SHAREN WILSON
Criminal District Attorney
Tarrant County

January 31, 2020

Barton Ray Gaines
TDCJ-ID #01139507
Coffield Unit
2661 FM 2054
Tennessee Colony, TX 75884

RE: EX PARTE BARTON RAY GAINES
Case No: HB 959

Dear Mr. Gaines:

Enclosed please find a copy of the **State's Response to Application for Writ of Habeas Corpus** and a copy of the **State's Proposed Memorandum, Findings of Fact and Conclusions of Law** which have been filed with the Tarrant County District Clerk's Office, and an unsigned order which will be submitted to the judge for review and signature.

Sincerely,

LaCourtnia Parker, Legal Secretary
Tarrant County Criminal District Attorney's Office
Post-Conviction Division
401 W. Belknap Street
Fort Worth, Texas 76196
Telephone: 817-212-7048
Fax: 817-884-1672

Enc.

2-4-20

HB 959

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

STATE'S RESPONSE TO APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW THE STATE OF TEXAS, by and through the Tarrant County Criminal District Attorney, and in opposition of the 11.09 Application for Writ of Habeas Corpus, respectfully states the following to the Court based on its information and belief:

I. HISTORY OF THE CASE

The applicant, BARTON RAY GAINES ("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. 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.

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

II. APPLICANT'S ALLEGATIONS

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.

III. NECESSITY FOR AN EVIDENTIARY HEARING & EXPANSION OF THE RECORD

There is no need for an expansion of the record due to the amount of time Applicant has waited to allege these pre-plea claims.

IV. CONFINEMENT

"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. "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). Collateral consequences may constitute confinement. *Id.* (citations omitted); *see Ex parte Valdez*, 489 S.W.3d 462, 463-64 (Tex. Crim. App. 2016) ("[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."); *see also 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) ("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.").

Applicant alleges that "this conviction is being used to set [him] off for parole." *See* Application, p. 2. Specifically, Applicant asserts that the fact that he has been denied parole based on his "excessive substance abuse history" refers to this case because "[t]his is his only conviction for possession of a controlled substance." *Id.* However, Applicant is not being set off because his "record indicates excessive substance abuse *involvement*" not criminal history. *See* Application, Exhibit 2: Notice of Parole Panel Decision, No. 01139507 (emphasis added).

It is more likely that Applicant is being denied parole because Applicant was convicted of two aggravated robberies that were committed during a drug deal transaction involving one pound of marijuana. *See* Attachment A: *Gaines v. State*, Nos. 02-02-498-CR, 02-02-499-CR, p. 2. In addition, during that trial, "[e]vidence was also introduced showing [Applicant's] prior use of alcohol, mari[j]uana, Xanax, cocaine, and methamphetamine." *See* Attachment A, p. 3. That trial was December 2, 2002, and before this conviction. *See* Attachment B: Offender Information Details, No. 01139507, p. 2; Judgment. Therefore, this conviction was irrelevant to that reference of Applicant's excessive substance abuse.

P.3 However, Applicant may be suffering collateral consequences as a result of this conviction.

VII. ARGUMENTS AND AUTHORITIES

A. Applicable Law

In a habeas corpus proceeding, the burden of proof is on the applicant. *Parrish v. State*, 38 S.W.3d 831, 834 (Tex. App. – Houston [14th Dist.] 2001, pet. ref'd); *see also Ex parte Rains*, 555 S.W.2d 478, 481 (Tex. Crim. App. 1977). An applicant must prove his allegations by a preponderance of the evidence. *Ex parte Cummins*, 169 S.W.3d 752, 757-58 (Tex. App. – Fort Worth 2005) (citations omitted). "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).

B. Applicant's sole ground for relief should be BARRED BY LACHES because Applicant has waited an unreasonable amount of time to raise this claim.

Applicant complains that trial counsel was ineffective regarding advice she gave him *before* his plea in 2003. *See* Application, p. 3-4; Judgment. However, Applicant does not explain why he waited over sixteen years to raise these claims on the basis of information he had at the time of his plea. *See* Application.

