Case Nos.C-213-W011921-0836979-A & C-213-W011922-0836985-A

IN THE

213th JUDICIAL DISTRICT COURT

Tarrant County, Texas

BARTON R. Bart,
Bart,
v.
SHAREN WILSON
(Tarrant Co. Dist. Atty.).

Applicant's Original Proposed Findings of Fact And Conclusions of Law

---

BARTON R. GAINES
244 SIESTA COURT
GRANBURY, TEXAS 76048
Email: bartonBart@gmail.com
TEL: 682-500-2753

PRO SE ATTORNEY FOR Bart
BARTON R. Bart
March 17, 2021

Table of Contents

Contents

Definitions

1. 1 FCR is Federal Clerk's Record for Applicant first Federal 2254
2. 2 FCR is Federal Clerk's Record for Applicant second Federal 2254
3. 3 FCR is the Federal Clerk's Record in the federal lawsuit Mowla filed against the prison officials.
4. AAG is Assistant Attorney General
5. ACR is appellant's clerk's record.
6. ADA is Assistant District Attorney

7. AEDPA is Anti-Terrorism and Effective Death Penalty Act
8. AG is Attorney General
9. AK47 is Automatic Kalashnikon 1947.
10. aka is also known as
11. APP is Appendix
12. ARR IS Abatement Reporter's Record from Applicant direct appeal.
13. Bart is Barton and vice-versa.
14. CA is Court of Appeals
15. CCA is Criminal Court of Appeals
16. Ch. is Chapter
17. CPD is Crowley Police Department
18. CR is Clerk's Record
19. CSI is Crime Scene Investigator
20. DA is District Attorney
21. DOB is date of birth
22. DOD is date of death
23. DX is defendant's exhibits
24. EX is exhibit
25. F, C, & R is Findings of Fact, Conclusions of Law, and Recommendations
26. FFCL is Finding of Facts and Conclusions of Law
27. FN is footnote
28. FWPDCL is Fort Worth Police Department Crime Lab
29. FWPD is Fort Worth Police Department
30. IATC is ineffective assistance of trial counsel
31. ID is identification
51.
32. LPN is license plate number
33. MDC is Mansfield Detention Center
34. Missy is Melissa and vice-versa.
35. MLEC is Mansfield Law Enforcement Center (Mansfield, TX)
36. MVD is motor vehicle department
37. PDRs is Petition for Discretionary Review
38. RR is Reporter's Record; preceded by the volume number and followed by the page and line number
39. SCFO is State Counsel for Offenders.
40. SCOTUS is Supreme Court of the United States
41. SCR is the Supplemental Clerk's Record.
42. SHCR is State Habeas Clerk's Record
43. SKS is Samozaryadny Karabin sistemy Simonova, 1945 (Russian: Самозарядный карабин системы Симонова, 1945; Self-loading Carbine of (the) Simonov system, 1945).
44. STD is Sexually transmitted disease
45. SubCh. Is subchapter
46. SX is state's exhibits
47. TCDA is Tarrant County District Attorney
48. TCU is Texas Christiian University
49. TDCJ is Texas Department of Criminal Justice
50. TS is Texas Syndicate

Findings of Fact

General Facts

1. Applicant pled guilty, pursuant to an open plea to the jury, to the first degree felony offenses of aggravated robbery with a deadly weapon, to-wit: a firearm, on December 12, 2002. *See Judgments*, No. 0836979A, & 0836985A.
2. The jury assessed punishment at thirty-five years confinement in the Texas Department of Criminal Justice and fined him $20,000 and made an affirmative finding that a deadly weapon was used or exhibited during the commission of the offense or during the flight therefrom. *See Judgment*.
3. Applicant appealed his conviction. *See Criminal Docketing Statements*, No. 0836979A, 0836985A, P. 2.
4. The Second Court of Appeals affirmed the convictions and sentences on October 14, 2004. See *Gaines v. State*, 2004 WL 2320367, No. 02-02-498-CR & No. 02-02-499-CR (Tex. App. — Fort Worth Oct. 14, 2004, pet. ref'd not designated for publication).
5. Hon. Greg Westfall and Hon. Cheyenne Minick represented Applicant during the trial proceedings. *See Judgments*; Westfall Affidavit, p. 1: Minick Affidavit. p. 1.[1]
6. Hon. Westfall has been a licensed attorney in good standing with the State of Texas since 1993. *See* Texas Bar Directory: http://www.texasbar.com
7. Hon. Westfall is certified in criminal law by the Texas Board of Legal Specialization. *See* Texas Bar Directory: http://www.texasbar.com.
8. Hon. Minick has been a licensed attorney in good standing with the State Bar of Texas since 1997. *See* Texas Bar Directory: http://www.texasbar.com: Minick Affidavit, p. 1.
9. Hon. Minick's primary practice of law has been criminal defense since 1997. *See* Minick Affidavit, p. 1

[1] These affidavits are included in the previous habeas clerk's record.

10. Hon. Minick sat second chair in this case. See Minick Affidavit. p. 2.
11. Hon. Westfall provided Hon. Minick with a copy of all discovery from the Tarrant County District Attorney's Office prior to trial. *See* Minick Affidavit, p. 2.
12. Hon. Westfall provided Hon. Minick with copies of all records, subpoenas, and notes of interviews with witnesses. *See* Minick Affidavit, p. 2.

Section Four

1. At trial when Applicant first learned of the true nature and cause of the extraneous accusations, Applicant told Westfall that he wanted to take the stand to rebut it, but Westfall essentially told Applicant that he should not because there was no evidence to support his bald assertion thereto, and that he would risk alienating the jury if he tried.[2]
2. Then on 10-12-20, 54-days after he (Applicant) made parole on 8-19-20 on these convictions and sentences and respondent was no longer able to deny him his own personal Freedom of Information Act (FIA) request under *Section* 552.028 of the *Texas Government Code*, Applicant filed a FIA request and discovered that was not the case. That there was corroborating evidence to support his assertion.[3]

Strickland

Research Law

1. Westfall failed to have a firm command of the **law** regarding Applicant's potential ("could be") criminal responsibility for shooting Rick.
2. Westfall and Minick argued "Applicant shot Rick" (the extraneous victim) "because of Paxil" over "Applicant didn't shoot Rick",[4] no doubt, so Wynn, the direct appeal attorney,

[2] *See* (paragraph 163-165 of Applicant's affidavit).
[3] *See* generally (chapter 35 of Applicant's affidavit) and (1 APP 7).
[4] *See* (4 RR 179:4).

whom (Wynn) Westfall and Minick had the trial judge (Gill) appoint Applicant for his direct appeal, could argue on appeal Gill failed to charge the jury on the law applicable to the case at sentencing, which Westfall was, in part, the cause of,[5] regarding Applicant's potential criminal responsibility for shooting Rick.

3. According to Wynn, Westfall went to the Kearney Law Firm, where they had all worked at some point in time, and where some of them still worked, to discuss with Kearney, Wynn, and Minick, who (Minick) wound up sitting second chair to Westfall, “trial strategy” and “other legal matters” which were no doubt appeal strategies.[6]
4. Before Wynn was able to perfect their trial and appeal strategy, Applicant encountered Tony Gregory, a fellow prisoner, who after briefly talking to Applicant after he (Applicant) was sentenced, who (Tony) took it upon himself to write a State Bar Grievance on Westfall, and who (Tony) encouraged Applicant to sign and mail it. That it would help his appeal.[7]
5. As a result, Wynn had Applicant brought back to the county and appointed substitute counsel (Francis) who (Francis) overlooked the charge error as an apparent courtesy to Gill, Wynn, Westfall, and Minick.[8]

Research Facts

6. Westfall failed to have a firm command of the **facts** surrounding Applicant's whereabouts leading up to when Rick was shot.
7. Tiffani, and others, told Westfall:
    a. Applicant and Tiffani broke up on Saturday, February 2, 2002,[9]

[5] See (5 RR 2:11-18)(1 CR 78)(2 CR 33)(3 APP 333:4)(3 APP 328:4).
[6] See (3 APP 333:4)(3 APP 328:4).
[7] See (paragraph 176 of Applicant’s affidavit).
[8] See (3 APP 328:13)(SCR 1-7).
[9] See (4 RR 100:25) (SHCR 115) (paragraph 21 & 30 of Applicant’s affidavit).

b. Tiffani and Paula saw Applicant at church the following weekend, “about a week” or eight days later, on Sunday, February 10, 2002,[10] and

c. Tiffani saw Applicant at her mom's the following Saturday, February 16, 2002, around three or four in the morning,[11]

8. However, Westfall mistook the Sunday at church Paula and Tiffani saw Applicant as Sunday, February 17, 2002, which would have been “about two week[s]” or fifteen days after Applicant and Tiffani broke up.

