UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THOMAS BARTLETT WHITAKER,	§	
	§	
PETITIONER,	§	
V.	§	**CASE NO. 4:11-cv-02467**
	§	
RICK THALER, DIRECTOR, TEXAS	§	
DEPARTMENT OF CRIMINAL JUSTICE,	§	
CORRECTIONAL INSTITUTIONS DIVISION,	§	
	§	
RESPONDENT.	§	

FIRST AMENDED PETITION FOR WRIT
OF HABEAS CORPUS OF A PERSON IN STATE CUSTODY

TO THE HONORABLE KEITH P. ELLISON, UNITED STATES DISTRICT JUDGE:

HISTORY

On March 5, 2007, a Fort Bend County, Texas jury found Thomas Whitaker guilty of capital murder. On March 8, 2007, the jury answered Texas' "special issues" at punishment in a manner that required the imposition of the death penalty. On June 24, 2009, the TCCA denied Thomas Whitaker's direct appeal. *State v. Whitaker* 286 S.W.3d 355 (Tex.Crim.App. 2009). On June 30, 2010, the TCCA denied Thomas Whitaker's post conviction claims for a writ of habeas corpus. *Ex parte Whitaker*, WR-73,421-01 (Tex. Crim. App., June 30, 2010) (unpublished opinion).

JURISDICTION

This court has personal jurisdiction pursuant to 28 U.S.C. § 2241(d) because Thomas Whitaker was convicted in a Fort Bend County, Texas district court. Subject matter jurisdiction is conferred by 28 U.S.C. § 2254.

FACTS

On December 10, 2003, Thomas Whitaker, his roommate (Chris Brashear), and a neighbor (Steve Champagne) carried out a plan to murder Thomas Whitaker's father, mother and younger brother.[1] *See, Whitaker,* 286 S.W.3d, at 357-359. As related by the Texas Court of Criminal Appeals, Thomas Whitaker deceived the family into believing that he was about to graduate from Sam Houston State College and they went out to dinner to celebrate. *Id.* When the Whitakers returned to their home in Sugar Land, Texas, Brashear shot and killed Thomas Whitaker's mother and brother, and wounded Thomas Whitaker's father. *Id.* Brashear shot Thomas Whitaker in the left bicep in order to create the appearance that Thomas Whitaker had been ambushed. Brashear then fled the scene with Champagne who was waiting outside in a getaway car. *Id.* Since at least 2000, Appellant had planned with several other individuals, at different times, to murder his family. He made at least one attempt to murder his family before December 10, 2003. *Id.*

Thomas Whitaker soon came under suspicion but denied involvement. *Id.* Kent Whitaker retained Dan Cogdell and Jimmy Ardoin to represent his son. *Id.* In June of 2004, after Cogdell informed him that Fort Bend County investigator Marshall Slot was convinced Thomas Whitaker was responsible for the murders, Thomas Whitaker stole ten thousand dollars from his father and fled to Mexico. *See, id.* In September of 2005, the FBI learned of his whereabouts. The Mexican police arrested Thomas Whitaker and extradited him to stand trial for capital murder in Fort Bend County, Texas. *Id.*

Cogdell resumed his representation of Thomas Whitaker. However, the evidence that Thomas Whitaker had orchestrated the murder of his mother and brother was significant.

[1] Norman Kent Whitaker ("Kent Whitaker") is the father; Kevin Whitaker is the brother, and Patricia Whitaker is the mother.

Brashear and Champagne had confessed and had agreed to tape numerous conversations with Thomas Whitaker. The State recovered physical evidence corroborating Brashear's and Champagne's statements. Cogdell, therefore, concentrated on developing a punishment phase defense and retained psychologist Dr. Jerome Brown to provide expert assistance. *See, Exh.* 'A' (*Affidavit of Dan Cogdell).*

Cogdell also sought to negotiate a life sentence. To this end, Cogdell proposed what he called a "proffer" to Assistant District Attorney Fred Felcman. *See, id.* These negotiations were handled very informally, consisting principally in a chance meeting with Felcman in a local store. *Id.* Nonetheless, according to Cogdell, the sides agreed that Thomas Whitaker would provide a written statement describing his role in the offense and taking responsibility for the crime; in return, Felcman supposedly assured the defense that the Fort Bend County District Attorney's Office would not seek the death penalty. Cogdell maintained that Felcman told him he wanted a factual account unleavened with *mea culpas*. *See, id.*

Ardoin drafted Thomas Whitaker's statement based on attorney-client interview notes and presented the statement to Felcman. *Exh.* 'B' (*Affidavit of Jimmy Ardoin*). However, Thomas Whitaker did not review or approve it. (31 RR 257-258.) According to Cogdell, Felcman accepted the document, but then told him that it showed insufficient remorse for the State to agree to a life sentence. *Exh.* 'A'. Contrary to Cogdell's claim, Felcman maintained in post conviction proceedings that there was no proffer agreement, and that the Fort Bend County District Attorney made the decision to seek death. *Exh.* 'C' (*Affidavit of Fred Felcman*). After the negotiations for a life sentence broke down, Cogdell resigned. With guilt-innocence a foregone conclusion, Kent Whitaker retained Randy McDonald ("trial counsel") to investigate and put on a punishment phase defense.

Trial counsel was faced with defending a client who had committed a bizarre crime that would typically require a psychological explanation. Kent Whitaker implored trial counsel to have his son examined by a psychiatrist and agreed to pay the costs. *Exh.* 'D' (2009 *Affidavit of Norman Kent Whitaker*). Trial counsel was also aware that Thomas Whitaker had a history of mental health and emotional problems serious enough to warrant professional intervention. Trial counsel knew that Cogdell had hired Dr. Jerome Brown to treat Thomas Whitaker, and he knew that Dr. O'Rourke had treated Thomas Whitaker in 1997. *Exh.* 'E' (Affidavit of Randy McDonald). However, trial counsel did not retain a mental health professional, although both the American Bar Association and State Bar of Texas Guidelines stress that having qualified mental health experts involved in the defense of a capital trial is essential whenever the defendant has a history of serious mental illness. *2006 State Bar of Texas Guidelines and Standards for Texas Capital Counsel*, §10.1(B)(1)(c), 11.7(F)(2);[2] *2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* ("2003 ABA Guidelines").

