A

COPY

No. 42969

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

Request for Entry of Order Pursuant to Article 11.071, § 8(a), C.Cr.P., and Motion for Evidentiary Hearing

The State has filed its response to the *habeas corpus* application in the above captioned case and has submitted to the Court a proposed Order under Article 11.071, § 8(a), C.Cr.P. In response, Applicant would show the Court that it cannot properly resolve the issues presented in this case without conducting a live evidentiary hearing. Applicant further requests the Court adopt and enter the proposed Order attached as Exhibit "A" hereto. In support of the requests made herein, Applicant would show the Court :

I

Prosecutor Fred Felcman

The following are definitive statements in affidavits which are so opposed to each other that only an evidentiary hearing, in which the credibility of the witnesses may be judged, will provide the Court with

the necessary information to make an informed and fair decision of the allegations.

A

Applicant's original trial attorneys, Dan Cogdill and Jimmy Ardoin, both explicitly swear that Assistant District Attorney Fred Felcman approached them in a public place and stated that he would consider removing the death sentence as an option in the case if Applicant would provide a "proffer" detailing the crime without mentioning remorse. They state that when the proffer was submitted to Felcman it was indignantly rejected for lack of any showing of remorse (App Ex 11 & 12). Specifically:

In the affidavit submitted in support of the *habeas corpus* application, at page 2, Cogdell swears:

> 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.

In the affidavit submitted in support of the habeas corpus application, at page 2, Ardoin swears:

> Mr. Cogdell and I were approached while in a public place by Mr. Felcman who stated that he would consider removing the death penalty as a possible option only if we would submit an acceptable "proffer of

> evidence" which would be supplied by Mr. Whitaker, in his words, as to his involvement with the offenses alleged. It was specifically stated by Mr. Felcman that statements of remorse or contrition were to be left out of the proffer and that the proffer should include only the facts, truthfully stated.

In his affidavit submitted in support of the State's reply to the habeas corpus application, at page 4, Felcman states:

> I never asked for nor told Dan that if the defendant confessed, the District Attorney would not seek the death penalty. That is easily born out because no mention/complaint was ever made about a supposed deal. Even after the receipt of a "proffered statement" was there any mention of a supposed deal. I had never heard of a "proffered statement" before and it doesn't exist in Texas except the general rule that "plea-negotiations" are not admissible in Texas and that includes any statements made in the course of. The letter could have been called "Here's Our Version but Don't Use It" and it would have had as much significance as the legal sound of "proffered statement"; since the defense has named the letter such, I have used that title.

In short, <u>both</u> Cogdell and Ardoin say Felcman affirmatively requested the statement at issue, Felcman says he didn't. These are direct contradictions which can only be resolved via a live evidentiary hearing.

B

Felcman admits to meeting Applicant's attorneys in Best Buy, but, and without equivocation, he states that there was no mention of plea negotiations. However, he also states that, during the conversation, Applicant's attorney, Dan Cogdell, stated that Applicant had remorse for the crime, and that he (Felcman) responded that

remorse was not negotiated but comes from within. Felcman concludes there was never a deal because no one ever complained about his action and he went to Dan Cogdell's home for a party in December 2008, and was warmly welcomed (State's Ex E).

C

Felcman admits that he had some exchange with Applicant's attorneys and an indication that remorse was not going to be something that could be negotiated. That there was some exchange is not in doubt. but the record needs development to establish just how two attorneys could have reached one, to them clear, interpretation of the exchange while another, who does not seem to have had the authority to negotiate a deal in the first instance, could have had such a different interpretation.

The credibility of each of the witnesses is in issue and decisions must be made. Those issues cannot, however, be explored or those decisions made without the ability of all parties to fully explore the facts through live testimony with the Court able to judge the demeanor of the witnesses. The issue is of extreme importance since Felcman used the "proffer" during trial, although in his affidavit he dismisses

it as having no legal value, to accuse Applicant of not showing remorse.

In yet another example of Felcman's use of the "proffer" before the jury, during his cross examination of Applicant, Flecman began to testify about the "proffer" and how he had not asked for it. And again, while he now states in his affidavit that the "proffer" was of no legal significance, he told the jury that the "proffer was an insult and a showing of no remorse" (State Ex D at RR page 257-258), certainly a matter of some legal significance in a case in which death was sought. In the words of Shakespeare, Felcman "*doth protest too much, methinks*" (Hamlet, Act 3, scene 2).