First, 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). Here, Applicant could have filed an application alleging he received ineffective assistance of counsel any time after he was convicted over sixteen years ago. *See* Judgment. There may have been an argument that Applicant was not facing collateral consequences prior to now; however, there is no evidence, or allegation, that Applicant even tried to seek relief. *See* Application; Docket. In short, the fact that Applicant had plenty of opportunity to complain about counsel but chose not to should prejudice the credibility of his claims.

Second, 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). 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." *Perez*, 398 S.W.3d at 215.

Proof of prejudice is applied on a sliding scale where "the longer the delay, the less prejudice must be shown." *Id.* at 219 (citing *Smith v. Caterpillar, Inc.*, 338 F.3d 730, 733 (7th Cir. 2003)). 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." *Id.*, 398 S.W.3d at 216 n.12 (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.")).

Here, Applicant committed the offense on August 18, 2001, over eighteen years ago. *See* Judgment. Unfortunately, this delay prejudices the State's ability to retry these cases. Tarrant County Criminal District Attorney's Office retains files of these types of cases for only ten years. *See* Attachment C: Tarrant County Criminal District Attorney's Office Retention Schedule. In addition, it is reasonable that the marihuana in question has been destroyed. Finally, assembling the documentation and witness evidence after more than eighteen years to prove the elements of possession of marihuana beyond a reasonable doubt would be a tremendously

difficult, if not impossible, task. Applicant should not be allowed to reap benefits from his grossly unreasonable delay in raising these issues that could have arguably been raised any time after his conviction in 2003.

Applicant's request for habeas relief should be **BARRED BY LACHES**.

VIII. CONCLUSION

Wherefore, premises considered, the State prays that this Court **DENY** Applicant's sole ground for relief.

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.

Respectfully submitted,

SHAREN WILSON
Criminal District Attorney
Tarrant County

JOSEPH W. SPENCE
Chief, Post-Conviction

/s/Andréa Jacobs
Andréa Jacobs
Assistant Criminal District Attorney
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Phone: 817/884-1687
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CERTIFICATE OF SERVICE

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

/s/Andréa Jacobs
Andréa Jacobs

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

ATTACHMENT A

NO. 2-02-498-CR
NO. 2-02-499-CR

BARTON RAY GAINES — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY

MEMORANDUM OPINION[1]

INTRODUCTION

Appellant Barton Ray Gaines was indicted in two cases. The first indictment charged the offenses of aggravated robbery with a deadly weapon, to-wit: a firearm, and attempted capital murder, in Cause No. 0836985A. The second indictment alleged the same charges, with a different victim, in Cause No. 0836979A. Both cases were tried together. Appellant pleaded guilty on the charges of aggravated robbery and the State waived the charges of attempted capital murder. The jury was instructed to find Appellant guilty and to set punishment within the statutory range. After hearing evidence regarding punishment, the jury assessed Appellant's punishment at thirty-five years' confinement and assessed a $10,000 fine. Appellant's court-appointed counsel

has filed an *Anders* brief asserting that there are no grounds that could be argued successfully on appeal. *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967). Appellant has filed a pro se brief raising three points on appeal. We grant counsel's motion to withdraw, overrule Appellant's points, and affirm the trial court's judgments.

FACTUAL AND PROCEDURAL BACKGROUND

Testimony showed that on February 21, 2002 Appellant and two friends, Jason Tucker and Daniel Aranda, went to a location known as the Rice Paddy, which is a housing development where young people hang out. At this location Appellant began talking to Michael Williams and Andrew Horvath, who were together, about buying a pound of marijuana. Williams agreed to lead Appellant to a friend who possibly had marijuana. Appellant and his friends followed Williams and Horvath to an apartment complex to buy the marijuana. On the way, Appellant stopped at Wal-Mart to buy some beer, but actually purchased shotgun shells.