Trial counsel states in his 2009 affidavit that he conferred with Dr. O'Rourke; however, it does not describe the content of any communications between himself and the mental health experts who evaluated Thomas Whitaker before trial. *Exh.* 'E'. According to post-conviction counsel, David Schulman, trial counsel's file did not contain notes of trial counsel's communications with the mental health experts or copies of Dr. O'Rourke's report or Dr. Brown's report. Therefore, in state post-conviction proceedings, Thomas Whitaker contended that trial counsel had provided ineffective assistance of counsel at the punishment phase because

[2] *See, also, id.*, at §3.1(A)(2)("The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.").

he did not investigate or present mitigating psychological evidence. *Original Application for Post Conviction Writ of Habeas Corpus* ("OAPCW"), at 5-30.

However, Thomas Whitaker has a significant history of serious mental illness. Before trial, Drs. Jerome Brown and Brendan O'Rourke made Axis I diagnoses that included mental diseases of psychotic proportions with an etiology antedating the capital offenses. *See, Exh.* 'F' (1997 *Report of Dr. Brendan O'Rourke*; *Exh.* 'G' (2005 *Report of Dr. Jerome Brown*). Thomas Whitaker's psychological problems persisted over time with no indication of malingering. *Exh.* 'H' (2009 *Report of Dr. Kit Harrison*). However, trial counsel failed to retain a mental health expert or a mitigation expert, and he tried this capital murder case without the assistance of co-counsel or an investigator.

CLAIMS FOR RELIEF

CLAIM ONE

IN VIOLATION OF DUE PROCESS, THE STATE, UNDER THE PRETENCE OF ENGAGING IN PLEA NEGOTIATIONS, PROCURED A PROFFER THAT IT USED TO PREPARE ITS PUNISHMENT PHASE CASE AND TO CROSS EXAMINE THOMAS WHITAKER

The plea bargaining process, including the negotiation phase, is marked by both the interests of justice and standards of good faith. *United States v. Valencia*, 985 F.2d 758, 761 (5th Cir. 1993) (citing *Santobello v. New York*, 404 U.S. 257, 262-263 (1971)). In addition to the requirement of honesty, a State's counsel cannot act in a vindictive manner without offending the Constitution. *North Carolina v. Pearce*, 395 U.S. 711 (1969). In Thomas Whitaker's case, the state violated due process by using the ruse of the plea bargaining process to get evidence it was not entitled to obtain or use.

Thomas Whitaker's former attorneys, Dan Cogdell and James "Jimmy" Ardoin, were approached by prosecutor Felcman while they were in a retail store in Sugar Land, Texas.

Felcman proposed to the two attorneys that negotiations would be enhanced by the submission by the defense of what came to be known as "the proffer", a statement of the facts of the offense, detailing Thomas Whitaker's involvement in a strictly factual manner. *Exh. 'A'*, at 3. According to Cogdell, Felcman stressed that there should be no embellishment of the factual statement with mention of remorse or contrition. *Id.* In exchange for a satisfactory proffer, Cogdell and Ardoin were told that the State would remove the death penalty as a punishment option. *Id.*

Ardoin interviewed Thomas Whitaker and wrote a multi-paged document describing Thomas Whitaker's role in the murders. *Id.* Cogdell presented the document to Felcman as a "proffer" in return for a life sentence. *Id.* However, according to Cogdell and Ardoin, Felcman rejected the proffer as unsatisfactory because it did not contain and expression of remorse on Thomas Whitaker's part. *Id.* The State proceeded to seek the death penalty and retained the document Ardoin drafted for use at trial.

The State's subterfuge regarding the plea negotiations surfaced during Kent Whitaker's guilt-innocence phase testimony. The lead prosecutor baited Kent Whitaker into mentioning the proffer by asking him why Thomas had not confessed upon returning from Mexico where he had fled:

> A. (Kent Whitaker) There was no confession. There was a proffer offered to the District Attorney's office a year and, what, three or four months ago.
>
> Q. (Mr. Felcman) Uh-huh. You know, of course, that proffer was absolutely inadmissible, and I could not have used it for any purposes. You understand that?
>
> A. No, I didn't understand that.
>
> Q. Okay.

25 RR 105

While acknowledging that the proffer was covered by Rule 410 of the Texas Rules of Evidence, the prosecutor proceeded to query Kent Whitaker about the proffer as though Kent Whitaker had opened the door to this issue.

> Q. (Mr. Felcman) So, the remorse or repentance that my office received was -- let me ask you this: Did the Defendant prepare that, or did one of Dan Cogdell's partners prepare that?
>
> A. (Kent Whitaker) I don't even think it was a partner. I found out much later -- in my visit with you, what, six weeks ago, that was at the time I found out that Bart had not written the proffer, and that you were offended by the tone of it, and that was when I knew that Jimmy -- I can't think of his last name -- anyway, one of Dan's junior assistants, I'd heard had written that up.
>
> Q. There was no legal repentance, there was nothing. There was legal maneuvering on your son's part. Am I correct on that?
>
> A. What?
>
> Q. He -- he repented to you, but he didn't put his neck on the line about this case, correct?
>
> A. As I understand it, it would have been -- Dan would not have allowed him to.
>
> Q. Uh-huh.
>
> A. I think that the problem broke when Dan and you did not seem to realize that Bart was trying to confess to this.

25 RR 106.

In post conviction proceedings, the State argued that Felcman was justified in using the document precisely because Kent Whitaker had brought the proffer up.[3] However, the attempted justification only compounds the misconduct. Kent Whitaker was the State's witness, and he had not been declared adverse. The State, therefore, manipulated its own witness into mentioning the

[3] Findings of Fact and Conclusions of Law, *Finding* #95. The findings were drafted by the State and rubber stamped the convicting court, a practice recently criticized by the Supreme Court in *Jefferson v. Upton*, 130 S.Ct. 2217 (2010). The TCCA, however, rejected several findings critical to the State's case against habeas relief. *Ex parte Whitaker*, WR-73,421-01, at 2.

proffer so it could use the document to impeach him regarding the critical issue of Thomas Whitaker's remorse.

