

No. 42,969

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

**Affidavit Of Robert B. Hirschhorn**

THE STATE OF TEXAS }  
 }  
COUNTY OF FORT BEND }

BEFORE ME, the undersigned authority, on this day personally appeared Robert B. Hirschhorn, known to me to be the person whose name and signature are affixed to this affidavit, and after being by me duly sworn on oath deposed and stated:

My Name is Robert B. Hirschhorn. I am over the age of eighteen and am competent to make this affidavit. I am licensed to practice law in the State of Texas and carry State Bar Card number 09719700. I have been associated with the firm of Cathy E. Bennett and Associates, Jury and Trial Consultants since 1985. I am a co-author of Bennett's Guide to Jury Selection in criminal cases and Blue's Guide to Jury Selection. I have assisted lawyers in many high-profile criminal cases including **State of Florida v. William Kennedy Smith** (sexual assault charges, not guilty verdict), **State v. U.S. Senator Kay Bailey Hutchison** (ethics charges, not guilty verdict), **State v. Robert Durst** (acquitted of murder charges), **Colorado v. Bryan Hood** (Capital murder, not guilty verdict), **State of Florida v. Yahweh Ben Yahweh** (Capital murder, not guilty verdict) **U.S.A. v. Mack**, (Capital murder, not guilty verdict). **U.S.A. v. Marrero**, (Capital murder, not guilty verdict). Attached hereto is my one page bio. I lecture nationwide to lawyers and judges on the art of jury selection. As a part of my work as a jury consultant, I routinely speak with mock

jurors and trial jurors concerning their experiences, what they felt was missing and what to them was superfluous.

I have reviewed the facts of the offense in ***State of Texas v. Thomas Bartlett Whitaker***, in which the defendant was found guilty of capital murder and sentenced to death. Included in that review was the following documentation:

1. State's statement of facts
2. Transcript of the opening statements

Having reviewed that documentation, it is my opinion that the jury in this case expected to hear that which was promised them by the opening statements of counsel, namely, any reasons why the death penalty was not appropriate in this case. That would require, of necessity, an explanation of the motive of the defendant in acting as he did.

While motive is not a necessary element of an offense in Texas law, a jury is comprised of human beings and human beings desire, expect and appreciate explanations. The explanation which was furnished by the State - that the defendant acted for monetary reasons - was not necessary to their case but necessary for them to convince the jury that death was an appropriate punishment. That explanation was neither challenged nor replaced by an alternative explanation from the defense. While we in the legal society wish to believe that jurors do not look for the motivation behind the crime, that belief is untrue. In fact, in my experience in speaking with numerous jurors post-verdict, the exact opposite is true.

Jurors in a criminal case, especially those cases in which the defendant's actions seem inexplicable, want to know why the crime was committed. If there is a reason which mitigates the culpability of a defendant, the jurors wish to know it. While they may not be given that information, they expect to hear it.

In the instant case that expectation was satisfied by the State's expressed theory that the crime was the result of the defendant's desire for money. In other words, the defendant wanted to hasten his inheritance. While the defendant's counsel opened his case with an admonition to the jury that the case they were to hear was only about punishment, ultimately, he gave them no alternative explanation of motive and thus no reason to reject the punishment sought by the State.

It is essential that the subject of mitigation be broached as soon as possible in a criminal trial. Defense counsel did this, resulting in the setting of expectations in the minds of the members of the jury. However, it is equally crucial to follow through and to deliver to the jury that which has been promised in voir dire or opening statement.

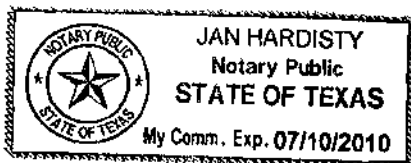
It is my opinion that, in this case, that failure to deliver the explanation that had been promised to the jury was catastrophic, and sealed the defendant's fate as it left only the State's explanation for the cold blooded murders before the jury. This failure could not have benefitted the defendant, and, by leaving the jury with only the State's explanation for the defendant's actions, defense counsel's action undoubtably harmed the defendant before that jury.

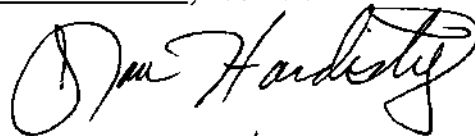
FURTHER SAYETH AFFIANT NAUGHT.

  
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**Robert B. Hirschhorn**

SIGNED and SWORN to before me, the undersigned authority, on this  
8<sup>th</sup> day of April, 2009.





Jan Hardisty

Printed Name

My Commission expires: 7/10/10