9. The apparent disconnect came from when Minick asked Paula if the Sunday she (Paula) and Tiffani saw Applicant at church was Sunday, February 17, 2002.[12]

10. As a result, the following Thursday, February 14, 2002, when Tiffani said she called Applicant after that Sunday at church was displaced from the Fourteenth to the twenty-first, and the following Saturday when Applicant went out to her mom's was displaced from the sixteenth to the twenty-third,[13] the night Rick was shot,[14] thereby placing Applicant within the same vicinity as Rick when he was shot.[15]

11. Westfall also failed to investigate when Applicant consolidated his loans. Although Applicant consolidated his loans, credit card debt, Friday, February 8,

[10] See (4 RR 103:5-6).
[11] See (4 RR 105:21-106:13).
[12] See (4 RR 147:17). See also (SHCR 63)(shortly before the trial, Melissa Adams took me to meet Gregory Westfall for the purpose of preparing me for my testimony. He spent about one minute with me. His assistant, Minick, spent about five minutes with me. And see (SHCR 66)(I met with Westfall only one time when I accompanied Melissa to his office. He did not prepare me for my testimony). See also (SHCR 94 & 95; + 206 & 214).
[13] See (4 RR 105:18-25).
[14] See (3 RR 211:4-7, 224-423, 229:13-230:5).
[15] See (3 RR 212:24, 226:8, 235:15-23) (4 RR 106:7-5).

2002,[16] Westfall asked Melissa whether it was Friday, February 15, 2002,[17] thus, also displacing his whole timeline forward one week.[18]

12. Westfall also failed to have a firm command of the **facts** regarding the:

    a. Incredulity of Jheen's pretrial identification of Applicant as the extraneous shooter.[19]

    b. Charla's unconstitutional arrest of Applicant.

    c. Fazio's incredible rifle-to-bullet link.

That is, he either failed to have a firm command of the facts, or he failed to keep Applicant informed of important developments throughout the course of the prosecution, i.e., so he could perpetuate the charge error hoax discussed above.

Jheen's In-Court ID; incredulity.

13. Doc 41: New: HCSO's Incident Report (2-23-02) and Doc 55; New: Info on JJ's Hideaway (*See* (3 APP 202:11-12 & 245)) shows that Jheen was at a bar, not an innocent sounding little birthday party like with cake and ice cream like what the State made it out to seem (3 RR 200:24, 224:8, 230:3).

---

[16] See (4 APP 3-4).
[17] See (4 RR 50:1-3).
[18] See also (SHCR 70:19, 71:23; + 115-119).
[19] The in-court basically boiled down to Hartmann and Foran telling their witnesses where Applicant would be seated that he would be seated next to an officer in the courtroom in case he decided not to "mind his manners:

> Oftentimes in cases in which the attorneys are doing their jobs [suggesting that Westfall was not doing his job] … we will meet with our witnesses and try and tell them … who is going to be in the courtroom, where those people [policemen] are going to be [and] what is their job. Oftentimes we tell little kids, "There's going to be three policemen in there to make sure everybody minds their manners [in other words, where the defendant (me) would be seated]." ¶ We tell them where we're going to sit…. Is there anyone here who feels that's improper, that they would think that that's coaching or trying to tell the witness what to say? … There's nothing secretive, awful. That's a normal practice.

(2 RR 56:10-11, 18, 19-24, 57:19-21, & 58:1-3). And,

> HARTMANN: If I am Person 1, 2, 3, 4, 5 and the man in the uniform[!] is 6 [Dave Darusha],[#] what number would he be [emphasis added]? JHEEN: No. 5.

(3 RR 232:18-20). See also subchapter H of chapter 26 of Applicant's affidavit.

14. Doc 10: Weaver, Richard's DPS Crim Conv Rec (*See* (5 APP 97-101)) shows that if Jheen was at a bar with Rick, she was probably intoxicated, to say the least.
15. Doc 45: New: Stephen's Statement (2-23-02) (*See* (3 APP 211:25-26)) shows that Stephen, who was in the best possible position to identify the man whom (the suspect) he talked to, said that he was six inches shorter than Applicant, and twenty pounds lighter (3 RR 232:6-9)4 APP 119-125).
16. Doc 46: New: Jheen's Statement (2-23-02) (*See* (3 APP 213:23-26)) shows that Jheen didn't get a good look at how much the suspect **weighed** (3 RR 232:6-9).
17. Doc 46: New: Jheen's Statement (2-23-02) (*See* (3 APP 213:23-26)) shows that Jheen didn't get a good look at whether the suspect was light **complexioned** or dark (3 RR 232:6-9).
18. Doc 46: New: Jheen's Statement (2-23-02) (*See* (3 APP 213:23-26)) shows that Jheen didn't get a good look at how **old** the suspect was (3 RR 232:6-9).
19. Doc 52; New: Jheen's Photo Spread Results (Applicant) and DOC 54: 3-7-02 Mugshot (*See* (3 APP 229 & 233)) shows that Jheen's in-court identification was probably dependent upon the suggestive pretrial photographic lineup **because** the procedure took place nearly a year after the offense.
20. Doc 46: New: Jheen's Statement (2-23-02) (*See* (3 APP 213:25-26)), Doc 52; New: Jheen's Photo Spread Results (Applicant) and DOC 54: 3-7-02 Mugshot (*See* (3 APP 229 & 233)) shows the pretrial identification was suggestive **because** Applicant's photo was the only one out of the six tending to match Jheen's pretrial description of the suspect "look[ing]" to have been "drunk or something."
21. Doc 50; New: Deleon's & Hubbard's Inv. Rpt. (11-26-02), Doc 52; New: Jheen's Photo Spread Results (Applicant), and Doc 53; New: Stephen's Photo Spread Results (Applicant) (*See* (3 APP 225:29 & 33, 229-230)) shows that Hubbard and Deleon weren't watching Greg, Jheen, and Stephen outside the interview room as they were taking their

turns trying to identify Applicant, and they show that Jheen probably told Stephen, **because** of the unlikely odds of them both picking the same position, that she (Jheen) identified their suspect before he was able to take his turn and that he was in position six.

22. Doc 45: New: Stephen's Statement (2-23-02) (*See* (3 APP 211:25-26)), Doc 52; New: Jheen's Photo Spread Results (Applicant) (*See* (3 APP 229)), Doc 8: TCSO Release (*See* (4 APP 117-118)), and Doc 9: Pictures; Height (*See* (4 APP 119-124)) shows Hubbard and Deleon didn't tell Jheen that Applicant was six inches taller than what Stephen, who was in the best possible position to identify the suspect, i.e., face-to-face, said the suspect was, and about twenty pounds heavier **because**, despite the huge discrepancy, they still tried to identify him, unless, of course, they were reversing course and recanting.
23. Doc 52; New: Jheen's Photo Spread Results (Applicant) (*See* (3 APP 229)), Doc 58; New: Charla's Letter to Goin (*See* (3 APP 258)), Doc 60; New: Charla's Photo of Applicant + truck (*See* (3 APP 267-270)), Doc 61; New: Charla's Photo of Brett's SKS (*See* (3 APP 273-275)), Doc 62; New: Charla's Commendation Letter to Hanlon (*See* (3 APP 278)) shows that, rather than tell the extraneous witnesses that Applicant was way taller and heavier than the suspect Stephen described, Hubbard and Deleon no doubt showed them the pictures of Applicant's truck and rifle and told them where they found the rifle and that Applicant's girlfriend lived a few short miles away from where Rick was shot.

Applicant's unconst. Arrest

24. Doc 57; Charla's Letter to Goin (*See* (3 APP 258)) and Doc 62; New: Charla's Commendation Letter to Hanlon (*See* (3 APP 278)) shows that Charla wanted Applicant off the streets "permanently" bad enough that she was motivated to move or have

somebody move--much like the missing documents (*See* (1 APP 23)), the rifle from the cab where Applicant last recalled it to the toolbox, where Gass said he found it (3 RR 146:4)(*See* paragraph 52, footnote 8 of Applicant's affidavit).