The misconduct reached its zenith during the State's cross-examination of Thomas Whitaker at the punishment phase. The State asked Thomas Whitaker, after he had been given the opportunity to read the proffer, if he could name one fact in the proffer that would lessen his "moral blameworthiness."32 RR 260. Because Ardoin, acting on Felcman's instruction, had omitted all statements of remorse or acceptance of responsibility, the State was able to use the proffer to great effect to create the appearance that Thomas Whitaker lacked remorse and was merely manipulating the legal system to his advantage.

> Q. You also mentioned something about a proffered statement. Remember that?
>
> A. I -- yes, sir.
>
> MR. FELCMAN: May I approach him, Judge?
>
> THE COURT: You may.
>
> Q. (BY MR. FELCMAN) Don't read this out loud to the jury. Do not read it out loud to the jury, but read this to yourself.
>
> A. (Reading.)
>
> Q. Is that true?
>
> A. I did not write that.
>
> Q. You didn't write it?
>
> A. No. I -- I wanted to write the proffer. That was some confusion between me and Mr. Cogdell at the time when initially -- I guess it was your office that suggested that if we wrote the proffer, we could all end this. It was my impression that I would write this admission of guilt.
>
> Q. It wasn't my suggestion.
>
> A. I'm sorry?

> Q. Your father poured his heart out to me, and I saw no remorse on your part.
>
> A. I didn't actually write that. The one that I wrote was in my cell, and it did have remorse. It was really how I felt at the time, and I didn't -- I was under the impression that I was going to be giving that copy to Mr. Cogdell, and then I find out -- I guess I didn't see him for a few weeks. I found out the next time that I talked to him that a proffer had been rejected. I was very confused, because it was my understanding that I would be writing it myself.
>
> Q. The proffer that presented -- that you didn't even have anything to do with. You understand how insulting that is to somebody that has to listen to the father plea, and I see no remorse on the Defendant?
>
> A. Yes, extremely insulting. I knew it would be, if it had been done that way. I wouldn't have agreed to that at all. I was very upset about that.

32 RR 258.

In sum, the prosecutor manipulated Mr. Whitaker's attorneys into providing a proffer under TRE 410 that, at the State's urging, was stripped of expressions of remorse or acceptance of responsibility. The State then baited it own witness, Kent Whitaker, into mentioning the proffer and used the ruse of "opening the door" to severely impeach the punishment phase defense that depended entirely on these two witnesses.

1. The State Court's Factual Findings Were Clearly Erroneous.

The convicting court recommended denying relief on Thomas Whitaker's prosecutorial misconduct claim based on the following findings of fact and conclusions of law.[4]

Findings of Fact

> **80. Applicant provides no physical proof of a plea offer, such as an offer letter from First Assistant Felcman, which the Court finds there was not.**

[4] The findings connected to the issue of prosecutorial misconduct also include findings that the prosecutors, Felcman and Strange, were credible witnesses. *Findings* at 74-79.

81. Applicant did not attach a copy of the proffer as evidence in support of his grounds for relief.

82. Based on the credible affidavit of First Assistant Felcman, the statements in the proffer did not match the evidence of the crime.

83. Applicant fails to prove by a preponderance of the evidence that First Assistant Felcman offered to remove the death penalty as a possible option if Applicant were to tender a detailed proffer of his involvement with the offenses and avoid statements of remorse and contrition.

84. Even if such an offer had been made, Applicant admits that he did not write or participate in writing the proffer that was tendered to the prosecution [App-Ex 5, RR-31 at 257-58].

85. Even if such an offer had been made, Applicant did not perform his part of the alleged Bargain.

86. Based on the credible affidavit of ADA Strange, trial counsel, Randy McDonald, first broached the subject of a plea agreement for life sentences after the prosecution announced it would seek the death penalty.

87. Based on the credible affidavit of First Assistant Fred Felcman, the State determined the death penalty was warranted solely on the basis of Applicant's actions and the circumstances of the case and never offered a plea agreement for life sentences.

88 Based on the credible affidavit of First Assistant Fred Felcman, the State never took the death penalty off the table.

89 Applicant failed to prove by a preponderance of the evidence his allegations of prosecutorial misconduct for failing to negotiate in good faith.

Conclusions of Law

18. Applicant fails to prove by a preponderance of the evidence that First Assistant Felcman offered to remove the death penalty as a possible option if Applicant were to tender a detailed proffer of his involvement with the offenses and avoid statements of remorse and contrition.

> 19. Even if such an offer had been made, Applicant admits that he did not write or participate in writing the proffer that was tendered to the prosecution [App-Ex 5, RR-31 at 257-58]. Applicant thus failed to prove by a preponderance of the evidence his allegations of prosecutorial misconduct for failing to negotiate in good faith.
>
> 20. As Applicant relies on a non-existent plea bargain offer, any alleged due process violation arising from the non-existent offer is indisputably meritless. *See, e.g., Geiger v Jowers*, 404 F 3d 371, 374 (5th Cir. 2005) (alleged due process violation complaint is indisputably meritless because inmate has no federally protected liberty interest in having his grievances resolved to his satisfaction)
>
> 21. Applicant fails to prove by a preponderance of the evidence that he suffered prejudice from a non-existent plea bargain offer

The TCCA agreed with the trial court's recommendation and denied relief. However, the TCCA did not adopt all the trial court's specific findings and conclusions. Instead, the TCCA expressly stated that it was not adopting findings of fact 80 and 83. *Ex Parte Whitaker*, NO. WR-73,421-01 (Tex. Crim. App., June 20, 2010). The TCCA also expressly stated that is was not adopting conclusions of law 18, which repeats finding 83 verbatim. The TCCA rejected these findings and conclusions even though the lead prosecutor signed an affidavit that plainly states that he "never told" Defense counsel that "if the defendant confessed, the District Attorney would not seek the death penalty." *Exh.* 'C', at 2.

a. The Evidence Clearly and Convincingly Shows that the Proffer at Issue was Provided to the State in the Course of Plea Negotiations.