Once at the apartment complex, Williams attempted to negotiate the marijuana transaction. At one point, Appellant checked Williams for weapons and then Appellant began to demand Williams's wallet. Williams testified that Appellant produced a shotgun and struck him in the head with the barrel. Williams and Horvath emptied their pockets and both were physically assaulted. Williams began to run, at which point he heard a "boom" and felt his left shoulder go numb. Williams made it to a convenience store and realized he was bleeding. Once at the convenience store, the police were called. Horvath testified that one of Appellant's friends punched him and knocked him down. Appellant then pointed the shotgun

at Horvath and demanded his wallet. Horvath testified that as Appellant and his friends were driving off, he was shot from the driver's side of Appellant's vehicle.

At trial, Appellant introduced evidence that he began taking Paxil beginning in February 2002. Appellant called Dr. Edwin Johnstone to testify regarding the possible role Paxil played in Appellant's behavior on the day of the offense. Dr. Johnstone testified that someone with attention deficit hyperactivity disorder, with which Appellant had been diagnosed, who also takes Paxil, may develop hypomania. Dr. Johnstone described hypomania as "sort of the opposite of depression. It is where the person's mood is high instead of low. The person is in an overenergized state. The elevated mood might be very happy and cheery and euphoric, but most of the time actually the mood is sort of a driven, irritable state." Evidence was also introduced showing Appellant's prior use of alcohol, marijuana, Xanax, cocaine, and methamphetamine.

Additionally, it was shown that Appellant continued taking Paxil while in jail with no adverse effects. Dr. Johnstone believed that the isolation and lack of stimulation, as well as Appellant's lack of access to marijuana, contributed to the effects Paxil had on Appellant's behavior while in jail. While Appellant introduced evidence of his use of Paxil in an attempt to explain his behavior, he did not use this as a basis for an insanity claim. Dr. Johnstone specifically testified that he was not offering an opinion as to Appellant's sanity, but rather Appellant's "disinhibition of social judgment."

STANDARD OF REVIEW

Appellant's court-appointed appellate counsel has filed a motion to withdraw

as counsel and a brief in support of that motion. In the brief, counsel avers that, in his professional opinion, this appeal is frivolous. Counsel's brief and motion meet the requirements of *Anders*, 386 U.S. 738, 87 S. Ct. 1396, by presenting a professional evaluation of the record demonstrating why there are no arguable grounds for relief. Appellant has also filed a pro se brief.

Once Appellant's court-appointed counsel files a motion to withdraw on the ground that the appeal is frivolous and fulfills the requirements of *Anders*, this court is obligated to undertake an independent examination of the record and to essentially rebrief the case for Appellant to see if there is any arguable ground that may be raised on Appellant's behalf. *Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991).

Appellant entered an open plea of guilty, so he waived the right to appeal any non-jurisdictional defects, other than the voluntariness of his plea, that occurred before entry of the plea so long as the judgment of guilt was rendered independent of, and is not supported by, the alleged error. *See Young v. State*, 8 S.W.3d 656, 666-67 (Tex. Crim. App. 2000); *Lewis v. State*, 911 S.W.2d 1, 4-5 (Tex. Crim. App. 1995). Therefore, our independent review of the record is limited to potential jurisdictional defects, the voluntariness of Appellant's plea, potential error occurring before Appellant's plea that resulted in or supports the judgment of guilt, and potential error occurring after the guilty plea. *See Young*, 8 S.W.3d at 666-67.

Jurisdiction

Our review of the record reveals no jurisdictional defects. The trial court had jurisdiction over the case. *See* TEX. CODE CRIM. PROC. ANN. art. 4.05 (Vernon

Supp. 2004-05). Further, the indictment conferred jurisdiction on the trial court and provided Appellant with sufficient notice. *See* TEX. CONST. art. V, § 12; *Duron v. State*, 956 S.W.2d 547, 550-51 (Tex. Crim. App. 1997).

