CAUSE NO. 42969

EX PARTE	§	IN THE 400th DISTRICT COURT
	§	
	§	OF
	§	
THOMAS BARTLETT WHITAKER	§	
	§	FORT BEND COUNTY, TEXAS

AFFIDAVIT OF DAN LAMAR COGDELL

STATE OF TEXAS }

COUNTY OF HARRIS }

Before me the undersigned authority, on this day personally appeared Dan Lamar Cogdell who, after being by me duly sworn, deposed on his oath and stated as follows:

My name is Dan Lamar Cogdell. I am over the age of 18 and am mentally capable of making this affidavit. I am an attorney at law, licensed to practice in the State of Texas, and have held Bar Number 04501500 since I was licensed on November 5, 1982. I have engaged, almost exclusively, in the practice of criminal law since that time. The facts in this affidavit are from my own personal knowledge.

I am familiar with the facts and circumstances of the case of Mr. Bartlett Whitaker as an attorney in a professional capacity. I am a friend of Mr. Whitaker's We remain good friends. I have also known Kent Whitaker, Bartlett Whitaker's father, for almost as many years and consider him a friend as well.

I first became acquainted with Bartlett Whitaker during the time I represented him after he had burglarized several public schools while a high school student. When Patricia and Kevin Whitaker were killed, and it became somewhat apparent that Mr. Whitaker was being viewed as a suspect, Kent Whitaker, his father, retained me to represent his son. There was a great deal of public attention on this case in the media and both Kent Whitaker and Thomas Bartlett Whitaker wished my professional assistance. I agreed to represent Mr. Whitaker in this matter. I did so with the understanding that should the family become opposed to my continuing representation at some point in the future; I could withdraw from the case as long as it was not to the detriment of my client. I would not, of course, either violate the attorney-client privilege or in any way

engage in conduct which was not in the best interest of Bartlett Whitaker's legal interest. Bartlett Whitaker fully understood and agreed to this proviso. Accordingly, I undertook, along with my assistant, James Madison "Jimmy" Ardoin III, representation of Mr. Whitaker in this case.

In the early stages of my representation of Mr. Whitaker, we did not (of course) engage in plea negotiations. This was true for a variety of reasons. First and foremost, no charges had been filed. In the early stages of my representation, Mr. Whitaker was (in my opinion) a suspect but it was not a certainty that he (or anyone else) would be charged in this matter. Indeed, charges were not filed until well after a year following my assuming responsibility for Mr. Whitaker. Secondly, Mr. Whitaker steadfastly maintained his innocence at that point. It was only later (after he fled to and returned from Mexico following the filing of charges against him) that he made admissions of guilt to me, that any negotiations were attempted. By the time of Mr. Whitaker's return, the case against him was fairly set-at least as to guilt or innocence. The co-defendants had, by that point, cut deals with the State and had agreed to testify against him. Indeed, by this point in time, the co-defendants had made very detailed statements describing not only their roles but that of Whitaker which were both externally and internally consistent. Simply put, by the time Whitaker was "returned" to the States from Mexico the evidence against him was, in my opinion, overwhelming (at least as to the guilt-innocence phase).

I did believe that, based upon the consistent positions of both the and Whitaker families, that there was a real possibility that the death penalty could be avoided. After all, these families were the real "victims" of the offense and both were adamantly opposed to the imposition of the death penalty. At the request of Bartlett Whitaker (and based upon our belief of what was in his best interest in attempting to avoid the death penalty) we began negotiations with the goal of obtaining life sentences. I believed, based on my experience, that the facts of the case, the timing of the commission of the offense as well as the "law and order" climate within the community, that a death sentence could be a very likely result of a trial on the merits. Our negotiations were primarily conducted with Fred M. Felcman, Assistant District Attorney for Fort Bend County.

During this period of time, Mr. Ardoin and I were approached while in public by Mr. Felcman. Felcman stated that he would consider removing the death penalty as a possible option only if we would submit a "proffer" of evidence which would be supplied by Mr. Whitaker, in his words, as to his involvement with the offenses alleged and the details thereof. It was specifically stated by Felcman that statements of remorse or contrition on the part of Whitaker were to be avoided and that the proffer should include only the facts, truthfully stated. Upon this representation, and in reliance on the good faith of Mr. Felcman in making the offer, we approached Mr. Whitaker and he agreed to

supply such a proffer as desired by Mr. Felcman. Of course, this statement was to be expressly protected by Rule 410 of the Texas rules of Evidence and would be inadmissible against him in the event the case was not resolved by agreement. Of course, it should also be mentioned that (as the State was already in possession of the details of the offense which had previously been provided to them by the co-defendants), I believed that providing this information was in Mr. Whitaker's best interests. Relying upon the protection of Rule 410 and on the good-faith of the prosecutor, Mr. Felcman, the decision was made to provide such a statement in the hopes of persuading the State not to seek the death penalty.