At trial, Felcman examined Kent Whitaker and Thomas Whitaker regarding the proffer that Thomas Whitaker's former attorneys, Cogdell and Ardoin, drafted and gave to the State. Felcman referred to the document on the record as a proffer. *See,* 25 RR 106 (quoted above). Felcman's statement that "the proffer was absolutely inadmissible, and I could not have used it for any purposes," *Id.,* at 105, obviously proves Felcman knew that the document had been

submitted pursuant to Rule 410 of the Texas Rules of Evidence as part of plea negotiations for a life sentence.

Instead of controverting Thomas Whitaker's contention that the State offered to consider taking death off the table in exchange for a proffer, Felcman's statements at trial, together with his 2009 affidavit, demonstrate that plea bargaining took place, but that Felcman was not negotiating in good faith, because he planned to use the proffer to impeach Kent and Thomas Whitaker all along. According to Felcman's affidavit, Felcman knew the Defense was aware that the State could "easily established the criteria for the defendant to receive the death penalty." *Exh*. 'C', at 2. Before the proffer was made, Felcman says he figured that "the only avenue available [to Thomas Whitaker] was to use any negotiations as a defense to receiving the death penalty." *Id.* As Felcman tells it, he anticipated specifically that the Defense would introduce "the desires of Kent Whitaker that the State not seek the death penalty" and "from that, the offer by the defendant to plead to life." *Id.* However, it was Felcman that made this forecast come true. Kent Whitaker was the first witness whom the State called. Felcman then elicited testimony about the proffer during *guilt innocence* through his direct examination. 25 RR at 105-106.

b. Findings Adopted by the TCCA Contradict the Determination That a Life Sentence Was Never Offered.

In his 2009, affidavit Felcman denies that he said "he would consider removing death … only if [the defense] submitted a "proffer" of evidence." *Exh*. 'C', at 4. According to Felcman, Cogdell and Ardoin approached him in a Best Buy, that "Dan said something about how despicable the actions of the defendant were but that he believed the defendant to have some remorse." *Id.* Felcman maintains that he simply replied that his "opinion was different and that true remorse is not negotiated but comes from within." *Id.* According to Felcman, "that was the

entire conversation." *Id.* Based on this allegation, the State proposed that the Court find that "First Assistant Felcman [never] offered to remove the death penalty as a possible option if Applicant were to tender a detailed proffer of his involvement with the offenses." **However, the TCCA expressly decided not to adopt this proposed finding**.

On the crucial issue of whether Felcman offered to consider taking death off the table only if supplied with a proffer, Cogdell's and Ardoin's adamant affirmation, therefore, stand unrebutted by the State's specific denial. Review of the evidence should therefore be to determine if the affidavits of Cogdell and Strange clearly and convincingly demonstrate the unreasonableness of a general denial that Felcman offered to consider a life sentence in return for a proffer of evidence stripped of expression of remorse. It clearly does. Both attorneys provide sworn statements, and describe in detail the circumstances under which Felcman elicited the proffer and the conditions he imposed on its contents. *Exh.* 'A', at 3; *Exh.* 'J', at 2-3. The State does not question their reputation for honesty. At trial, the State produced the proffer that the Cogdell gave Felcman, and the contents of this document corroborate their claim that they drafted it as a factual account rather than repentant one.

c. The Finding That Thomas Whitaker Did Not Keep His End of the Plea Bargain is Falsified by the Record.

The TCCA's justification of Felcman's use of the proffer on the ground that Thomas Whitaker did not keep up his end of the bargain was also unreasonable. The conclusion that Thomas Whitaker breached the plea agreement appears to be based on a predicate finding that the statements in the proffer conflicted with the evidence of the crime. However, the evidence against this is overwhelming.

First, the claim that the proffer was untruthful is based on a perfunctory statement that Felcman attributes to his investigator, Marshal Slot. The incompetence of this evidence is

manifest. Felcman says first, that his investigator, Marshall Slot "told me the facts were wrong in it." *Id.,* at 3. This is hearsay unsupported by any indicia of reliability. Later on he says simply "that Dan or Jimmy" sent him a letter with "facts that were wrong." *Id.,* at 10. However, Felcman does not back up the conclusory allegation by identifying a single discrepancy between the State's evidence and the proffer. He does not say he confirmed Slot's view independently. Furthermore, Felcman never says that Slot's detection of factual inaccuracies was the reason for rejecting the proffer. To the contrary, Felcman insists that "the proffered statement given to me was of absolutely no legal detriment to the defendant." *Id.,* at 4. This flatly contradicts the TCCA's finding that the document given to the District Attorney's office contained untruthful statements, let alone knowing material falsehoods. Had the proffer contained anything of the sort, it would have been a crime to submit it, and Felcman, a long time Assistant District Attorney, would have recognized and used that fact against Mr. Whitaker.[5]

Second, if Felcman had found discrepancies of any importance in the proffered statement, he would have impeached Mr. Whitaker with the deviations from the evidence. Felcman's primary aim was to demonstrate that Thomas Whitaker could not be trusted, that he could manipulate even seasoned attorneys, and, therefore, that the jury should find that his remorse was feigned. A line of questioning demonstrating that Thomas Whitaker had used his attorneys to feed false information to the State obviously would have advanced the prosecution's argument. However, Felcman did not identify a single factual inaccuracy at trial in 2007 or in the affidavit he submitted in 2009.

[5]Under Texas Code of Criminal Procedure § 37.08 (a)(2) it is a class B misdemeanor to make "a false statement material to a criminal investigation" to "any employee of a law enforcement agency." In Texas, assistant district attorneys are employees of a law enforcement agency. The District Attorney's Office is a law enforcement agency under TCCP §2.12 (defining peace officer to include investigators employed by a District Attorney) and TCCP §59.01 (defining law enforcement agency as a government division employing peace officers).