25. Doc 12: New: Unresponsive Document (Mike's Photo Spread Results on Jason) (*See* (3 APP 92)) shows that Charla lied she asked Mike to identify Jason when she asked him to identify Applicant, suggesting that she didn't ask Mike to identify Applicant before arresting him (3 APP 21:60-22:6).
26. Doc 8: 12-30-20 TCDA Req.; Missing Docs (*See* (1 APP 23:4)) shows that Charla lied that Hanlon pulled up Applicant's ticket file, and that was how they found Applicant, **because** the supposed ticket doesn't exist and probably never existed in the first place (3 APP 21:49-59, 75:18, & 144:J).
27. Doc 6: New: Smith's MVD Inquiry (2-24-02) (3 APP 78) shows that Charla lied that Hanlon pulled up Applicant's ticket file and got his license plate number to his truck **because** if Hanlon did, why would Charla turn around a few short hours later and do it again (3 APP 21:49-59).
28. Doc 62; New: Charla's Commendation Letter to Hanlon (3 APP 278), Doc 65: New: Radio Call Master Sheet New: (2-23-02)/Unresponsive Document, paragraph 268 Footnote 9 of applicant's affidavit shows that Charla arrested Applicant before the magistrate judge signed her warrant for Applicant's arrest (*See* paragraph 97 of Applicant's affidavit) (3 APP 19:10-15 & 48-52) (3 APP 280).
29. Doc 5: New: Charla's Warrant (3 APP 75:17-18) and Doc 6: New: Smith's MVD Inquiry (2-24-02) (3 APP 77) shows Doc 10: Mike's Statement (2-23-02) (3 APP 87:13-15) and Doc 11: Mike's Photo Spread Results (for Applicant) (3 APP 90) were Charla's only probable cause for Applicant's arrest.

30. Charla's Letter to Goin (*See* (3 APP 258)) shows that Charla believed Mindy so much that after she called her she went out right then and there to arrest Applicant, even if it meant arresting Applicant before Mike identified Applicant, then lying to the magistrate that it was the other way around (3 APP 27:26-32 + 39 + 28:28-30).
31. Doc 64; New: Hanlon's Criminal/disciplinary Records shows that Hanlon's notary as to the date Mike supposedly identified Applicant was a fabrication Mike identified Applicant before Applicant was arrested **because** he has a history of misleading and lying to authority (3 APP 87:13-15 + 30-37).
32. Doc 5: New: Charla's Warrant (2-23-02), Doc 12: New: Unresponsive Document (Mike's Photo Spread Results on Jason), Doc 58; New: Charla's Letter to Goin, Doc 60; New: Charla's Photo of Applicant + truck, Doc 61; New: Charla's Photo of Brett's SKS shows that Charla lied to the magistrate judge that Mike identified Applicant before she arrested Applicant **because**:
    a. Her only probable cause to arrest Applicant was Mike's identification, not her CIs,
    b. She never asked Mike to identify Jason, and the lied about doing so **because** she didn't want anybody wondering why she didn't go out and arrest Jason at the same time she arrested Applicant.
    c. She evidently hoped Applicant was the suspect in Goin's case
    d. She sent him (Goin) photos of Applicant's truck and the SKS and lied to him she found it (the SKS) where Goin's victims said they saw the suspect digging in an effort to persuade him to investigate Applicant for Goin's case.

Bullet-to-Rifle Link; incredulity

33. Doc 49; New: Car Repair Bill (4-3-02) (*See* (3 APP 221)) and Doc 50; New: Deleon's & Hubbard's Inv. Rpt. (11-26-02) (*See* (3 APP 224-225)) shows that

Stephen, and no doubt others, contaminated the forensic evidence from no later than 4-3-02 to no later than 11-26-02.

34. Doc 41: New: HCSO's Incident Report (2-23-02) (*See* (3 APP 202:25-28)) shows Stephen lied he found the supposed bullet fragment **because** Goin, a trained Crime Scene Investigator, looked for remnants of the bullet and determined there was none to be had.

Cuyler

1. Westfall and Minick argued "Applicant shot Rick" (the extraneous victim) "because of Paxil" over "Applicant didn't shoot Rick",[20] no doubt, so Wynn, the direct appeal attorney, whom (Wynn) Westfall and Minick had the trial judge (Gill) appoint Applicant for his direct appeal, could argue on appeal Gill failed to charge the jury on the law applicable to the case at sentencing, which Westfall was, in part, the cause of,[21] regarding Applicant's potential criminal responsibility for shooting Rick.
2. According to Wynn, Westfall went to the Kearney Law Firm, where they had all worked at some point in time, and where some of them still worked, to discuss with Kearney, Wynn, and Minick, who (Minick) wound up sitting second chair to Westfall, "trial strategy" and "other legal matters" which were no doubt appeal strategies.[22]
3. Before Wynn was able to perfect their trial and appeal strategy, Applicant encountered Tony Gregory, a fellow prisoner, who after briefly talking to Applicant after he (Applicant) was sentenced, who (Tony) took it upon himself to write a *State Bar Grievance* on Westfall, and who (Tony) encouraged Applicant to sign and mail it. That it would help his appeal.[23]

[20] See (4 RR 179:4).
[21] See (5 RR 2:11-18)(1 CR 78)(2 CR 33)(3 APP 333:4)(3 APP 328:4).
[22] See (3 APP 333:4)(3 APP 328:4).
[23] See (paragraph 176 of Applicant's affidavit).

4. As a result, Wynn had Applicant brought back to the county and appointed substitute counsel (Francis) who (Francis) overlooked the charge error as an apparent courtesy to Gill, Wynn, Westfall, and Minick.[24]

Napue

1. Respondent's expert (Fazio) in this case gave testimony that exceeded the limits of science.
2. This misled the jury by implying that the expert could identify scratches on a metal shaving recovered from the extraneous, to the exclusion of any contamination (extraneous scratches), to the scratches on an exemplar fired from the rifle in Applicant's truck.

Conclusions of Law

General Writ Law

1. In a habeas corpus proceeding, the burden of proof is on the applicant. *Ex parte Rains*, 555 S.W.2d 478 (Tex. Crim. App. 1977). An applicant "must prove by a preponderance of the evidence that the error contributed to his conviction or punishment." *Ex parte Williams*, 65 S.W.3d 656,658 (Tex. Crim. App. 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 S.W.2d 114 (Tex. Crim. App. 1985). Relief may be denied if the applicant states only conclusions, and not specific facts. *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000). In addition, an applicant's

[24] See (3 APP 328:13)(SCR 1-7).

sworn allegations alone are not sufficient to prove his claims. *Ex parte Empey*, 757 S.W.2d 771, 775 (Tex. Crim. App. 1988).

Section Four

1. Because this is a "subsequent application" under *Texas Code of Criminal Procedure, Art. 11.07 (2021)*, it is subject to the provisions of *§ 4. Section 4* provides in relevant part:

    a. (a) if a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing:

        i. (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on or before the date the applicant filed the previous application;

    b. (c) for purpose of subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by subsection (a) (1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

    See Tex. Code of Crim. Proc., Art. 11.07, § 4 (2021).

Application

2. Thus, this Court is barred from considering the merits of the instant application unless the facts giving rise to the claims made in the instant application could not have been presented in the initial application because it was "not ascertainable through the exercise of reasonable diligence on or before" the date of the initial application.
3. In *Ex parte Lemke*, the Criminal Court of Appeals held that because "applicant had previously asked his attorney about the existence of [a] plea bargain offer, was told that

none were made, and applicant otherwise did not doubt his attorney's representations, applicant satisfied § 4's requirement of reasonable diligence."[25]

4. The facts giving rise to this instant application, or applications, could not have been presented in the initial application because it was "not ascertainable through the exercise of reasonable diligence on or before" the date the initial application was filed.
5. Applicant asked Westfall about the existence of the evidence, was told there was none, and he (Applicant) had no reason to otherwise doubt Westfall's representations.
6. Applicant was not expected to suspect the "Honorable" Westfall was lying; that he was sitting on corroborating evidence he (Applicant) did not and could not have shot Rick.
7. But even if he was, why and how was Applicant to prove it?
8. Write Gass, Smith, Fazio, and Jheen letters?
9. This sort of evidence is a unique form of evidence in that it is completely incumbent on the witness to come forward and admit prevaricated testimony.[26]
10. Or was Applicant expected to file FIA request?
11. Texas FIA excepted and excepts prisoners, period.[27]
12. What's more, "due diligence" doesn't "require a defendant to file a public information act request to double-check … compli(ance) with … disclosure obligations."[28] (*Strickland* has a similar disclosure obligation like *Brady)*.[29]
13. Or was Applicant expected to file a writ of habeas corpus and get a court order for the documents, which he did not know existed?[30]

---

[25] See *Lemke*, 13 S.W.3d 791, 794-95 (Tex. Crim. App. 2000), overruled on other grounds, *Ex parte Argent*, 393 S.W.3d 781 (Tex. Crim. App. 2013).
[26] See generally *In re Young*, 789 F.3d 518, 529 (5th Cir. 2015), citing *Pacheco v. Artuz*, 193 F. Supp.2d 756, 761 (S.D.N.Y. 2002).
[27] See *Texas Government Code* § 552.028 (2021).
[28] See *Smith v. State*, 165 A.3d 561, 590 (Maryland App. 2017), commenting on *Ex parte Miles*, 359 S.W.3d 647, 664 (Tex. Crim. App. 2012).
[29] See *Id*., 466 U.S. at 688 (counsel owes the client a duty to keep him informed of important developments throughout the course of the prosecution).
[30] See, e.g., *Nabelek v. Bradford*, 228 S.W.3d 715, 718 (Tex. App.-Houston [14th Dist.] 2006).

