

(B)

No. 42969

COPY

EX PARTE

§ IN THE 400th DISTRICT COURT

§

§

OF

§

THOMAS BARTLETT WHITAKER

§

FT. BEND COUNTY, TEXAS

Supplemental Information Relevant to Motion for Evidentiary Hearing

TO THE HONORABLE JUDGE OF SAID COURT:

On November 9, 2009, the undersigned forwarded Applicant's "*Request for Entry of Order and Motion for Evidentiary Hearing*," received and filed marked by the Clerk of the Court on November 12, 2009. Applicant now presents the following supplemental information:

I

After reviewing the State's response and specifically the affidavit of Randy McDonald, Kent Whitaker has informed the undersigned as follows:

The first correction was on Page 1 of 12, near the bottom of the next to last paragraph. Randy states that I thought Bart had done the murders just to see if he could; the truth is that in response to his question I said that I didn't know why, but believed it *might have been possible* that he did it to see if he could get away with it. The truth is that I had no idea why he had done it, and one scenario I envisioned was that Bart might have done this as a dare to himself. It was not a claim that I believed necessarily to be true.

One Page 3 of 12 in the big middle paragraph Randy states that P. M. Clinton was hired by Dan Cogdell to do investigations. I do not remember that name; the man I paid to do investigations was, I believe, the son of legendary Houston P.I. Clyde Wilson. I did believe that this was money that I had spent without getting much in return. When I spoke to Randy McDonald about

getting another investigator I did not realize that the court would appoint one if I did not pay for it; I believed that I would have to pay (in addition to Randy's fees) for any investigator or medical examination that Randy pursued.

One of my most vigorous responses comes in the next paragraph, still on Page 3 of 12. Mr. McDonald states that he was not able to find any mitigating evidence that would allow Bart to be any less blameworthy. In retrospect, he says that he has read Dr. Harrison's report and finds nothing that would make him less blameworthy. Whether or not there is anything in the report that might have been useful, the point is that even after repeated requests by both Bart and myself, Mr. McDonald would not pursue having him tested. He had no idea what might have been in a report because none was ever pursued or obtained. In fact, Mr. McDonald repeatedly told me that obtaining a psychiatric report would be "committing legal suicide" (his term) because the prosecution would have access to whatever was learned in the report. I have since learned that any report purchased by the defense could either be submitted to the court, or not, and the prosecution wouldn't have access to it unless the defense felt that it was to their advantage to submit the report. Mr. McDonald had no clue what a report might contain. I have since come to believe that he might have thought that any testing fees would have come out of his fee (elsewhere in his statement he makes the comment that his fee included funds for a second chair or testing).

Mr. McDonald rejected both Bart's requests and my requests for an evaluation - we both badly wanted to know why Bart had done this - based on his statement that if the tests uncovered anything bad the prosecution would have access to it and would use it against us, and in an argument of our experts versus their experts we would lose. After the trial one of the women on the jury panel stated that they were initially split on the question of the death penalty, but those in favor of it eventually worked down those in favor of life in prison because they had no ammunition to defend against the question of why Bart had done it; there was no motive other than the motive of financial gain (which I believe to be totally false, but which was continually argued by the prosecution). If there had been a medical diagnosis of an illness I believe that the jury may have eventually ended hung. A medical evaluation may have provided that reason to hold out for life in prison.

Further, in the first paragraph of Page 4 of 12 Randy states that he expressly asked Dr. Brown to not interview Bart Whitaker any more. I did not know that he had done this. I had paid Dr. Brown to do testing, but then he

stopped coming. I could get no reason why, and did not learn why until I read Mr. McDonald's affidavit.

On Page 5 of 12, in the first paragraph, Randy says that he would have paid any additional lawyer retained as a second chair out of his fee. This is absolutely not what I understood. Based on my conversations about a second chair I fully believed that I would have to pay for any additional legal help. All along I had been told that Randy would devote perhaps as much as a half a year full time to this case, and with the cost of preparing for trial, for attending the trial, and for lost opportunities from other potential cases, the full amount I paid him was justified for his efforts. He never told me that his fee might include other representation; he knew that I was paying for most of the defense fees myself. Of the money that Bart received from his grandmother I had spent \$10,000 on investigators, and \$75,000 to Dan Cogdell; what little was left was more than used up prior to Mr. McDonald's involvement

On Page 7 of 12 Randy says within the first paragraph that he thought that the jury's verdict had nothing to do with the state's claim that Bart had not taken responsibility for the murders. I do not know how every juror felt, but my recollection of the interviews with the jurors after the trial was that it was a very big factor to them. Some did not believe that he was sorry, at all. The jury foreman even said "Bart Whitaker hasn't changed; he can't change."