Felcman's affidavit establishes that something happened in Best Buy but does not attempt to explain how two attorneys could have so completely misunderstood his short discussion and how he considered the legally insignificant "proffer" to be, at trial, of such emotional import. These are matters of extreme importance and, due to both the contradictions involved and the necessary credibility choices inherent in the contradictions, demand an evidentiary hearing.

Constitutionally speaking, no resolution can be had when matters of fact of this nature are disputed without a live evidentiary

hearing. The Fifth Circuit in ***United States v. Sanderson***, 595 F.2d 1021 at n. 1 (5th Cir. 1979) (quoting *Blackledge v. Allison, supra*, at 82 n. 25), stated, "opposing affidavits present a credibility question which should be resolved at an evidentiary hearing." *See also* ***Herman v. Claudy***, 350 U.S. 116, 123 (1956)(requiring evidentiary hearing even when petitioner's allegations were contradicted by affidavit from the government).

D

Additionally, in his affidavit, Felcman makes several statements related and pertaining to "defendant's website." First, while it is apparent that Movant provides the some of the materials which appear on the website, common sense provides that someone other than Movant is responsible for maintaining the site, since Movant has no direct Internet access. The undersigned are informed, and believe, and on that basis allege, that an affidavit from the person responsible for such maintenance will be forthcoming, and will provide several statements which contradict those made by Felcman.

E

Finally, Felcman makes several statements pertaining and related to information he obtained from Movant's father, Kent

Whitaker. Here again, the undersigned are informed, and believe, and on that basis allege, that a supplemental affidavit, contradicting statements included in Felcman's affidavit, will be submitted by Mr. Whitaker.

F

It is clear that an evidentiary hearing is required on the basis of the three attorney's affidavits alone. There are more reasons compelling the procedure, however.

II

The following are statements in Randy McDonald's affidavit that call for examination and cross-examination to assist the court in determining the truth and, in that truth, whether counsel's actions and explanations for those actions demonstrate that McDonald did not provide effective assistance of counsel. Movant would respectfully reiterate that the decisions demanded of the *habeas* court necessarily include those relating to credibility of witnesses with that factor playing a large part in the fact-finding process, especially where there are obvious examples of contradictory recollections.

Without the tried and true procedure of examination and cross-examination, these factors cannot be explored fully and the Court will

be hobbled to the point of inability when those important decisions confront it.

> The courtroom is the crucible of the law, where the fire of litigation tests the intellectual and political forces that inform social policy.

James Gibson, *A Topic Both Timely and Timeless*, 10 RICH. J.L. & TECH. 49 (2004).

A

Article 37.071, § 2(b)(1), C.Cr.P., states that the jury shall be asked "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." McDonald stated that information about Applicant's past would show that he was a "future threat." McDonald did not, however, ever try to determine if a psychologist or other mental health expert would say that Applicant was capable of change, had changed, or would be controlled in prison so that he would not commit criminal acts of violence. McDonald did not state that he tried to get this information so that he could make an informed decision on trial strategy. Applicant is entitled to have McDonald explain, under oath and in front of the court charged with making credibility choices, why he failed to conduct such a seemingly necessary investigation. The relevance of these questions, and their answers, to Article 37.071, §

2(b)(1), and thus their importance, cannot be questioned or overstated. An evidentiary hearing is demanded.

B

Article 37.071, § 2(e)(1), C.Cr.P., states that the jury shall be asked "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." It is not merely an issue of mental retardation or abusive upbringing. However, Kent Whitaker indicates there was some sort of parental responses to Applicant that could have made him the way he was.

This is the very sort of indication that the Supreme Court found sufficient in *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) and *Rompilla v Beard*, 545 U.S. 374 (2005), to require the trial attorney to investigate the nature and extent of the information. McDonald should have tried to show Applicant had changed and had remorse for his crime, evidence which, properly presented might, to one juror, be sufficient to be a mitigating circumstance.

While McDonald states that he made specific trial strategy decisions about mental health, investigative, or mitigation assistance, the record also shows that McDonald did nothing to investigate mental health issues, obtain investigative or mitigation assistance or that he had any particular expertise in these areas himself obviating the need for such assistance. The reality is that he did not do anything to investigate any of the issues facing him so as to allow an informed decision on these issues.