14. If so, such speculative and conclusionary allegations as Westfall may or may not have been lying about corroborating evidence was an insufficient basis upon which to seek a court order to produce the DA's, among others, files.[31]
15. Westfall did tell Applicant about the evidence, and he (Applicant) is now lying Westfall didn't?
16. Surely Applicant would have opted for it over accepting responsibility for another shooting.
17. Surely Applicant didn't think Westfall's “novel defense” of accepting responsibility for another shooting, then floating the Paxil defense, was better.[32]
18. Surely Westfall didn't think it was better, unless, of course, it was to argue on appeal Gill failed to charge the jury on the law applicable to the case (i.e., set legal precedent).
19. Perhaps that was why Westfall got so cagey every time somebody appeared to threaten it.[33]
20. Like in *Lemke*, Applicant has proven that he meets the requirements of § 4's “reasonable diligence” holding, i.e., because like in *Lemke*, Applicant’s trial attorney (Westfall (Greg)) kept important developments throughout the course of the prosecution from him (Applicant).

Strickland

Performance Standard

1. As many cases have noted, the right to counsel does not mean the right to errorless counsel. In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*.[34]

[31] See generally *Murphy v. Johnson*, 205 F.3d 809, 813-14 (5th Cir. 2009).
[32] See (SHCR 95).
[33] See (paragraph 163-165 of Applicant’s affidavit)(4 RR 220:8-11)(5 RR 2:11-15).
[34] See *Id*. 455 U.S. 668, 687-88 (1984)

2. The first prong requires a showing that counsel's performance fell below an objective standard of reasonableness.
3. This requirement can be difficult to meet since there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.
4. This measure of difference, however, must not be watered down into a disguised form of acquiescence.
5. Allegations of ineffectiveness must be firmly founded in the record.
6. The *Strickland* test of necessity requires a case-by-case examination of the evidence.
7. In any criminal case, counsel must first evaluate what conceivable lines of evidence exist and then decide whether following any of those lines would likely lead to evidence that would assist the defendant.
8. In determining what the conceivable leads are, counsel must first evaluate the information available to him at that time.
9. The reviewing court must decide whether the attorney's decision either to forego investigation, or to stop investigating at some later point, was reasonable under prevailing professional norms.
10. In evaluating whether counsel's decisions were reasonable under the norms of the profession, the reviewing court must defer to trial counsel's decisions required by *Strickland*, taking into consideration not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.
11. Counsel's performance must be viewed objectively and from counsel's perspective at the time.

12. Stated simply, the court must decide whether a reasonable attorney would consider the information available to defense counsel worthy of further investigation, and if so, how much additional investigation a reasonable attorney would perform.[35]

Prejudice Standard

13. The second *Strickland* prong, sometimes referred to as the prejudice prong, requires a showing that, but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different.
14. A probability is defined as a probability sufficient to undermine confidence in the outcome.
15. Thus, in order to establish prejudice, an applicant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result was reliable.
16. It is not sufficient for the applicant to show that the errors had some conceivable effect on the outcome of the proceeding.
17. Rather, he must show that there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.
18. The applicant has the burden to prove ineffective assistance of counsel by a preponderance of the evidence.
19. Allegations of ineffectiveness must be based on the record, and the presumption of a sound trial strategy cannot be overcome absent evidence in the record of the attorney's *reasons* for his conduct.
20. The reviewing court must look at the totality of the representation and its decision must be based on the facts of the particular case, viewed at the time of counsel's conduct so as to eliminate hindsight bias.

[35] See *Lampkin v. State*, 470 S.W.3d 919, 922 (Tex. App.—Texarkana 2015, pet. ref'd).

21. In all cases, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding.
22. A failure to make a showing under either prong defeats a claim for ineffective assistance.
23. In deciding whether a defendant has established *Strickland* prejudice during the punishment phase of non-capital cases as a result of deficient attorney performance of *any kind*, the following nonexclusive list of factors are considered:
    a. whether the defendant received a maximum sentence.
    b. the disparity, if any, between the sentence imposed and the sentence(s) requested by the respective parties,
    c. the nature of the offense charged, and the strength of the evidence presented at the guilt/innocence phase of trial.
    d. the egregiousness of counsel's error--essentially, the relationship between the amount of effort and resources necessary to have prevented the error as compared to the potential harm from that error--and
    e. the defendant's criminal history.
24. Where the deficient performance arises from counsel's *failure to investigate and introduce mitigating evidence*, the following additional factors are also relevant:
    a. whether mitigating evidence was available and, if so, whether the available mitigating evidence was admissible,
    b. the nature and degree of the mitigating evidence presented to the jury at punishment.
    c. the nature and degree of aggravating evidence actually presented to the jury by the State at punishment,
    d. whether and to what extent the jury might have been influenced by the mitigating evidence,

e. whether and to what extent the proposed mitigating evidence serves to explain the defendant's actions in the charged offense, and

f. whether and to what extent the proposed mitigating evidence serves to assist the jury in determining the defendant's blameworthiness.[36]

Performance: research Law

25. Westfall and Minick failed to research the law on jury charges at sentencing.

26. The law required Gill to charge the jury on criminal responsibility, plus then define the term criminal responsibility as it appeared in the *Texas Penal Code Section* 6.03.[37]

27. Instead of doing that, Westfall objected to it on the ground that Applicant was presumed to have committed the offense and to have possessed the required mental state necessary to "be [potentially] held" criminally responsible therefor.[38]

28. In other words, so Wynn could argue on appeal Gill failed to *sua sponte* charge the jury on the law applicable to the case at sentencing, Westfall apparently objected to Gill's involuntary intoxication instruction on the extraneous.[39]

29. But before Wynn was able to perfect their strategy, he (Wynn) withdrew because Applicant filed *State Bar Grievances* on Westfall that he was displeased with the representation he received, and because he (Wynn) and Westfall were friends.[40]

[36] See *Lampkin v. State*, 470 S.W.3d 876, 911 (Tex. App.—Texarkana 2015, pet. ref'd).
[37] See also *Huizar v. State*, 12 S.R.3d 479, 481 (Tex. Crim. App. 2-23-00); and *Ranger v. State*, 2005 Tex. App. LEXIS 10430, *10-17 (Tex. App.-Fort Worth 2005), citing *Lindsay v. State*, 102 S.W.3d 223, 230 (Tex. App.-Houston [14th Dist.] 2003, pet. ref'd).
[38] See (2 RR 75:22-25) (4 RR 220:8-11)(5 AR 2:13-15, 22-3:5)(1 CR 78)(2 CR 33).
[39] See (5 RR 2:11-15)
[40] See (ARC 4).

30. If Westfall's trial strategy was not Wynn's appeal strategy, why didn't Westfall use the information in the above documents to subject Jheen's, Charla's and Fazio's testimonies to the crux of adversarial testing?
31. Surely Applicant would have opted for it over accepting responsibility for shooting Rick?
32. Surely Applicant didn't think Westfall's "novel defense" of accepting responsibility for shooting Rick, then floating the Paxil defense, was better.[41]
33. Surely Westfall didn't think it was better, unless, of course, it was to argue on appeal Gill failed to charge the jury on the law applicable to the case.
34. But for Westfall, Hartmann didn't even want to accuse Applicant of shooting Rick at sentencing.[42]
35. What's more, every time either Hartmann or Gill maneuvered to include an instruction on the law applicable to the case, Westfall objected on the ground there was "no presumption of innocence" at the "punishment phase" of the case,[43] which only reinforced its necessity and lessened the harm analysis from the "egregious" harm analysis to the "some harm" analysis.[44]
36. If Wynn's appeal strategy was not Gill's failure to charge the jury on the applicable law, it sure was in *Bluitt v. State*.[45]

---

[41] See (SHCR 95).
[42] See (2 RR 7:17-22).
[43] See (2 RR 75:24)(5 RR 2:11-18).
[44] See *Huizar*, 12 S.W.3d at 464, citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).
[45] See *Id*., 70 S.W.3d 901 (Tex. App.-Fort Worth 2-14-02, pet. granted, ref'd on prior adjudication grounds).

37. *Bluitt's* trial judge (Wisch) failed to charge the jury on the law applicable to the case at sentencing, similar to how Gill failed to charge the jury on the applicable law in Applicant's case at sentencing and his (Applicant's) potential (could be) criminal responsibility for shooting Rick.[46]

38. What's more, *Bluitt's* case was overturned on appeal, at least till it was determined his extraneous had already been previously adjudicated.

