relief in habeas actions." *Ex parte Garcia*, 353 S.W.3d 785, 789 (Tex. Crim. App. 2011) (11.072 proceeding).

Confinement

3. "The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty." Tex. Code Crim. Proc. art. 11.01.

4. "For a court to have jurisdiction over a habeas application in a misdemeanor case under section 11.09, an applicant must be 'confined' or 'restrained' by either an accusation or a conviction." *Ex parte Karlson*, 282 S.W.3d 118, 126 (Tex. App. – Fort Worth 2009, pet. ref'd).

5. Collateral consequences may constitute confinement. *Ex parte Karlson*, 282 S.W.3d 118, 126 (Tex. App. – Fort Worth 2009, pet. ref'd).

6. "[W]e held in *Ex parte Schmidt* that a person who had discharged a misdemeanor sentence, but was suffering collateral consequences of that sentence, could file a habeas application in the county court even though he did not meet the confinement requirements of Article 11.09." *Ex parte Valdez*, 489 S.W.3d 462, 463-64 (Tex. Crim. App. 2016).

7. "A person convicted of a misdemeanor and confined or restrained as a result of that conviction or otherwise subject to collateral legal consequences because of the conviction may challenge the conviction's validity by filing an application for writ of habeas corpus." *Ex parte Andrews*, No. 02-13-00139-CR, 2014 WL 1257289, at *1 (Tex. App. – Fort Worth Mar. 27, 2014, no pet.) (mem. op., not designated for publication).

8. Applicant has failed to demonstrate that he is suffering collateral consequences as a result of his conviction.

9. Applicant has failed to prove that he is being restrained in his liberty as a result of this conviction.

Laches

10. An applicant's delay in seeking habeas corpus relief may prejudice the credibility of the claim. *Ex parte Young*, 479 S.W.2d 45, 46 (Tex. Crim. App. 1972).

11. The doctrine of laches bars habeas relief "when an applicant's unreasonable delay has prejudiced the State, thereby rendering consideration of his claim inequitable." *Ex parte Perez*, 398 S.W.3d 206, 219 (Tex. Crim. App. 2013); *see also Ex Parte Smith*, 444 S.W.3d 661, 666-67 (Tex. Crim. App. 2014).

12. No "particularized showing of prejudice" is required of the State and prejudice has been broadly defined "to permit consideration of anything that places the State in a less favorable position, including prejudice to the State's ability to retry a defendant, so that a court may consider the totality of the circumstances in deciding whether to grant equitable relief." *Ex parte Perez*, 398 S.W.3d 206, 215 (Tex. Crim. App. 2013).

13. Proof of prejudice is applied on a sliding scale where "the longer the delay, the less prejudice must be shown." *Ex parte Perez*, 398 S.W.3d 206, 219 (Tex. Crim. App. 2013) (citing *Smith v. Caterpillar, Inc.*, 338 F.3d 730, 733 (7th Cir. 2003)).

14. A delay longer than five years after a judgment becomes final "may generally be considered unreasonable in the absence of any justification for the delay." *Ex parte Perez*, 398 S.W.3d 206, 216 n. 12 (Tex. Crim. App. 2013) (citing *Ex parte Florentino*, 206 S.W.3d 124, 126 (Tex. Crim. App. 2006) (Cochran, J., concurring) ("Eight years elapsed between the time applicant's conviction was affirmed and the time at which he may file a PDR. Normally, laches should bar any relief on this claim.")).

15. The State has properly made a showing of prejudice.

16. The prejudice was caused by Applicant not alleging ineffective assistance of counsel.

17. The prejudice was caused by Applicant filing these applications over sixteen years after his conviction.

18. Applicant has failed to prove that he could not have alleged he received ineffective assistance of counsel in the last sixteen years.

19. Applicant has not acted with reasonable diligence as a matter of law.

20. This Court recommends that Applicant's application be **BARRED BY LACHES**.

Never mind the Statutory expansion of Article 11.07, § 3(c) over the doctrine of laches in 1995. See Acts of May 24, 1995, 74th Leg., R.S., ch. 319, § 5, sec. 3(c), 1995 Tex. Gen.Laws 2764, 2771 (eff. Sept. 1, 1995). Ex Parte Harrington, 310 S.W.3d 452, 457 (Tex. Crim. App. 2010). My collateral consequences didn't arise, i.e., my collateral confinement didn't materialize, until I was denied parole, i.e., because of the ill-gotten conviction. I couldn't file until then, unless it was within the first five years, according to laches, but the confinement issue therewith, of course.

WHEREFORE, the State prays that this Court adopt these Proposed Findings of Fact and Conclusions of Law and **DENY** Applicant's application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the above has been sent to Applicant, Mr. Barton Ray Gaines, TDCJ-ID# 1139507, Coffield Unit, 2661 FM 2054, Tennessee Colony, Texas 75884, on the 31st day of January, 2020.

/s/Andréa Jacobs
Andréa Jacobs