Voluntariness of Plea

Appellant's pro se brief alleges the trial court erred in not holding a competency hearing at the time Appellant entered his plea of guilty and thus his plea was not voluntary. A court must conduct a competency inquiry only if there is a bona fide doubt in the judge's mind as to the defendant's competence to stand trial. *Alcott v. State*, 51 S.W.3d 596, 601 (Tex. Crim. App. 2001). Additionally, "unless an issue is made of an accused's present insanity or mental competency at the time of the plea the court need not make inquiry or hear evidence on such issue." *Kuyava v. State*, 538 S.W.2d 627, 628 (Tex. Crim. App. 1976). The Appellant was orally admonished by the trial judge regarding the consequences of his plea, and the record indicates that the Appellant understood the nature of the charges and that his plea was free and voluntary. Further, Appellant's trial counsel answered affirmatively that his client was competent to stand trial. Once the jury was sworn in, Appellant again pleaded guilty in open court in front of the jury. There is no evidence in the record supporting Appellant's claim that he was incompetent to stand trial. Thus, Appellant's first point is overruled.

Having found that the trial court did not err in finding Appellant competent to stand trial, we will address appellate counsel's potential issues.

Potential Errors After Plea

Appellate counsel presents five potential issues on appeal: (1) the trial court

committed error in striking two prospective jurors at the request of the State; (2) the trial court committed error in failing to strike a juror at the request of Appellant; (3) the trial court committed error in various evidentiary rulings; (4) the trial court committed error in overruling Appellant's objection to the State's jury argument; and (5) the evidence was both legally and factually insufficient to sustain a finding that Appellant committed the offenses charged.

In his first potential issue, appellate counsel states that the trial court erred in striking two prospective jurors for cause at the request of the State. The State challenged the two members of the venire panel based on bias against the State, and the challenges were granted. However, Appellant did not object to the court's striking of these potential jurors; thus, the error is waived. *See Boulware v. State*, 542 S.W.2d 677, 683 (Tex. Crim. App. 1976), *cert. denied*, 430 U.S. 959 (1977) (holding that "failure to object to the improper exclusion of a venire member waives that right and it cannot be considered on appeal").

In his second potential issue, appellate counsel argues that the trial court erred in failing to strike a juror for cause at the request of Appellant. To preserve error for a trial court's denial of a valid challenge for cause, it must be demonstrated on the record that Appellant asserted a clear and specific challenge for cause, that he used a peremptory challenge on that juror, that all his peremptory challenges were exhausted, that his request for additional strikes was denied, and that an objectionable juror sat on the jury. *Green v. State*, 934 S.W.2d 92, 105 (Tex. Crim App. 1996), *cert. denied*, 520 U.S. 1200 (1997). There is no indication in the record that Appellant exhausted all of his peremptory challenges and

requested additional strikes. Thus, error has not been preserved regarding this potential issue.

In his third potential issue, appellate counsel complains that the trial court committed error in various evidentiary rulings. Specifically, appellate counsel refers to forty-two instances of rulings on the admissibility of certain evidence by the trial court. An appellate court reviews a trial court's decision to admit or exclude evidence under an abuse of discretion standard of review. *Green*, 934 S.W.2d at 101-02. The trial court does not abuse its discretion if its "ruling was at least within the zone of reasonable disagreement." *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

Appellate counsel refers us to a sustained objection on the part of the State to the relevancy of testimony from Appellant's mother. Appellant attempted to admit into evidence testimony that his grandfather was arrested for "molesting neighborhood children" when Appellant was thirteen years' old. The State objected on relevancy grounds. When questioned why this information was relevant, Appellant's trial counsel responded that it showed "family dynamics" but specifically refused to attempt to allege that Appellant had been abused by his grandfather. The trial court sustained the State's relevancy objection.