39. Applicant's case, no doubt, would've been overturned, at least till Tony filed the State Bar Grievance and Wynn withdrew because Applicant has not been, nor has he ever been, previously adjudicated of the extraneous, but for in Texas where conviction before punishment for the extraneous doesn't matter.[47][48]

40. Then to make matters worse, Hartmann prosecuted *Bluitt*, and defended the State on appeal, like how she evidently wanted to do Applicant, but respondent wouldn't let her defend the State on his appeal,[49] apparently because they had somebody better.[50]

41. Consequently, Applicant got stuck with way more time than he would have otherwise gotten for robbing and shooting Mike and Andy in and of themselves.

---

[46] See (1 CR 78)(2 CR 33).

[47] American Bar Association, third Edition, Standard 18-3.6 (offense of conviction as basis for sentence) and the commentary and citations therein, including Elizabeth T. Lear's "Is Conviction Irrelevant?" 40 U.C.L.A. Law Review 1179 (1993).

[48] See (3 APP 333:4)(3 APP 328:4).

[49] See (1 EX 15:54-16:5) (1 ARR 3:19).

[50] See (1 ARR 1:19). See also *Edward L. Wilkinson, Grunsfeld, Ten Years Later*, 35 St. L.J. 603 (2004). Note Wilkinson and Wynn's wife defended the State in Ranger, 2005 Tex. App. LEXIS 10430. Incidentally, for some strange reason, Wynn's wife also filed the State's subpoena in Applicant's case to secure Tarah's testimony (1 CR 85)(2 CR 48). Then, in some weird twist of fate, or not, Wynn represented the same inmate, Tony, who filed the State Bar Grievance for Applicant against Westfall causing Wynn's withdrawal. *Gregory v. State*, 2010 Tex. App. LEXIS 618 (Tex. App.-Fort Worth 2010).

42. Applicant has therefore proven by a preponderance of the evidence that Westfall and Minick failed to have a firm command of the **law**; specifically, Westfall and Minick didn't know the law required Gill to *sua sponte* instruct the jurors they couldn't consider the extraneous in sentencing Applicant for the extraneous (shooting Rick), unless they found and believed beyond a reasonable doubt that Applicant could be held criminally responsible therefor.

Prejudice; research law

43. Although Applicant's imprisonment is about a third of the maximum, his fine was 200% of the maximum,[51] and his parole eligibility date was 58% of the maximum.[52]
44. Second, the sentence imposed was 35 years with two $10,000 fines; the sentences requested by respondent were 30 years with no fine, and the sentences requested by Applicant were 10 years imprisonment and 10 years' probation with no fine.[53]
45. Third, the offense was robbery, and although the nature of the offense was brutal,[54] the evidence produced at trial and on this habeas corpus application actually showed the State's principal was Jason, who got six years (he would have gotten probation but for Applicant's mom who gave Applicant's attorney, who then gave them to the DA, pictures of Jason with a gun and marijuana), not Applicant, but that little tidbit was glossed over by the respondent (the State & the "Defense").[55]
46. Fourth, Greg's error was highly egregious:
    a. the amount of effort and resources necessary to have prevented the error was negligible.

[51] See (1 APP 35). *State v. Crook*, 248 S.W.3d at 177. *Ex parte Applewhite*, 729 S.W.2d at 708
[52] See Government Code § 508.145 (2021).
[53] See (paragraphs 169-170 of Applicant's affidavit)(2 RR 61:25)(5 RR 13:3-5, 19:15, 20:25-21:15) (1 CR 82)(2 CR 37).
[54] See (5 RR 5:5-8:14, 15:4-7, 19:1-2).
[55] See (3 RR 54:22-55:10; 98:10-99:10) (paragraph 191 of Applicant's affidavit).

b. Westfall had to look no further than the DA's file for the evidence, so the amount of effort and resources necessary to have prevented the error was negligible.[56]

c. The potential harm from the error, accepting responsibility for shooting Rick was great.

d. As Bradberry put it, the threat of bodily injury was of greater interest to him than the value of property.[57]

e. And “evidence that a defendant 'committed another [shooting] [is] the most powerful imaginable aggravating evidence” there is, according to SCOTUS, and a few other noteworthy courts.[58]

47. Fifth, Applicant's criminal history, depending on how defined, was either no criminal history,[59] or next to no criminal history.[60]

48. Applicant has also therefore proven by a preponderance of the evidence that there is a reasonable probability (does this not change reasonable probability to preponderance of the evidence?) that Applicant was prejudiced from Westfall’s and Minick’s failure to have a firm command of the **law on criminal responsibility**:

a. The jurors were led to believe and think Applicant “could be held” strictly liable for shooting Rick in sentencing him for robbing and shooting Mike and Andy under the Texas Penal Code.

b. The jurors found the same beyond a reasonable doubt.[61]

---

[56] See (SHCR 77:27, 96).
[57] See (2 RR 22:13-16).
[58] See, e.g., *Wong v. Belmonte*, 558 U.S. 15, 26 (2009); see also *Clark v. Davis*, 850 F.3d 770, 776 (5th Cir. 2017), citing *Clark v. Thaler*, 673 F.3d 410, 424 (5th Cir. 2012).
[59] See (4 RR 63:11-17)(1 CR 74)(2 CR 29).
[60] He hadn't yet been convicted of the misdemeanor possession of marijuana case, whose records are also in the district clerk's office under cause number 819607 and HB 959, County Criminal Court Number Eight, Tarrant County, Texas, and which may also be necessary to the resolution of this case.
[61] See (5 RR 12:3-4).

c. The same was no doubt considered in sentencing Applicant for robbing and shooting Mike and Andy.

Performance: investigate Facts

49. Westfall also failed to have a firm command of the facts surrounding Applicant's whereabouts leading up to when Rick was shot.

50. Although Tiffani, and others, told Westfall:

    a. Applicant and Tiffani broke up on Saturday, February 2, 2002,[62]

    b. Tiffani and Paula saw Applicant at church the following weekend, "about a week" or eight days later, on Sunday, February 10, 2002,[63] and

    c. Tiffani saw Applicant at her mom's the following Saturday, February 16, 2002, around three or four in the morning,[64]

    Westfall mistook the Sunday at church Paula and Tiffani saw Applicant as Sunday, February 17, 2002, which would have been "about two week[s]" or fifteen days after Applicant and Tiffani broke up.

51. The apparent disconnect came from when Minick asked Paula if the Sunday she (Paula) and Tiffani saw Applicant at church was Sunday, February 17, 2002.[65]

52. As a result, the following Thursday, February 14, 2002, when Tiffani said she called Applicant after that Sunday at church was displaced from the Fourteenth to the twenty-first, and the following Saturday when Applicant went out to her

[62] See (4 RR 100:25) (SHCR 115) (paragraph 21 & 30 of Applicant's affidavit).
[63] See (4 RR 103:5-6).
[64] See (4 RR 105:21-106:13).
[65] See (4 RR 147:17). See also (SHCR 63)(shortly before the trial, Melissa Adams took me to meet Gregory Westfall for the purpose of preparing me for my testimony. He spent about one minute with me. His assistant, Minick, spent about five minutes with me. And see (SHCR 66)(I met with Westfall only one time when I accompanied Melissa to his office. He did not prepare me for my testimony). See also (SHCR 94 & 95; + 206 & 214).

mom's was displaced from the sixteenth to the twenty-third,[66] the night Rick was shot,[67] thereby placing Applicant within the same vicinity as Rick when he was shot.[68]

53. Westfall also failed to investigate when Applicant consolidated his loans. Although Applicant consolidated his loans, credit card debt, Friday, February 8, 2002,[69] Westfall asked Melissa whether it was Friday, February 15, 2002,[70] thus, displacing his whole timeline forward one week.[71]

54. Also, as discussed above, Westfall failed to have a firm command of the facts regarding the:

    a. Incredulity of Jheen's pretrial identification of Applicant as the extraneous shooter.[72]

    b. Charla's unconstitutional arrest of Applicant. And,

    c. Fazio's incredible rifle-to-bullet link.

---

[66] See (4 RR 105:18-25).
[67] See (3 RR 211:4-7, 224-423, 229:13-230:5).
[68] See (3 RR 212:24, 226:8, 235:15-23) (4 RR 106:7-5).
[69] See (4 APP 3-4).
[70] See (4 RR 50:1-3).
[71] See also (SHCR 70:19, 71:23; + 115-119).
[72] The in-court basically boiled down to Hartmann and Foran telling their witnesses where Applicant would be seated that he would be seated next to an officer in the courtroom in case he decided not to "mind his manners:

> Oftentimes in cases in which the attorneys are doing their jobs [suggesting that Westfall was not doing his job] … we will meet with our witnesses and try and tell them … who is going to be in the courtroom, where those people [policemen] are going to be [and] what is their job. Oftentimes we tell little kids, "There's going to be three policemen in there to make sure everybody minds their manners [in other words, where the defendant (me) would be seated]." ¶ We tell them where we're going to sit…. Is there anyone here who feels that's improper, that they would think that that's coaching or trying to tell the witness what to say? … There's nothing secretive, awful. That's a normal practice.