Third, after the encounter with Felcman at a Best Buy department store, Ardoin took down a factual account from Mr. Whitaker. *Exh.* 'B', at 2. Cogdell confirms that Ardoin met with Thomas Whitaker immediately after the conference to produce a factual account in accordance with Felcman's directions. *Exh.* 'A', at 3. By this time, both the Defense and the State were aware of the evidence that law enforcement had developed in the case. Cogdell and Ardoin would not and did not allow their client to make statements in a proffer that conflicted with what was known about the case. Indeed, factual discrepancies are not evident; the proffer Ardoin drafted appears completely consistent with the facts developed by the State. *See, Exh.* 'J.1' (Jan. 5, 2006, Proffer). The intimation that Thomas Whitaker did not keep up his end of the plea bargain because he fabricated some portion of the factual account of the crime is not just false, it is a concoction. It does not deserve deference.

d. The Finding That Thomas Whitaker Did Not Participate in Plea Negotiations is Also Unreasonable.

Cogdell and Ardoin's affidavits both prove that the factual account of the crime contained in the proffer came straight from Thomas Whitaker. *Exhs.* 'A' and 'B'. Thomas Whitaker's testimony at trial that he did not write the proffer or review it before Cogdell submitted it does not negate his participation in the plea bargaining process. It would be one thing if Thomas Whitaker were unaware of Cogdell's and Ardoin's efforts to arrange a deal or had objected to them. However, Thomas Whitaker did not testify that he had not authorized plea bargaining. To the contrary, his testimony acknowledges that he was actively engaged in assisting his attorneys' endeavors to arrange a deal for a life sentence. 31 RR 226. Felcman's own 2009 affidavit also confirms that Thomas Whitaker authorized and participated in plea negotiations. Felcman's reveals that the State secretly recorded a conversation between Thomas Whitaker and Kent Whitaker. *Exh.* 'C', at 3. The recording, according to Felcman's affidavit,

reflected Thomas' understanding that his attorneys were engaged in plea negotiations and had been informed of the objectives. *Id.*

In addition to being demonstrably false, the factual findings that Thomas Whitaker did not keep up his end of the plea bargain and the allegation he did not participate in the plea bargain seem to be irrelevant to the TCCA's disposition of Thomas Whitaker's due process claim. The finding on which the TCCA's conclusion of law regarding due process squarely rests intermixed with the 20th conclusion of law. According to this conclusion, Felcman's procurement and use of the proffer did not offend due process because the due process allegation "relies on a non-existent plea bargain offer." *See, Conclusion of Law #* 20.

Because the TCCA ***rejected*** the finding and conclusion that there is no "physical proof of a plea offer" and ***rejected*** the finding that Thomas Whitaker "fail[ed] to prove by a preponderance of the evidence that First Assistant Felcman offered to remove the death penalty as a possible option if Applicant were to tender a detailed proffer of his involvement with the offenses and avoid statements of remorse and contrition," the only way to square the finding that the offer of a plea was "non-existent" is by reference to Felcman's representation that he did not say that the District Attorney, John Healey, would offer a life sentence if Thomas Whitaker confessed. *Exh.* 'C', at 3-4. However, Felcman does not say he lacked authority to enter into plea negotiations, and his 2009 affidavit demonstrates that he was doing precisely that.

Felcman's co-counsel, Assistant District Attorney Jeff Strange's 2009 affidavit also shows that the State engaged in plea negotiations through the time the proffer was tendered and afterwards. *Exh.* 'J', at 3. Strange says he was part of two formal conferences between Cogdell and Healey, but Healey did not offer to forego seeking the death penalty at either meeting. *Id.*, at 3. Nonetheless, he concedes that the offer of a plea to a life sentence was discussed, albeit, in his

view, "never seriously." *Id*. Strange acknowledges that Cogdell's goal was to get us to take the death penalty "off the table" so he could then start negotiating for a period of years on a possible murder plea." *Id.* Strange also corroborates Cogdell's post-conviction assertion that, after the proffer, Cogdell responded to inducements to continue negotiating by arranging for Bo Bartlett and Kent Whitaker to meet with the prosecutor to express the Bartlett and Whitaker families' desires for a life sentence. According to Strange, Felcman and he met with Kent Whitaker and Bo Bartlett on at least a couple of occasions while the question of punishment was still left open. As Strange says, it was not until a series of the meetings with Kent Whitaker and Bo Bartlett concluded that "we ultimately decided to seek the death penalty." *Id.* Felcman's affidavit in fact shows that Healy did not foreclose the possibility of a plea to life sentence until close to the time of trial. According to Felcman,

> All conversations with Kent Whitaker and Bo Bartlett that Jeff, Marshall, Billy and I had were relayed to District Attorney John Healey. Mr. Healey and Jeff also met with Mr. Bartlett without me being present. After all conversations, Mr. Healey determined that the evidence warranted the seeking of the death penalty. We then went to trial.

Exh. 'C', at 5.

e. Felcman's Plan to Use the Proffer to Undercut Thomas Whitaker's Punishment Phase Defense is Evident From the Record.

Felcman's questioning of Kent Whitaker is inexplicable except as part of a scheme to capitalize on the elimination of contrition from the proffer as a way to defuse what Felcman believed was Mr. Whitaker's lone defense to the death penalty, which was to show a willingness to except remorse by pleading guilty. *Id.*, at 3. In order to realize this goal, Felcman, in what may be a first, impeaches a credible witness's guilt-phase testimony that the defendant confessed to a capital crime:

A. I hadn't seen my son in 15 months. He walked in, and there was the bulletproof glass separating us, and he looked down, and I think I told him that I missed him and he looked good. And he said, "Dad, I'm so sorry. I'm sorry for everything. I'm going to do everything in my power to make this as easy and painless as possible for everyone." And it was at that moment that I realized that he was –

Q. Guilty?

A. -- he was guilty and willing to confess.

Q. There was no confession, though, at any time, was there?

A. There was no confession. There was a proffer offered to the District Attorney's office a year and, what, three or four months ago.

25 RR 105. This shows he had one pre-conceived purpose for soliciting testimony about the proffer from *his* witness, which was to portray Thomas Whitaker as remorseless.

The interrogation of Kent Whitaker (25 RR 105-106) regarding the lack of remorse expressed in the proffer was itself irrelevant to guilt innocence. Once again, the only purpose for this line of questioning was to set up the prosecution's punishment phase theme that Thomas Whitaker was manipulative and cold hearted. Felcman's use of Kent Whitaker at guilt innocence to draw a contrast between the father's grief and the lack of remorse expressed in the proffer compounds with vindictiveness the bad faith inherent in the State's calculated misuse of the proffer. *See, id.*, at 106.