My associate, Mr. Ardoin, worked with Mr. Whitaker, using his words, and wrote out a multi-page document which we had printed. When we presented the document to Mr. Felcman he acted "upset" that it did not contain "any mention of remorse" on Mr. Whitaker's part. Of course, this reaction by Felcman came as a complete surprise to us as we were specifically told by him not to include any discussion of remorse. Felcman used the absence of any display of remorse or sorrow as a basis to "reject" the proffer and the State continued to pursue the death penalty. Given that the document had been secured with the specific admonition that remorse be avoided within the document, and its absence was the reason for its rejection, we became concerned that Mr. Felcman had no intentions of not pursing the death penalty and we were simply being "played". I recall (after Felcman continued to pursue the death penalty despite the submission of the proffer) being told by Felcman that "the only way I will agree not to pursue the death penalty is if comes to my office and begs me not to pursue the death penalty". It is my understanding that then did exactly that ("beg" Felcman not to pursue the death penalty).

Again, despite complying with this specific request, the State continued to indicate that it would pursue the death penalty. At some point, my efforts at plea negotiations ceased. The tension between me and Felcman was fairly specific at this point. I was angry at Felcman (as I had done exactly as he had asked in terms of providing the proffer as directed) and I felt some specific resentment towards me by him. I had concerns that either Felcman was so acrimonious towards me that my presence was actually a deterrent towards resolving the case or that he never had any intention of not pursuing the death penalty, or both.

Shortly after this I was approached by and spoke with Mr. Whitaker's expressed to me the family's desire that I not continue as Mr. Whitaker's attorney. Given our prior agreement in this regard, I discussed the request with Mr. Whitaker who agreed with that decision. To be frank, my efforts to resolve the case had failed and I believed that (in addition to respecting the desires of the family) another lawyer might be better able to convince the State to abandon the death penalty. I

believed that my withdrawal would provide another lawyer (who had not been involved in the negotiations detailed above) the opportunity for resolution short of trial which was in the best interests of the client. I refunded any unearned fees to Kent Whitaker and attempted to assist in the transition of the case over to the attorney who would replace me.

Discussions were had with regard to my associate, Jimmy Ardoin, continuing on the case with another, more experienced trial lawyer taking the lead. Eventually a list of three attorneys in whom I had confidence was provided to Kent Whitaker. Randy McDonald was eventually hired.

I had several conversations with Mr. McDonald prior to and following his taking over representation of Mr. Whitaker. I reviewed with him all the details of the history of the case and my dealings with Felcman. I explained to him my understanding of the desire of not only Kent Whitaker to have the State not seek the death penalty, but a parallel desire on the part of the I communicated my desire to assist in any way I could, as well as my belief that Kent Whitaker had not only an incredible love for his son but sufficient financial resources to assist Mr. McDonald as needed in the defense.

I told Mr. McDonald of what I knew about the facts of the case. I also told him of a statement I had heard made by an ex-supervisor of Mr. Whitaker (when Whitaker was working in a nearby restaurant) wherein it was asserted that Mr. Whitaker "was a homosexual". I had also relayed that comment to Whitaker himself during the period of my representation of him and he strongly denied that it was true. I knew that the family did not perceive Mr. Whitaker as a homosexual. I informed Mr. McDonald that I had confronted Mr. Whitaker with this information and that he had, in fact, denied being homosexual. I do not know what, if any efforts, Mr. McDonald made to determine if the statement made to me was correct and, if it was, what effect that information would have had on the trial of the case.

Lastly, it is my considered opinion that the trial of this cause had to be about either some form of mitigation or an absence of future dangerousness or a combination of both. Practically speaking, there was virtually no doubt as to Whitaker's guilt or as to the facts and circumstances of the crime. The facts of the case were, suffice it to say, horrific as Whitaker had (on more than one occasion) plotted the deaths of his father, mother and brother and had eventually been instrumental in having both his mother and his brother killed. Those facts and circumstances, without some form of explanation for those actions, would very likely lead a jury in that community to assess the death penalty.

FURTHER AFFIANT SAYETH NOT.

Dan Lamar Cogdell

Sworn to and subscribed before me the undersigned authority on this the 15th day of April 2009.

Rosalinda G. Nuñez
Notary Public, State of Texas

ROSALINDA G. NUNEZ
NOTARY PUBLIC, STATE OF TEXAS
COMMISSION EXPIRES:
MAY 4, 2010