

No. 42969

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

**Statement Made Under Penalty of Perjury  
by  
Thomas Bartlett Whitaker**

THE STATE OF TEXAS	}
	}
COUNTY OF FORT BEND	}

I, Thomas Bartlett Whitaker, being presently incarcerated at the Polunsky Unit of the Texas Department of Criminal Justice, Criminal Institutions Division, located in Polk County, Texas, declare under penalty of perjury that the following statement is within my personal knowledge and is true and correct:

I

**My Proffered Statement**

After my arrest and return from Mexico, Mr. Cogdell came to visit me at the County jail and explained a deal that he had made with Fred Felcman. He said that if I explained my involvement in the crime, that

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Felcman would “take death off the table.” What Dan told me was that Felcman wanted me to write out a statement explaining all the facts. Subsequently, Jimmy Ardoin came to visit and told me that the District Attorney had rejected the statement.

As to Randy McDonald, other than him telling me his opinion about the circumstances surrounding the creation and delivery of the statement, we never discussed it. We had no discussions about the content of the statement or how it might be used against me, if I testified. The very first time I saw the proffered statement was when Felcman shoved it in my face at trial, and asked, “didn't you say this ...,” or words to that effect.

## II

### **Randy McDonald's Performance**

McDonald told me that, because this was going to be basically a punishment case, he didn't need a second lawyer. He told me that I would have to be his second chair at voir dire. Other than helping to arrange transfer of my funds to my father, money was never discussed.

As to Cogdell possibly staying on as the second chair lawyer, McDonald told me that he did not want Cogdell as second chair because he

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intended to call him as a witness to prove how duplicitous Felcman had been during the process surrounding the proffer and negotiations. McDonald told me this in private, when he and Cogdell came to visit me at the Limestone County Detention Center, at the time McDonald was taking over as my lawyer.

During voir dire, McDonald said to me that “this” is when a second chair would be handy. On several occasions during trial, he expressed concern about how much work he was doing and how little sleep he was getting.

### III

#### **Failure to Prepare a Case for Punishment**

When Cogdell was my lawyer, he had arranged for Dr. Brown to interview me. When McDonald got into the case, I told him that I thought it was important that I continue to see Dr. Brown. McDonald told me that he was not interested in that aspect of the case. My father told me, after trial, that McDonald told him that he felt psychology was a “Sword of Damacles.” Over a period of time before trial, on several occasions, I asked McDonald about the psychiatric aspects of the case. His answer was always

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the same, that it was unnecessary. Most of our meetings had less to do with legal issue than him asking questions to basically get into my head.

Until today, I did not know how much money my father had paid McDonald. Today I was informed that it was \$180,000. If I had known prior to trial, that McDonald was being paid that much, I would have insisted on a second chair and a psychiatrist or a psychologist.

As to what inquiries McDonald made into my background, he asked if and to what extent I had done drugs. He asked if I ever saw a mental health professional. I told him about having seen Dr. O'Rourke, but he never indicated that he had seen her or spoken with her. It was obvious at trial, that he had never spoken with her.

Also, although Cogdell had an investigation on the case, McDonald never mentioned having an investigator, and one never spoke with me or came to see me, after McDonald became my lawyer.

IV

**McDonald's Preparation of Me as a Witness**

Initially, McDonald asked me how I felt about testifying. I told him that I didn't think I could. I was a mess. As we got closer to trial, he told me it

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would be necessary for me to testify. After he told me I would have to testify there was no time at which we discussed my testimony or how the District Attorney would cross examine me. I had no idea what would happen if I testified.

McDonald's stated reason for not preparing me was that he did not want it to appear to be "rehearsed." On the day I testified, McDonald told me it was up to me to save my life. He gave me no specific guidelines about how to testify, other than to say, "be honest," which was something that was always understood.

McDonald never told me that the District Attorney could ask me questions about the statement that Cogdell and Ardoin had given him. He also did not tell me that there were any areas I should not talk about, or that, if I did, they could use the statement.

SIGNED on the \_\_\_\_\_ day of April, 2009, at Livingston, Texas.

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**Thomas Bartlett Whitaker**  
TDCJ-CID #999522