1. The TCCA Unreasonably Failed to Extend *Santobello*.

A state-court decision involves an unreasonable application of Supreme Court precedent if the state court either "unreasonably extends a legal principle" from Supreme Court precedent "to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407 (2000); *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000) ("A state determination may be set aside under this standard

if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled."). In *Williams v. Spitzer*, 246 F.Supp.2d 368 (S.D.N.Y. 2003), the District Court found that it was unreasonable not to extend *Santobello* into a context situated farther from the facts of the Supreme Court's decision than is Thomas Whitaker's case. In *Williams*, 246 F.Supp.2d at 371, the defendant pled to murder charges in federal court. Police detectives promised that if the defendant continued cooperating against a gang he formerly belonged to, the State would agree to a sentence in his State case that would run concurrently and terminate with his federal sentence. *Id.*, at 372. At sentencing in State court, however, the District Attorney successfully sought a 15 year sentence exceeding the federal punishment. *Id.*, at 373. The federal district court granted habeas relief upon finding no meaningful distinction from *Santobello* with regard to the due process claims.

Cogdell and Ardoin's affidavits establish that in order to obtain a proffer from Thomas Whitaker, Felcman promised to take death off the table. As in *Williams*, the contention that this promise was off the record and not made by the elected District Attorney himself is immaterial. Clearly, the TCCA's refusal to extend *Santobello* into this context justifies setting aside its decision and granting relief.

2. The TCCA Unreasonably Failed to Recognize That Using the Proffer in the State's Case in Chief and to Impeach Mr. Whitaker Was Repugnant to Basic Principles of Fundamental Fairness.

The contractual principles underlying the plea bargaining process are of course "supplemented with a concern that the bargaining process not violate the defendant's rights to fundamental fairness under the due process clause." *See, United States v. Rourke*, 74 F.3d 802, 805 (7th Cir.) (quoting *Ingram*, 979 F.2d at 1184), cert. denied, 517 U.S. 1215 (1996). Thomas

Whitaker had every reason to expect that the District Attorney would treat the information he provided as part of plea bargaining. Defendants are justified in believing that "prosecutors will be faithful to their duty." *Newton v. Rumery*, 480 U.S. 386, 397 (1987) (plurality opinion). The use of evidence obtained through plea negotiations, therefore, is obviously repugnant to due process. *See, United States v. Sikora*, 635 F.2d 1175, 1178 (6th Cir. 1980). The defendant must waive rights under Rule 410 before the State can use proffered testimony even if the purpose is just for impeachment. *United States v. Mezzanatto*, 513 U.S. 196 (1995). Even so, waiver is freighted with serious due process concerns. *See, United States v. Gomez*, 210 F.Supp.2d 465, 475 (S.D.N.Y. 2002).

The legal conclusions adopted by the TCCA are colored by the false premise that there was no plea bargain offer. Because of this error, the rule of decision that the TCCA relied upon predictably conflicted squarely with Supreme Court precedents. The TCCA relies on *Geiger v Jowers*, 404 F 3d 371, 374 (5th Cir. 2005), for due process principles. Geiger complained about the adequacy of the prison's inquiry into the conduct of the mail room and security staff. The Court found that Geiger did not have a cognizable interest in being free from the conduct he complained about. Because there was no substantive due process interest at stake, Geiger was not entitled to procedural due process. Likewise, the TCCA decided that because the State did not ultimately make an offer of a life sentence, Thomas Whitaker did not have an interest in the way plea negotiations were carried out. However, the TCCA's analogous reasoning sprays wide of the target. First, Thomas Whitaker is not raising a procedural due process claim, but a substantive claim that arises when the State represents that it is procuring information supplied by the Defendant as part of a plea bargaining process. Under these circumstances, the Defendant

has a substantive interest in having the State treat the documents it receives as inadmissible, rather than misusing the process to secure information for undercutting the defense.

3. Harmless Error Analysis is Not Necessary.

In *Santobello*, 404 U.S. at 263, the Supreme Court indicated that reviewing courts "need not reach the question whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea." Instead, the Court held that "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration." *Id.* Instead of analyzing the harmfulness of the error, this Court should grant relief so that the trial court, as happened in *Santobello*, *id.*, may determine whether the more appropriate course of action is to enforce the promise not to seek the death penalty that the State made in exchange for Thomas Whitaker's proffer.

4. Because the TCCA Applied the Wrong Constitutional Standard, This Court, if it Assesses Harm, Should Do So *De Novo*.

Under *Brecht, supra*, and *O'Neal v. McAninch*, 513 U.S. 432 (1995), an error requires relief if it had a "substantial or injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 622 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). When the reviewing court has "grave doubt" as to the harmlessness of an error, the writ should issue. *O'Neal*, 513 U.S. at 435. However, the TCCA addressed the issue of harm in a single proposition, in which it found that "Applicant fails to prove by a **preponderance** of the evidence that he suffered **prejudice** from a non-existent plea bargain offer." *Conclusion of Law* #20 (emphasis added). Because the analysis of harm in post conviction proceeding is governed by *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the TCCA's decision is contrary to, or involves an unreasonable application of, Supreme Court law.

Habeas petitioners do not shoulder the burden of proving that constitutional error caused substantial harm. *See, Soffar v. Johnson,* 237 F.3d 411, 460 (5th Cir. 2000) (explaining that "the Supreme Court rejected the notion that under *Brecht,* the habeas petitioner must bear the burden of establishing whether the error was prejudicial"). Furthermore, prejudice and materiality are the same, *see, Kyles v. Whitley*, 514 U.S. 419 (1995), and the Supreme Court has explained that "the constitutional standard of materiality," and therefore prejudice, "must impose a higher burden on the defendant" than the standard for harm under *Brecht*. *See, United States v. Agurs*, 427 U.S. 97, 112 (1976).

