

the facts demonstrated in my mind that something was wrong. I told Mr. McDonald that money was not a stumbling block and that the tests needed to be performed, especially given the facts of the case, which just about everyone had to admit were abnormal, to say the least. However, each time the subject was broached, Mr. McDonald stated that we would be committing legal suicide by having those evaluations because the State would have access to the reports and, if something negative showed up, the State would see it. He did not tell me that the State would not necessarily see the reports. The implication of these conversations was that experts would hurt us more than help. Mr. McDonald advised me that a battle of psychological experts (ours versus the State's) would confuse the jury and would not be beneficial. This conversation was repeated each time, amounting to some two or three times, the subject was broached. Mr. McDonald stated that he also did not need the assistance of a second attorney and no one was, therefore, hired to assist him. Additionally, there was no mention of a "mitigation specialist."

I am aware that plea negotiations were attempted by both Mr. Cogdell, while he was retained, and by Mr. McDonald after he replaced Mr. Cogdell. At one point, Mr. McDonald offered for Thomas to plead guilty and receive two life sentences to be served consecutively, but the State did not accept that offer.

There were no mitigation witnesses offered by the defense at trial, not because there were insufficient funds or because it was the desire of the family to not attempt to mitigate the punishment. It was my desire to have such an investigation performed. While I was prepared for the results of any such psychological evaluation or investigation, which I very well knew could have painted some of my previous actions, or inactions, as a parent in less than a favorable light, Mr. McDonald did not think that any such investigation would be helpful, despite the earlier diagnosis by Dr. O'Rourke at the time of the burglaries. I accepted this decision, as I did all others made by Mr. McDonald, because he was the legal expert and I was not. His experiences were in this area, and mine were not. While I truly believe that it was a mistake to fail to have Thomas evaluated, and I believed it at the time, I also believed at that time that my experiences, and thus judgments, were not as relevant as Mr. McDonald's and that it was appropriate to accede to his legal decisions.

I testified as a fact witness for the State at the trial and as a defense witness at the punishment phase. Mr. McDonald did not prepare my testimony for either of these court appearances with me by going over any specific questions he would be asking or that the State would ask. He told me that it was important to be spontaneous and that preparation would imperil that spontaneity.

I believe that the jury was expecting and, in some cases, wanting, evidence from the defense which would show that the death penalty would not be appropriate. I believe this for three reasons. First, Mr. McDonald told me on the date the death penalty was returned that there had been a split with some jurors

wanting life, but that the jury foreman had convinced those who were holding out that the death penalty was the only appropriate punishment. This would mean that some jurors believed, at least initially, that death was inappropriate. Second, I have a recollection of seeing the jury foreman on television following the verdict and his stating that my son could not change and will never change, followed by his assessment that Thomas "needs to find God." When coupled with Mr. McDonald's earlier statement, it was evident to me that evidence which would show Thomas' underlying psychological problems and the potential for handling those problems in a secure setting had been missed by the jury. Lastly, some time after the verdict, while having dinner at Sandy McGee's, a restaurant in Richmond, Fort Bend County, Texas, I was approached by a man employed at the restaurant who told me that he had served on the jury and, after initial expressions of sorrow at the situation, that the jury foreman was a dynamic man who had swayed others of the jury from their favoring of life imprisonment by pointing out that the death penalty was appropriate and that "no reason had been shown which would make it [the death penalty] inappropriate."

FURTHER AFFIANT SAYETH NOT.

Norman Kent Whitaker

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

Laurie C. Dawson

 Notary, State of Texas