C

McDonald states that the State may obtain and present mental health opinions if there is any mental health investigation by the defendant whether or not it is used at trial. Movant acknowledges that, in some circumstances, the State may, in fact, have a defendant examined by its mental health expert if the defendant wishes to present mental health testimony based on interviews with the defendant. Nevertheless, McDonald did not even try to determine if there was some underlying mental health issue, pro or con, from which he could make an informed decision on presenting such evidence. From his affidavit, McDonald does not seem to understand the difference between a testifying expert, whose evidence may expose

the defendant to examination, and a consulting expert, a member of the defense team, and the evidentiary ramifications of the difference. A hearing is necessary to create a complete picture of this issue.

D

McDonald chose not to have a second chair attorney assist him during the trial. Yet in his affidavit he stated that he tried to hire two different attorneys for $75,000. If he did not want assistance why did he try to hire these attorneys and who were they? He admits that he told everyone he was tired but also asserts he was merely creating a ruse to garner favor for himself with the district clerk and court employees. Yet he also admits to making one bad juror selection decision and not being in focus during his closing argument - from being tired? Certainly his statements in these areas cry out for examination and cross-examination so that a complete picture might be had with regard to the allegations and the evidence.

E

McDonald's alleged strategy was to try to get one juror to believe that Applicant was not a threat to commit criminal acts in the future. Yet he failed to seek expert assistance in trying to be able to explain why this was true to the jury, preferring to keep psychological or

medical explanations from the jury. In this regard, McDonald's explanation must be aired. He must be made to explain why he, without consulting any medical or mental health experts, without having Applicant examined in any way, and without any personal expertise, felt he could make decisions with regard to a "defense" which depended to so great a degree on psychological principles such as future dangerousness, manipulation and the ability to change psychologically from one who planned the murder of his parents and brother to one who would not be a threat to anyone. Without some bases, these decisions could not, and most assuredly should not, have been made. That they were must be explained.

Conclusion

The State's response to the *habeas corpus* application fails to definitively assert facts which controvert the allegations made in the application and, in fact, establishes that there are significant factual issues, as well as credibility choices, which cannot, Constitutionally, be resolved from the affidavits. Thus the court should not attempt to make findings of fact without an evidentiary hearing to assist in resolving the issues in controversy.

Prayer

WHEREFORE, the preceding factual and credibility controversies being shown, Applicant requests that the court set a date for a hearing under the provision of Article 11.071, § 8(a), C.Cr.P.

Respectfully submitted,

The Law Office of David A. Schulman
Post Office Box 783
Austin, Texas 78767-0783
Tel. 512-474-4747
Fax: 512-532-6282

By: **David A. Schulman**
eMail: zdrdavida@gmail.com
State Bar Card No. 17833400

John G. Jasuta
Attorney at Law
Post Office Box 783
Austin, Texas 78767-0783
eMail: johngjasuta@earthlink.net
Tel. 512-704-3550
Fax: 512-532-6282
State Bar No. 10592300

Attorneys for Thomas Bartlett Whitaker

Certificate of Delivery

This is to certify that the above and foregoing "*Request for Entry of Order and Motion for Evidentiary Hearing,*" was hand delivered, transmitted by telecopier (*fax*) or electronic mail (*eMail*), or mailed, postage pre-paid, to Gail McConnell, Assistant District Attorney, 301 Jackson, 2nd Floor, Richmond, Texas 77469-3108, on November 9, 2009.

David A. Schulman

Exhibit "A"

Proposed Order Designating Issues

No. 42969

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

Order Designating Issues Pursuant to Article 11.071, § 8(a), C.Cr.P

On the date indicated below, the Court considered the *habeas corpus* application of Thomas Bartlett Whitaker, Applicant herein, the State's response, the various affidavits attached to these pleadings, and the record as a whole. Pursuant to Article 11.071, § 8(a), C.Cr.P, the COurt enters the following Order designating issues to resolved concerning the *habeas corpus* application:

1. Whether Applicant was denied his right to effective assistance of counsel under the Sixth Amendment to the Constitution of the United States;

2. Whether Applicant was denied the due process of law when the State's attorney failed to negotiate in good faith, causing the defense attorney to produce the defendant's version of the events which the State rejected as the basis for negotiations then used to prepare for trial..

3. Whether intentional references by the prosecutor to matters contained in the plea bargaining process was improper and denied Applicant due process and a fair trial.

4. Whether the decision to seek the death penalty in this case was not made after consideration of Applicant's moral blameworthiness, but, rather, the decision was made based on the prosecutor's perception of community expectations.

In order to resolve these issues, the Court shall conduct an evidentiary hearing at a time and place to be later determined.

SIGNED this _____ day of November, 2009.

_____

Judge Presiding