The harm caused by the State's misuse of the plea bargaining process to obtain the proffer Ardoin drafted is reflected in the State's case and in Felcman's 2009 affidavit. Felcman realized that an expression of remorse was a viable mitigation defense. He therefore went to lengths to undermine the defense by procuring a factual proffer, eliciting testimony from Kent Whitaker in order to justify questioning Kent and Thomas about the proffer (while simultaneously announcing that it was inadmissible), and then using the proffer to draw a devastating comparison between the sorrowful yet forgiving father, and an allegedly still remorseless, manipulative son. 31 RR 257 ("The proffer that presented -- that you didn't even have anything to do with. You understand how insulting that is to somebody that has to listen to the father plea, and I see no remorse on the Defendant?"). In closing, the State focused on the proffer as proof that Thomas Whitaker was incapable of taking responsibility, and instead blamed others:

> This is manipulation, this is gamesmanship, what you've seen during the entire course of this trial, worthy of Bart Whitaker. Wasn't it amazing that he started blaming his attorneys on the stand yesterday? He was talking about the proffer. "Well, that was my attorney's fault. I didn't want it done that way." And the plea? "Well, I didn't want to do that. I didn't agree with it, but I just followed my lawyer's advice." He did not take an iota of responsibility.

Id., at 31.

In evaluating the harm caused by the misuse of the proffer, evidence that the State intentionally mislead the jury should be taken into consideration. *See, e.g., United States v. Gerard*, 491 F.2d 1300, 1302 (9th Cir. 1974); *United States v. Esposito*, 523 F.2d 242, 249 (7th Cir. 1974). Felcman's affidavit shows he knew that Cogdell was in complete charge of the plea negotiations and that Thomas Whitaker was not pulling his strings. Felcman's co-counsel shows that Felcman realized right away that the proffer had been drafted by Thomas Whitaker's attorneys. According to Strange, "reading the proffer it was clear that it had been prepared by Mr. Cogdell's office and did not reflect the words of Bart Whitaker." *Exh.* 'J', at 4. Strange's affidavit also shows he was perfectly familiar with what a proffer was. On the other hand, Felcman (a veteran, career prosecutor) professed to have never of heard of a "proffered statement" (*Exh.* 'C', at 4), said he "did not know for certain" that Cogdell's office had drafted the document until trial, *id.*, and impeached Thomas Whitaker on the specious ground that he had engineered the proffer in order to avoid taking responsibility. 31 RR 257-58. The misuse of the proffer to mislead the jury clearly caused substantial harm by vitiating entirely the only defense to the death penalty sponsored at trial. Habeas relief is therefore warranted.

CLAIM TWO

TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE

Strickland v. Washington, 466 U.S. 668 (1984), set forth the legal principles that govern ineffective assistance of counsel claims. A defendant must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id.*, at 687. To establish deficient performance, he must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.*, at 688. The Supreme Court has "declined to articulate specific

guidelines for appropriate attorney conduct." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Instead, the Court has "emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Id.* (quoting *Strickland*, 466 U.S. at 688). After demonstrating that counsel performed deficiently, a defendant must show that counsel's failures prejudiced his defense. *Strickland*, 466 U.S. at 692. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694. In assessing prejudice, the reviewing court reweighs the evidence in aggravation against the totality of available mitigating evidence. *Wiggins*, 539 U.S. at 534. The totality of the evidence includes "both that adduced at trial, and the evidence adduced in the habeas proceeding[s]." *Williams*, 529 U.S. at 397-398 (emphasis added).

Straightforward application of seminal Supreme Court decisions establishes that Thomas Whitaker's attorneys' performance did not conform to reasonable professional norms. As in *Strickland* and *Wiggins*, the deficient performance allegation in this case "stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence." *Wiggins*, 539 U.S. at 421 (citing *Strickland*, 466 U.S. at 673). The Supreme Court cautioned that, in assessing counsel's performance, strategic decisions of counsel must be afforded deference. *Strickland*, 466 U.S. at 681. However, the Court also stressed that deference is owed only if counsel's decision were based upon a reasonable investigation. *Id.*, at 691.

Strickland's prejudice prong may be satisfied by claims taken individually. However, even if the harm caused by any single given claim is not material, the cumulative harm of multiple errors may require relief and must be considered. *Kubat v. Thieret*, 867 F.2d 351, 370

(7th Cir. 1989); *Gonzalez v. McKune*, 247 F.3d 1066 (10th Cir. 2001) ("Faced with established errors at trial, a court must consider the cumulative impact of those errors in light of the totality of the evidence properly presented to the jury."). In Thomas Whitaker's case, relief is warranted on claims taken individually. When the cumulative effect of counsel's errors are evaluated, habeas relief is unquestionably required.

I. TRIAL COUNSEL'S FAILURE TO INVESTIGATE A MITIGATION DEFENSE DEPRIVED THOMAS WHITAKER OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

A. Trial Counsel's Failure to Investigate and Sponsor a Mitigation Defense Was Deficient.

In a capital case, "the defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." *See*, State Bar of Texas Guideline 3.1 (A)(2); *and, see*, ABA Guideline 4.1 (A)(2). "Attorneys have an obligation to explore all readily available sources of evidence that might benefit their client . . .," and counsel who has access to defendant's medical records "ha[ve] a professional obligation to do an in-depth investigation into their client's deep-seated psychiatric problems." *Brown v. Sternes*, 304 F.3d 677, 693-698 (7th Cir. 2002).

Trial counsel admits that he "deliberately determined" not to investigate mitigating evidence of any sort, including evidence of mental illness and emotional problems. *Exh.* 'E'. Trial counsel failed to retain a mental health expert, and counsel failed to obtain necessary mental health records and reports, including the 2005 report of Dr. Brown. Trial counsel received a copy of Dr. O'Rourke's 1997 report; however, he failed to consult with Dr. O'Rourke regarding her findings, and failed to consult with another expert who could explain the significance of Dr. O'Rourke's findings.

Trial counsel compounded his failure to investigate by attempting to evaluate Thomas Whitaker's mental health unassisted by a mental health professional. *See, Exh.* 'A', at 10. As a result, trial counsel failed to comprehend that Thomas Whitaker suffered from an Axis I mental illness that included delusional thinking with serious symptoms of emotional disturbance. Instead, trial counsel erroneously attributed personality disorders – antisocial personality disorder and narcissistic disorder – to Thomas Whitaker, which he did not have.