(2 RR 56:10-11, 18, 19-24, 57:19-21, & 58:1-3). And,

> HARTMANN: If I am Person 1, 2, 3, 4, 5 and the man in the uniform[!] is 6 [Dave Darusha],[] what number would he be [emphasis added]? JHEEN: No. 5.

(3 RR 232:18-20). See also subchapter H of chapter 26 of Applicant's affidavit, footnote 268 omitted).

That is, he either failed to have a firm command of the facts, or he failed to keep Applicant informed of important developments throughout the course of the prosecution, i.e., so he could perpetuate the charge error hoax discussed above.

Jheen's In-Court ID; incredulity

55. Doc 41: New: HCSO's Incident Report (2-23-02) and Doc 55; New: Info on JJ's Hideaway (*See* (3 APP 202:11-12 & 245)) shows that Jheen was at a bar, not an innocent sounding little birthday party like with cake and ice cream like what the State made it out to seem (3 RR 200:24, 224:8, 230:3).
56. DOC 10: Weaver, Richard's DPS Crim Conv Rec (*See* (5 APP 97-101)) shows that if Jheen was at a bar with Rick, she was probably intoxicated, to say the least.
57. Doc 45: New: Stephen's Statement (2-23-02) (*See* (3 APP 211:25-26)) shows that Stephen, who was in the best possible position to identify the man whom (the suspect) he talked to, said that he was six inches shorter than Applicant, and twenty pounds lighter (3 RR 232:6-9).
58. Doc 46: New: Jheen's Statement (2-23-02) (*See* (3 APP 213:23-26)) shows that Jheen didn't get a good look at how much the suspect **weighed** (3 RR 232:6-9).
59. Doc 46: New: Jheen's Statement (2-23-02) (*See* (3 APP 213:23-26)) shows that Jheen didn't get a good look at whether the suspect was light **complexioned** or dark (3 RR 232:6-9).
60. Doc 46: New: Jheen's Statement (2-23-02) (*See* (3 APP 213:23-26)) shows that Jheen didn't get a good look at how **old** the suspect was (3 BR 232:6-9).
61. Doc 52; New: Jheen's Photo Spread Results (Applicant) and DOC 54: 3-7-02 Mugshot (*See* (3 APP 229 & 233)) shows that Jheen's in-court identification was probably dependent upon the suggestive pretrial photographic lineup **because** the procedure took place nearly a year after the offense.

62. Doc 46: New: Jheen's Statement (2-23-02) (*See* (3 APP 213:25-26)), Doc 52; New: Jheen's Photo Spread Results (Applicant) and DOC 54: 3-7-02 Mugshot (*See* (3 APP 229 & 233)) shows the pretrial identification was suggestive **because** Applicant's photo was the only one out of the six tending to match Jheen's pretrial description of the suspect "look[ing]" to have been "drunk or something."
63. Doc 50; New: Deleon's & Hubbard's Inv. Rpt. (11-26-02), Doc 52; New: Jheen's Photo Spread Results (Applicant), and Doc 53; New: Stephen's Photo Spread Results (Applicant) (*See* (3 APP 225:29 & 33, 229-230)) shows that Hubbard and Deleon weren't watching Greg, Jheen, and Stephen outside the interview room as they were taking their turns trying to identify Applicant, and they show that Jheen probably told Stephen, **because** of the unlikely odds of them both picking the same position, that she (Jheen) identified their suspect before he was able to take his turn and that he was in position six.
64. Doc 45: New: Stephen's Statement (2-23-02) (*See* (3 APP 211:25-26)), Doc 52; New: Jheen's Photo Spread Results (Applicant) (*See* (3 APP 229)), DOC 8: TCSO Release (*See* (4 APP 117-118)), and Doc 9: Pictures; Height (*See* (4 APP 119-124)) shows Hubbard and Deleon didn't tell Jheen that Applicant was six inches taller than what Stephen, who was in the best possible position to identify the suspect, i.e., face-to-face, said the suspect was, and about twenty pounds heavier **because**, despite the huge discrepancy, they still tried to identify him, unless, of course, they were reversing course and recanting.
65. Doc 52; New: Jheen's Photo Spread Results (Applicant) (*See* (3 APP 229)), Doc 58; New: Charla's Letter to Goin (*See* (3 APP 258)), Doc 60; New: Charla's Photo of Applicant + truck (*See* (3 APP 267-270)), Doc 61; New: Charla's Photo of Brett's SKS (*See* (3 APP 273-275)), Doc 62; New: Charla's Commendation Letter to Hanlon (*See* (3 APP 278)) shows that, rather than tell the extraneous witnesses that Applicant was way

taller and heavier than the suspect Stephen described, Hubbard and Deleon no doubt showed them the pictures of Applicant's truck and rifle and told them where they found the rifle and that Applicant's girlfriend lived a few short miles away from where Rick was shot.

Applicant's unconst. Arrest

66. Doc 57; Charla's Letter to Goin (*See* (3 APP 258)) and Doc 62; New: Charla's Commendation Letter to Hanlon (*See* (3 APP 278)) shows that Charla wanted Applicant off the streets "permanently" bad enough that she was motivated to move or have somebody move--much like the missing documents (*See* (1 APP 23)), the rifle from the cab where Applicant last recalled it to the toolbox, where Gass said he found it (3 RR 146:4)(*See* paragraph 52, footnote 8 of Applicant's affidavit). *See* generally also subchapter E of chapter 26 of Applicant's affidavit).
67. Doc 12: New: Unresponsive Document (Mike's Photo Spread Results on Jason) (*See* (3 APP 92)) shows that Charla lied she asked Mike to identify Jason when she asked him to identify Applicant, suggesting that she didn't ask Mike to identify Applicant before arresting him (3 APP 21:60-22:6).
68. Doc 8: 12-30-20 TCDA Req.; Missing Docs (*See* (1 APP 23:4)) shows that Charla lied that Hanlon pulled up Applicant's ticket file, and that was how they found Applicant, **because** the supposed ticket doesn't exist and probably never existed (3 APP 21:49-59, 75:18, & 144:J).
69. Doc 6: New: Smith's MVD Inquiry (2-24-02) (3 APP 78) shows that Charla lied that Hanlon pulled up Applicant's ticket file and got his license plate number to his truck **because** if Hanlon did, why would Charla turn around a few short hours later and do it again (3 APP 21:49-59).

70. Doc 62; New: Charla's Commendation Letter to Hanlon (3 APP 278), Doc 65: New: Radio Call Master Sheet New: (2-23-02)/Unresponsive Document, paragraph 268 Footnote 9 of applicant's affidavit shows that Charla arrested Applicant before the magistrate judge signed her warrant for Applicant's arrest (*See* paragraph 97 of Applicant's affidavit) (3 APP 19:10-15 & 48-52) (3 APP 280).
71. Doc 5: New: Charla's Warrant (3 APP 75:17-18) and Doc 6: New: Smith's MVD Inquiry (2-24-02) (3 APP 77) shows Doc 10: Mike's Statement (2-23-02) (3 APP 87:13-15) and Doc 11: Mike's Photo Spread Results (for Applicant) (3 APP 90) were Charla's only probable cause for Applicant's arrest.
72. Charla's Letter to Goin (*See* (3 APP 258)) shows that Charla believed Mindy so much that after she called her she went out right then and there to arrest Applicant, even if it meant arresting Applicant before Mike identified Applicant, then lying to the magistrate that it was the other way around (3 APP 27:26-32 + 39 + 28:28-30).
73. Doc 64; New: Hanlon's Criminal/disciplinary Records shows that Hanlon's notary as to the date Mike supposedly identified Applicant was a fabrication Mike identified Applicant before Applicant was arrested **because** he has a history of misleading and lying to authority (3 APP 87:13-15 + 30-37).
74. Doc 5: New: Charla's Warrant (2-23-02), Doc 12: New: Unresponsive Document (Mike's Photo Spread Results on Jason), Doc 58; New: Charla's Letter to Goin, Doc 60; New: Charla's Photo of Applicant + truck, Doc 61; New: Charla's Photo of Brett's SKS shows that Charla lied to the magistrate judge that Mike identified Applicant before she arrested Applicant **because**:
    a. Her only probably cause to arrest Applicant was Mike's identification, not her CIs

b. She never asked Mike to identify Jason, and the lied about doing so **because** she didn't want anybody wondering why she didn't go out and arrest Jason at the same time she arrested Applicant.

c. She evidently hoped I was the suspect in Goin's case.

d. She sent him (Goin) photos of Applicant's truck and the SKS and lied to him she found it (the SKS) where Goin's victims said they saw the suspect digging in an effort to persuade him to investigate Applicant for Goin's case.