On Page 8 of 12, near the bottom of the large first paragraph, Randy states that there was a long period before Bart was arrested that I "did not believe Bart was involved despite the Police proving the obvious." This is not accurate at all. From very early on (perhaps within the first week after the shootings, but certainly no later than a month after the shootings) I realized that it may well be true that Bart was involved in some way. But I told both Bart and the Police that I had no way to know the truth; the Police gave me absolutely no evidence of their claims (which was the right thing to do, since the investigation was on-going; I realized they could not give me any details). I told everyone that I was not discounting the Police's nebulous and unsubstantiated claims, but that I was not going to abandon my only living son simply because they wanted me to; I would be neutral and report anything I

learned, but that Bart was not going to go through this alone. By the time that he ran off to Mexico (fifteen months before his arrest) I had become convinced that he really was responsible.

On Page 8 of 12, at the very bottom, Randy said that the coup de gras was the Christmas card; perhaps so. But I think the real coup de gras was the weak closing argument of the penalty phase, when Randy did not give those who wanted to hold out for life in prison any reason to hold fast.

On Page 9 of 12, Randy says that I did not testify as he had expected me to testify; I am very sorry that this is so. He told me to be completely open and to just speak what I was thinking. He told me that it was his strategy to not prepare me in any way, because he didn't want the jury to believe that anything I said was prepared in advance. Perhaps I would have benefitted from a little openness of what he was expecting of me.

On Page 10 of 12 Randy discusses his closing arguments. I was in the court room during this and I was very disappointed. Both Mr. Felcman and Mr. Strange made clear and persuasive arguments. Neither had any problems with the sound system. I had high hopes that Mr. McDonald would effectively respond. I was very disappointed; I told my friends that we needed to begin planning what sort of statement I would make when the death penalty was announced. I found his summation wandering and without cohesion, and it was true that people all over the room had trouble hearing him. I had trouble, and so did those sitting with me. Perhaps there are problems with the room's acoustics, but it seems to me that after two weeks in a courtroom Mr. McDonald should have known that there were areas where the courtroom mics were ineffective. And the argument that his summation was damaged because of an interruption by the court reporter seems pretty lame for someone who is being paid nearly \$10,000 to make an effective argument for someone's life, especially at the most critical, climactic part of the trial. I do not doubt Mr. McDonald's abilities; I am simply saying that I was very disappointed that for whatever reason the final arguments were presented in a very disjointed and ineffective manner.

Kent Whitaker has indicated he will supply an affidavit to this effect and/or will be available to offer his testimony to this effect at an evidentiary

hearing.

II

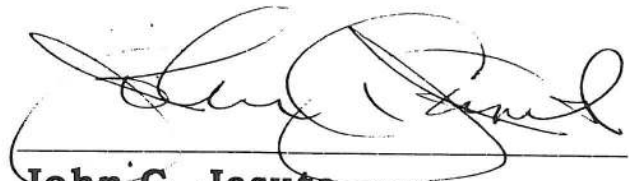
The undersigned respectfully assert that Kent Whitaker's statements not only reinforce the affidavit he previously submitted, but also shows that, contrary to assertions in his affidavit, Randy McDonald did not investigate any mental aspect that might have had some value as mitigating the death sentence. It also tends to demonstrate the self-serving nature of McDonald's affidavit, and thus, demonstrates the need for an evidentiary hearing.

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: zdrdavid@gmail.com
State Bar Card No. 17833400

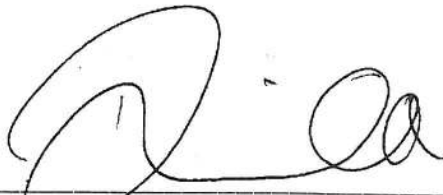


John G. Jasuta
Attorney at Law
Post Office Box 783
Austin, Texas 78767-0783
eMail: johngjasuta@earthlink.net
Tel. 512-704-3550
Fax: 512-532-6282
State Bar No. 10592300

Attorneys for Thomas Bartlett Whitaker

Certificate of Delivery

This is to certify that the above and foregoing "*Supplemental Information Relevant to 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 23, 2009.

A handwritten signature in black ink, appearing to read 'David A. Schulman', written over a horizontal line.

David A. Schulman