The State and defendant may offer evidence of any matter the court deems relevant to sentencing. TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)(1) (Vernon Supp. 2004-05). As there is no indication in the record that his grandfather's arrest had any emotional impact on Appellant and due to the fact that Appellant's trial counsel specifically disavowed any intention of claiming that Appellant had been

abused when he was thirteen years' old, this evidence had no relevance to the offense for which Appellant pleaded guilty. *See Tow v. State*, 953 S.W.2d 546, 547-48 (Tex. App.—Fort Worth 1997, no pet.) (finding that the admissibility threshold under article 37.07(a) is relevance). Therefore, it was not error to exclude this testimony. Likewise, our independent review of the other rulings on objections by the State and Appellant reveals no reversible error. Thus, appellate counsel's third potential issue is overruled.

In his fourth potential issue, appellate counsel argues that the trial court committed error in overruling Appellant's objection to the State's jury argument. There are four possible areas of jury argument: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) answer to the argument of opposing counsel; and (4) plea for law enforcement. *Felder v. State*, 848 S.W.2d 85, 94-95 (Tex. Crim. App. 1992), *cert. denied*, 510 U.S. 829 (1993); *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973). During closing argument, the State argued that there had been no testimony nor evidence that Appellant was suffering from any type of mania on the date of the offense. Appellant objected that this mischaracterized the evidence, and the court overruled Appellant. Dr. Johnstone testified on behalf of Appellant regarding the effects of Paxil on someone who has been diagnosed with attention deficit hyperactivity disorder, with which Appellant had been diagnosed. However, Dr. Johnstone also testified that he could not state for certain that Appellant had used Paxil on the day of the offense. Additionally, two friends of Appellant, who had contact with him shortly after the shooting, both described Appellant as acting normal. Based on this testimony, the State's closing

argument constituted proper reasonable deductions from the evidence. It was not error to overrule Appellant's objection. Thus, appellate counsel's fourth potential issue is overruled.

In his fifth potential issue, appellate counsel argues the evidence was both legally and factually insufficient to sustain a finding that Appellant committed the offenses charged.

> In felony cases a plea of guilty before the jury admits the existence of all necessary elements to establish guilt, and in such cases, the introduction of testimony by the State is to enable the jury to intelligently exercise the discretion which the law vests in them touching the penalty to be assessed. In such cases there is no question of the sufficiency of the evidence on appeal or on collateral attack.

Ex parte Martin, 747 S.W.2d 789, 792 (Tex. Crim. App. 1988) (op. on reh'g) (citations omitted). Since Appellant pleaded guilty to a jury, he may not now challenge the sufficiency of the evidence. Accordingly, appellate counsel's fifth potential issue is overruled.

Having overruled appellate counsel's potential issues, we will address the remaining points raised in Appellant's pro se brief.

Competency at Time of Sentencing

Appellant complains that the trial court erred in not holding a competency hearing at the time of his sentencing. Appellant points to evidence produced at the punishment hearing that he suffers from a learning disability and attention deficit hyperactivity disorder. Appellant also points to the testimony of Dr. Johnstone, who testified on behalf of Appellant concerning the effects of Paxil on Appellant's

behavior. However, Dr. Johnstone conceded that he did not know when Appellant started taking Paxil or whether he had taken it on the day of the offense. Dr. Johnstone also agreed with the State's assertion that Appellant's conduct on the day in question could be just as consistent with "wanting to rob someone of their drugs and then kill the witnesses."

In pointing out Dr. Johnstone's testimony, Appellant seems to confuse competency with sanity on the night of the offense. *See Valdes-Fuerte v. State*, 892 S.W.2d 103, 108 (Tex. App.—San Antonio 1994, no pet.) (finding that evidence of person's mental status at time of offense was not evidence of incompetency to stand trial); *Lang v. State*, 747 S.W.2d 428, 430-31 (Tex. App.—Corpus Christi 1988, no pet.) (stating competency and sanity are not synonymous). The issue of Appellant's sanity was not raised during his plea or punishment hearing, nor was the issue raised at any point. Dr. Johnstone, Appellant's own expert witness, specifically stated that he was not offering an opinion as to Appellant's sanity. Moreover, the record contains a psychiatric evaluation from Dr. Florence Ouseph, which was conducted on January 10, 2002, approximately five weeks before the date of the offense, and nothing within this report calls into question Appellant's sanity or competence to stand trial. Additionally, a learning disability or attention deficit hyperactivity disorder is an insufficient basis to claim incompetence to stand trial. *See Culley v. State*, 505 S.W.2d 567, 569 (Tex. Crim. App. 1974) (holding that testimony that defendant had learning disabilities and was in special education classes did not raise issue of competency); *Ortiz v. State*, 866 S.W.2d 312, 316 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (finding evidence of learning