Bullet to Rifle Link; incredulity

75. Doc 49; New: Car Repair Bill (4-3-02) (*See* (3 APP 221)) and Doc 50; New: Deleon's & Hubbard's Inv. Rpt. (11-26-02) (*See* (3 APP 224-225)) shows that Stephen, and no doubt others, contaminated the forensic evidence from no later than 4-3-02 to no later than 11-26-02.

76. Doc 41: New: HCSO's Incident Report (2-23-02) (*See* (3 APP 202:25-28)) shows Stephen lied he found the supposed bullet fragment **because** Goin, a trained Crime Scene Investigator, looked for remnants of the bullet and determined there was none to be had.

77. Consequently, Applicant, but not Jason and Daniel (i.e., his codefendants) got stuck with way more time than he (Applicant) would have otherwise gotten for robbing and shooting Mike and Andy in and of themselves.

78. Applicant has therefore proven by a preponderance of the evidence that Westfall and Minick failed to have a firm command of the **facts**; specifically, Westfall and Minick didn't know or investigate

    a. when Applicant went to Tiffani's.

b. the unlawfully obtained truck and its contents, the rifle, were suppressible or inadmissible.[73]

c. Fazio's bullet-to-rifle link was highly incredible, if not an outright fabrication.[74]

Prejudice: investigate facts

79. Although Applicant's imprisonment is about a third of the maximum, his fine was 200% of the maximum,[75] and his parole eligibility date was 58% of the maximum.[76]

80. Second, the sentence imposed was 35 years with two $10,000 fines; the sentences requested by respondent were 30 years with no fine, and the sentences requested by Applicant were 10 years imprisonment and 10 years' probation with no fine.[77]

81. Third, the offense was robbery, and although the nature of the offense was brutal,[78] the evidence produced at trial and on this habeas corpus application actually showed the State's principal was Jason, who got six years (he would have gotten probation but for Applicant's mom who gave Applicant's attorney, who then gave them to the DA, pictures of Jason with a gun and marijuana), not Applicant, but that little tidbit was glossed over by the respondent (the State & the "Defense").[79]

82. Fourth, Greg's error was highly egregious:

---

[73] *See Franks v. Delaware*, 438 U.S. 154 (1978), *Brown v. State*, 831 S.W.2d 847, 848 (Tex.App.-Dallas 1992, pet. Granted, affirmed), *Hernandez v. State*, 60 S.W.3d 106, 106 (Tex.Cr.App. 2001)), and *Hernandez v. State,* 80 S.W.3d 63, 65 (Tex. App.Amarillo 3-28-02)

[74] See generally, *Ballard v. State,* 23 S.W.3d 178 (Tex.App.-Waco 2000) citing Gill v. State, 57 S.W.3d 540 (Tex.App.-Waco 2001). See also generally, *Dawson v. State,* 645 S.W.2d 915 (Tex.App.-Ft. Worth 1983, pet. ref'd), and Ennis v. State, 71 S.W.3d 804 (Tex.App.-Texarkana 2002), and *Belcher v. State*, 661 S.W.2d 230 (Tex.App.-Houston [1st Dist.] 1983, pet. ref'd).

[75] See (1 APP 35). *State v. Crook*, 248 S.W.3d 172, 177 (Tex. Crim. App. 2008). *Ex parte Applewhite*, 729 S.W.2d 706, 708 (Tex. Crim. App. 1987)

[76] See *Texas Government Code* § 508.145 (2021).

[77] See (paragraphs 169-170 of Applicant's affidavit)(2 RR 61:25)(5 RR 13:3-5, 19:15, 20:25-21:15) (1 CR 82)(2 CR 37).

[78] See (5 RR 5:5-8:14, 15:4-7, 19:1-2).

[79] See (3 RR 54:22-55:10; 98:10-99:10)(paragraph 191 of Applicant's affidavit).

a. the amount of effort and resources necessary to have prevented the error was negligible.

b. Westfall had to look no further than the DA's file for the evidence, so the amount of effort and resources necessary to have prevented the error was negligible.[80]

c. The potential harm from the error, accepting responsibility for shooting Rick was great.

d. As Bradberry put it, the threat of bodily injury was of greater interest to him than the value of property.[81]

e. And “evidence that a defendant 'committed another [shooting] [is] the most powerful imaginable aggravating evidence” there is, according to SCOTUS, and a few other noteworthy courts.[82]

83. Fifth, Applicant's criminal history, depending on how defined, was either no criminal history,[83] or next to no criminal history.[84]

84. As for Westfall's failure to investigate and introduce mitigating evidence, the mitigating evidence that Applicant did not and could not have shot Rick, was available to Westfall, as shown above.

85. He had to look no further than the DA's own file.[85]

---

[80] See (SHCR 77:27, 96).
[81] See (2 RR 22:13-16).
[82] See, e.g., *Wong v. Belmonte*, 558 U.S. 15, 26 (2009); see also *Clark v. Davis*, 850 F.3d 770, 776 (5th Cir. 2017), citing *Clark v. Thaler*, 673 F.3d 410, 424 (5th Cir. 2012).
[83] See (4 RR 63:11-17)(1 CR 74)(2 CR 29).
[84] He hadn't yet been convicted of the misdemeanor possession of marijuana case, whose records are also in the district clerk's office under cause number 819607, County Criminal Court Number Eight, Tarrant County, Texas, and which may also be necessary to the resolution of this case.
[85] See (SHCR 77:27).

86. And the evidence was admissible as rebuttal evidence--either as contradictory evidence, defective capacity evidence, prior inconsistent statement evidence, bias evidence, or untruthful character evidence.[86]

87. Second, the nature and degree of other mitigating evidence actually presented to the jury at punishment was simply acceptance of responsibility, including the extraneous, with a “novel” twist, Paxil, etc., a “double-edged”[87] sword, despite the fact that Applicant wasn't freaking out in jail (an inherent contradiction which Westfall himself didn’t even quite understand or believe until maybe the eleventh hour of trial when it dawned on him that Applicant was like a bird in a box[88]).[89]

88. As far as Westfall was apparently concerned, or so he feigned, there was no presumption of innocence in a punishment case,[90] so there was no need to contest the extraneous, and so he decided and advised Applicant to accept responsibility for shooting Rick (the extraneous) versus not doing so.

89. Third, the nature and degree of aggravating evidence actually presented to the jury by the State at punishment was (Westfall's attempt to put a positive spin on the extraneous, but the extraneous was a non-sequitur) the extraneous.

90. Add to that respondent's attempt to make Applicant, not Jason, out to be respondent’s principal.

91. Principal was bad enough, but then add to that evidence of another shooting, and Applicant's mental defects, the double-edged sword, and his flimsy red-herring and contradictory, “bird-in-the-box” defense, some of the most powerful imaginable

---

[86] See *Texas Rules of Evidence*, Rule 607.
[87] *Clark v. Davis*, 14-70034 Document: 00513905975 Page: 6 Date Filed: 03/10/2017
[88] See (5 RR 9:1-18)
[89] See (4 RR 181:20-182:12; 194:21-196:2) (5 RR 8:18-9:1).
[90] See (2 RR 75:24).

aggravating evidence there is, according to SCOTUS, among others, as stated above, and here is an appreciable, significant increase.

92. Fourth, according to Mrs. Dimple Junior, the jury was influenced by the extraneous, but not as Westfall had hoped.[91]

93. How could they help but to have been influenced by it? Gill obviously was he found it relevant to sentencing, i.e., he found the probative value outweighed the prejudicial value.[92]

94. Therefore, evidence that Applicant did not repeat the same type of offense less than 72 hours after attempting to lure Mike and Andy to their death, i.e., evidence that Applicant did not try to lure five more young promising college kids to their death, couldn't have been but some of the most powerful mitigating evidence there was, and the jury was no doubt to have considered it.

95. Fifth, rather than serve to explain Applicant's actions, the proposed mitigating evidence serves to distance Applicant from the State's aggravating sentencing factor, the extraneous.

96. The mitigating evidence serves to lessen Applicant's blameworthiness for shooting Rick. Indeed, it serves to exculpate Applicant from the extraneous accusations all together.

97. *Article* 37.07 of the *Tex. Crim. Code Proc.* allows for the introduction by either the State or the defendant of any matter the court deems relevant to sentencing; in other words, *Tex. Crim. Code Proc. A*rt. 37.07, § 3(a)(1), trumps *Texas Rules Of Evidenc*e, *Rule* 404(b), so, if the extraneous was relevant to sentencing, how much more so was evidence that Applicant couldn't have possibly been the one who shot Rick?