disabilities alone is not sufficient to show defendant incompetent to stand trial). As we have already found that there is no evidence supporting Appellant's claim that he was incompetent to enter a voluntary plea, the trial court was not required to conduct a subsequent competency hearing at the time of sentencing. We overrule Appellant's second point.

Ineffective Assistance of Counsel

Appellant also argues that he received ineffective assistance of counsel in that his trial counsel was ineffective in investigating Appellant's competency, failing to obtain a ruling regarding the admissibility of prior bad acts, and failing to object to introductions of hearsay. We apply a two-pronged test to ineffective assistance of counsel claims. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). First, appellant must show that his counsel's performance was deficient; second, appellant must show the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Hernandez v. State*, 988 S.W.2d 770, 770 (Tex. Crim. App. 1999).

In evaluating the effectiveness of counsel under the first prong, we look to the totality of the representation and the particular circumstances of each case. *Thompson*, 9 S.W.3d at 813. The issue is whether counsel's assistance was reasonable under all the circumstances and prevailing professional norms at the time of the alleged error. *Strickland*, 466 U.S. at 688-89, 104 S. Ct. at 2065. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at

690, 104 S. Ct. at 2066. An allegation of ineffective assistance must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 814. Our scrutiny of counsel's performance must be highly deferential, and every effort must be made to eliminate the distorting effects of hindsight. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. When the record is silent as to possible trial strategies employed by defense counsel, we will not speculate on the reasons for those strategies. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

The second prong of *Strickland* requires a showing that counsel's errors were so serious that they deprived the defendant of a fair trial, i.e., a trial whose result is reliable. *Id.* at 687, 104 S. Ct. at 2064. In other words, appellant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694, 104 S. Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The ultimate focus of our inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Id.* at 697, 104 S. Ct. at 2070.

Appellant claims that his trial counsel failed to investigate his mental history, and in support he provides several affidavits attached to his pro se brief. However, there is no support for Appellant's allegations in the record. The attached affidavits were not admitted into evidence and are not properly before this court for consideration. *See Brown v. State*, 866 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) (noting that material outside the record that is improperly included in or attached to a party's appellate brief may be stricken). Furthermore,

as we have already held, there is no evidence within the record that Appellant was incompetent to stand trial.

Appellant also complains that his trial counsel was ineffective for failing to obtain a ruling on the admission of prior bad acts. The record indicates that the State provided notice of its intent to introduce evidence of other crimes, wrongs, or acts. The record further indicates that the State and Appellant's trial counsel agreed to discuss how they wanted to address the issue of Appellant's other crimes, wrongs, or acts.

Evidence of an accused's prior crimes and bad acts is admissible during the punishment phase of the trial. TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a); *Rodriguez v. State*, 955 S.W.2d 171, 175 (Tex. App.—Amarillo 1997, no pet.). As there is no indication in the record of the agreement reached between the State and Appellant's trial counsel regarding the introduction of other crimes, wrongs, or acts evidence, and based on our finding that the evidence was admissible during the punishment phase, there is no support for Appellant's claim that he was denied effective assistance of counsel based on the admission of this evidence. Absent such a showing, it is presumed Appellant's counsel's actions "fell within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065.

Finally, Appellant complains generally that his trial counsel was ineffective for failing to object on "several occasions" to inadmissible hearsay. We take note that Appellant's complaint of ineffective assistance of counsel is largely based on such alleged failures on the part of his trial counsel. Appellant did not file a motion for

new trial on the basis of ineffective assistance of counsel, which would have afforded the trial court the opportunity to conduct a hearing as to these alleged failures. As such, the record is not sufficiently developed to allow us to do more than speculate as to the strategies of Appellant's trial counsel. *See Jackson*, 877 S.W.2d at 771. Thus, we cannot say that Appellant was denied effective assistance of counsel. Appellant has a more appropriate remedy in seeking a writ of habeas corpus to allow him the opportunity to develop evidence to support his complaints. Thus, Appellant's final point is overruled.

CONCLUSION

Our independent review of the record compels us to agree with appellate counsel's determination that any appeal in these cases would be frivolous. Accordingly, we grant counsel's motion to withdraw on appeal, overrule Appellant's points, and affirm the trial court's judgments.

ANNE GARDNER
JUSTICE

PANEL B: HOLMAN, GARDNER, and WALKER, JJ.

DO NOT PUBLISH
TEX. R. APP. P. 47.2(b)

DELIVERED: October 14, 2004

NOTES

1. *See* TEX. R. APP. P. 47.4.

ATTACHMENT B

Return to Search Results

Offender Information Details

SID Number: 06736464

TDCJ Number: 01139507

Name: GAINES,BARTON RAY

Race: W

Gender: M

DOB: 1982-10-25

Maximum Sentence Date: 2037-02-20

Current Facility: COFFIELD

Projected Release Date: 2037-02-20

Parole Eligibility Date: 2019-08-22

Offender Visitation Eligible: YES

Information provided is updated once daily during weekdays and multiple times per day on visitation days. ***Because this information is subject to change, family members and friends are encouraged to call the unit prior to traveling for a visit.***

SPECIAL INFORMATION FOR SCHEDULED RELEASE:

Scheduled Release Date:
Offender is not scheduled for release at this time.

Scheduled Release Type:
Will be determined when release date is scheduled.

Scheduled Release Location:
Will be determined when release date is scheduled.

Parole Review Information

Offense History:

Offense Date	Offense	Sentence Date	County	Case No.	Sentence (YY-MM-DD)
2002-02-21	AGG ROBBERY W/DEAD WPN	2002-12-12	TARRANT	0836979A	35-00-00
2002-02-21	AGG ROBBERY W/DEAD WPN	2002-12-12	TARRANT	0836985A	35-00-00

Return to Search Results

The Texas Department of Criminal Justice updates this information regularly to ensure that it is complete and accurate, however this information can change quickly. Therefore, the information on this site may not reflect the true current location, status, scheduled termination date, or other information regarding an offender.

For questions and comments, you may contact the Texas Department of Criminal Justice, at (936) 295-6371 or webadmin@tdcj.texas.gov. This information is made available to the public and law enforcement in the interest of public safety. Any unauthorized use of this information is forbidden and subject to criminal prosecution.

New Offender Search

Texas Department of Criminal Justice | PO Box 99 | Huntsville, Texas 77342-0099 | (936) 295-6371

ATTACHMENT C

TARRANT COUNTY CRIMINAL DISTRICT ATTORNEY'S OFFICE
RETENTION SCHEDULE FOR RECORDS WITH ADMINISTRATIVE VALUE

RECORD CATEGORIES	RETENTION SCHEDULE
Administration	FE* + 5 Years
Appeals	20 Years
Appeals/Major Cases	50 Years
Asset Forfeitures	5 Years
Business Office	5 Years Personnel / Permanent Budget
Capital Cases	5 Years After Death
Civil	AV*
Economic Crimes	10 Years
Felony	20 Years
Felony Major Cases	50 Years
Forensic & Technical	20 Years
Grand Jury	20 Years
Grand Jury No Bills	10 Years
Hospital District	10 Years
Intake	10 Years
Juvenile	25 Years
Misdemeanor	10 Years
Special Crime Unit	50 Years
Victim Assistance	10 Years
Worthless Checks	5 Years

Revised 11/29/17

*FE means "fiscal end"
*AV means "administratively valuable"