---

[91] See (2 RR 140:2)(paragraphs 154-157 of Applicant's affidavit).
[92] See (2 RR 7:2-3). See TRE, Rule 403. See also, generally, *Harrell v. State*, 884 S.W.2d 154 (Crim. Ct. App. 1994)

98. Let them testify, just allow Applicant the opportunity to subject their testimony to adversarial testing.

99. The sentencing process consists of weighing mitigating and aggravating factors and making adjustments in the severity of the sentence consistent with the calculus; subtracting the aggravating factor (the extraneous) and adding the mitigating factor (evidence Applicant couldn't have possibly shot Rick, and the scale tips in the other direction. How much is hard to say since Texas doesn't require or want the jury to say (perhaps it would then become unconstitutional under *Apprendi v. NJ, 530 U.S. 466 (2000)*).

100. As much as Jheen and Charla wanted somebody (Applicant) to pay, the evidence just didn't add up.

101. They had the wrong man.

102. Applicant has therefore proven by a preponderance of the evidence that there is a reasonable probability that he (Applicant) was prejudiced from Westfall's and Minick's failure to have a firm command of the **facts** because:

a. they argued Applicant went to Tiffani's right after he shot Rick, or they placed Applicant within the same vicinity about the same time Rick was shot.

b. They failed to subject Jheen's in-court identification testimony to reliable adversarial testing.[93]

[93] The in-court basically boiled down to Hartmann and Foran telling their witnesses where Applicant would be seated that he would be seated next to an officer in the courtroom in case he decided not to "mind his manners:

> Oftentimes in cases in which the attorneys are doing their jobs [suggesting that Westfall was not doing his job] … we will meet with our witnesses and try and tell them … who is going to be in the courtroom, where those people [policemen] are going to be [and] what is their job. Oftentimes we tell little kids, "There's going to be three policemen in there to make sure everybody minds their manners [in other words, where the defendant (me) would be seated]." ¶ We tell them where we're going to sit…. Is there anyone here who feels that's improper, that they would think that that's coaching or trying to tell the witness what to say? … There's nothing secretive, awful. That's a normal practice.

(2 RR 56:10-11, 18, 19-24, 57:19-21, & 58:1-3). And,

c. They failed to subject Charla's in-court testimony how they found Applicant was by going out and looking for his truck by its license plate[94] to reliable adversarial testing

d. Fazio's incredible rifle-to-bullet link. They failed to subject Fazio's in-court bullet-to-rifle link testimony to reliable adversarial testing.[95]

Cuyler

1. Prejudice to a criminal defendant by reason of their counsel's conflict of interest is presumed only if:

    a. the defendant demonstrates that counsel actively represented conflicting interests and that

    b. an actual conflict of interest adversely affected their lawyer's performance.

Strickland.[96]

Conflicting Interest

5. Westfall's and Minick's own personal ambitions (legal precedent) conflicted with Applicant's interest (smaller sentence, i.e., he didn't shoot Rick), especially once their interest of self-preservation conflicted with Applicant's, i.e., once the State Bar Grievance discussed herein was filed.

6. To name but a few legal precedents they set or tried to set:

    a. Wynn and Hartmann did it in *Bluitt*, and

    b. Wynn and Gill did it in *Moore*,

HARTMANN: If I am Person 1, 2, 3, 4, 5 and the man in the uniform[!] is 6 [Dave Darusha],[#] what number would he be [emphasis added]? JHEEN: No. 5.
(3 RR 232:18-20). See also subchapter H of chapter 26 of Applicant's affidavit.

[94] *See* (3 RR 151:15-16).

[95] *See* (3 RR 249:6-7).

[96] See Id., 466 U.S. at 692, citing *Cuyler v. Sullivan*, 446 U. S. 335, 345-350, (1980)

c. Westfall did something similar in *Burke v. State (strict liability)*,[97]

d. Westfall and his wife, Mollee Westfall, did something similar in *Nickerson v. State* (heighted conflict of interest standard in capital cases);[98]

e. Westfall and Kearney did something similar in *State v. Daugherty*;[99]

f. Wynn's wife, Sheila Wynn, and Wilkinson did it in *Ranger v. State*;[100] and

g. Wilkinson did it in Applicant's case and wrote about it in *Grunsfeld, Ten Years Later.*[101]

1. Westfall's and Minick's actual conflict of interest adversely affected their performance:

a. Applicant didn't shoot Rick,[102]

b. there was little to no evidence that Applicant did shoot Rick,[103]

c. what little there was easily disproved with evidence gleaned from the DA's file, which Gill ordered respondent to disclose to the "defense" by 11-22-02.[104]

d. Westfall and Minick no doubt ignored it, so they could pursue their own selfish interest, i.e., another trophy (Applicant's case) on the mantel or in their hall-of-fame,[105],[106]

e. Westfall and Minick had to bend the facts to support their slant,[107]

---

[97] See *Id.*, 80 S.W.38 82 (Tex. App.-Fort Worth 5-28-02, on remand).
[98] See *Id.*, 2003 Tex. App. LEXIS 10216 (Tex. App.-Fort Worth 2003, pet. ref'd); see (SHCR 101 & 186).
[99] See *Id*., 931 S.W.2d 268 (Tex. Crim. App. 1996)
[100] See *Id.*, 2005 Tex. App. LEXIS 10430 (Tex. App.-Fort Worth 2005); see (1 CR 88), and (2 CR 48).
[101] See *Id*., 35 St. Mary's L.J. 603 (2004) and (1 ARR 1:19).
[102] See (paragraphs 50-55, 93-94, 115-118, & 161-165 of Applicant's affidavit).
[103] See (3 RR 207:21-254).
[104] See (1 CR 38).
[105] See (1 CR 78)(2 CR 33) (2 RR 75:22-25)(4 RR 220:8-11) (5 RR 2:11-15 & 29-3:5) (4 ACR 2:4)(SHCR 95), *Huizar v. State*, 12 S.W.3d 479 (Tex. Crim. App. 2-33-00).
[106] Respondent didn't even want to accuse Applicant of shooting Rick at sentencing, but for Westfall and Minick they made sure they did (2 RR 7:17-22).
[107] See (chapter 23 of Applicant's affidavit, and paragraphs 162-165 of the same).(4 RR 103:5-6, 105:21-106:13, 147: 17) (SHCR 62, 66; 94. 95. 115; + 206 & 214)(4 APP 3-4)(4 RR 50:1-3) (SHCR 70:19, 21:23; + 115-119).

f. Westfall and Minick abandoned Applicant's appeal through Wynn to save themselves once the *State Bar Grievances* were filed,[108] and

g. Westfall and Minick kept the evidence disproving respondent's accusations that he shot Rick, as well as their appeal strategy (jury charge error) to themselves.[109]

2. Applicant has proven by a preponderance of the evidence that Westfall and Minick actively represented conflicting loyalties.
3. Therefore, Applicant has proven by a preponderance of the evidence that an actual conflict of interest adversely affected Westfall's and Minick's performance and, hence, he was prejudiced therefrom

Napue

Standard of Review

1. The prosecution's introduction of false testimony deprives a defendant of a fair trial, but a new trial or hearing is not "automatic."
2. Instead, false testimony is material if it could "in any reasonable likelihood" have affected the jury's decision.
3. Even if the testimony may not have affected the verdict, it is still material if it could have affected the verdict.
4. Evidence that is redundant or "clearly irrelevant to the verdict, however, is not material in the Constitutional sense.[110]

[108] See (paragraph 176 of Applicant's affidavit)(3 APP 333:4)(3 APP 328:4).
[109] See (paragraphs 174-175, 187, & 276 of Applicant's affidavit)(SHCR 92).
[110] See *Napue V. Illinois*, 360 U.S. 264 (1959); See also *United States v. Ausby*, 916 F.3d 1089 (D.C. Cir. 2019).

Application

1. Without the false testimony, “there is a reasonable likelihood that one or more jurors would have harbored a reasonable doubt whether Applicant committed the extraneous.
2. Applicant therefore asks the Court to find and conclude the testimony was material, thus, presenting a valid claim under *Napue* that he was sentenced in violation of the *Fourteenth Amendment* to the *United States Constitution*.
3. Also, without the false testimony, “there is a reasonable likelihood that one or more jurors would have harbored a reasonable doubt whether Applicant committed the extraneous.
4. Applicant has proven by a preponderance of the evidence that the testimony was material, thus, presenting a valid claim under *Napue* that he was sentenced in violation of the *Fourteenth Amendment* to the *United States Constitution*.
5. The State knew or should have known” the expert's testimony was false at the time of
6. trial.

Prayer

WHEREFORE, Applicant prays that this Court adopt these Proposed Findings of Fact and Conclusions of Law and **GRANT** Applicant’s applications.

Respectfully submitted,

By:_____
BARTON R. GAINES, Pro Se
244 Siesta Court
Granbury, Texas 76048
Tel.: 682-500-7326
Email bartongaines@gmail.com