Trial counsel was not strapped by time or by limited resources. Trial counsel concedes that, in fact, Thomas Whitaker's father, Kent, would have funded a psychological investigation. *Exh.* 'E'. Kent Whitaker confirms that he was anxious to have his son evaluated by a mental health professional and would have provided additional funding. *Exh.* 'D'.

B. Trial Counsel Did Not Have a Strategic Reason for Ignoring Mitigating Psychological Evidence.

In post conviction proceedings, trial counsel justified his failure to develop a mitigation defense based on psychological evidence because he felt a preliminary inquiry indicated that such punishment phase defense would be fruitless or inadvisable. According to trial counsel,

> [a]fter having a discussion with Dr. O'Rourke, who also was the psychologist for Kent Whitaker, I made the determination that I would not be pursuing the third issue in the capital murder theme of mitigation and that any testimony from a psychologist would be, not only harmful, but would allow the State to bring forth evidence attempting to show that Bart Whitaker did not have a conscious, was narcissistic, and therefore, could not be remorseful for the acts that he committed. As a trial strategy, early on, after my conversations with Bart and my understanding of the other records regarding his psychological state, I made a deliberate determination that I would not be pursuing the mitigation issue in this case.
>
> *Exh.* 'E'.

However, this underscores the trial counsel's deficient performance.

1. Trial Counsel's Failure to Investigate Was the Inexcusable Product of Not Knowing Basic Legal Differences Between Consulting and Testifying Experts.

In *Soria v. State*, 933 S.W.2d 46, 56 (Tex. Crim. App. 1996), the TCCA held that "when the defendant initiates a psychiatric examination and based thereon presents psychiatric testimony on the issue of future dangerousness, the trial court may compel an examination of appellant by an expert of the State's or court's choosing and the State may present rebuttal testimony of that expert based upon his examination of the defendant." In *Lagrone v. State*, 942 S.W.2d 602 (Tex.Crim.App. 1997), the TCCA expanded *Soria*, holding that if a defendant expresses an intent to challenge the future dangerousness special issue with psychological testimony, the trial court can order that the defendant submit to an examination by an expert selected by the State. However, *Lagrone* also held that if the defense ultimately decides not to sponsor psychological testimony, the State cannot put on adverse psychological findings. Instead, it is limited to rebutting the defense's theory. *See, Lagrone*, 942 S.W.2d 609–612 (defendant's presentation of psychiatric testimony on future-dangerousness is a "limited" waiver of Fifth Amendment rights entitling State to compel defendant to an examination by State's psychiatric expert for rebuttal purposes "provided, however, that the rebuttal testimony is limited to the issues raised by the defense expert").

Lagrone's holdings shows that trial counsel's belief that by retaining a mental health expert he would open the door to compulsory psychological examinations by State experts, and to the inevitable use of adverse findings at trial, rests on a fundamental misunderstanding of firmly established law. Furthermore, since Kent Whitaker was funding the case, trial counsel did not have to file a motion in open court seeking the appointment of an expert, which would reveal his intention to explore a mitigation defense based on psychological testimony. Dr. Brown, in

fact, examined Thomas Whitaker in 2005 without the dire consequences that trial counsel feared. However, because trial counsel failed to take rudimentary steps to gather records, he, too, was unaware of Dr. Brown's report.

2. Trial Counsel's Conclusion That a Mental Health Defense Would be Fruitless Was Unreasonable.

On November 9, 2006, approximately 100 days before guilt-innocence began, the Fort Bend County Clerk issued a subpoena *duces tecum* for Dr. O'Rourke to testify at trial and to disclose Thomas Whitaker's psychological records. These records included Dr. O'Rourke's report and analysis of his performance on the MCMI-II test. *Exh.* 'I' (Subpoena). On December 21, 2006, the State served the subpoena on Dr. O'Rourke. *Id.* The State provided trial counsel with a copy of the 1997 report, *Exh.* 'J' (Affidavit of Assistant D.A., Jeff Strange), at 2, and Dr. O'Rourke's notes reflect that she scheduled a conference with trial counsel for January 15, 2007, in order to discuss her testimony. *Group Exh.* 'K'. At trial she confirmed that she spoke "once" with trial counsel by phone. 31 RR 25.

Documents that Dr. O'Rourke disclosed in response to the State's November 9, 2006, subpoena contradict trial counsel's post-conviction claim that he learned through his lone conference with Dr. O'Rourke that Thomas Whitaker only suffered from anti-social and narcissistic disorders. Dr. O'Rourke turned over copies of notes that she created in preparation for possible interrogation by the prosecution and testimony, as a witness at trial. Dr. O'Rourke's pre-trial review of her 1997 psychological evaluation of Thomas Whitaker confirmed that Thomas Whitaker did **not** meet criteria for having an antisocial personality disorder and it confirmed that Thomas Whitaker did not satisfy the numerous factors on the "psychopathy check list." *Group Exh.* 'K'. Dr. O'Rourke's disclosures also show that in preparing to deal with Thomas Whitaker's prosecutors, Dr. O'Rourke consulted the DSM-IV for Children and

Adolescents and highlighted the following statements about diagnosing personality disorders in youths and young adults:

> • The DSM-IV criteria for personality disorders require a lifelong pattern of experiences and features. Children (especially younger children) simply haven't lived long enough to attain this standard.
>
> • When personality disorder diagnoses are made in adolescents, they tend to be unstable.
>
> • Changing diagnostic criteria promote uncertainty in the diagnostic process.
>
> • In fact, as personality disorder diagnoses fall out of favor (consider the case of passive-aggressive personality disorder), even less stability in this diagnostic process can be assumed.
>
> • Many teenagers and adults qualify for several personality disorders; [but]
>
> • According to the DSM, the best validated personality disorder, Antisocial Personality Disorder, cannot be diagnosed before the age of 18.

Group Exh. 'K'.

The argument that Dr. O'Rourke's 2006-07 review notes are inconsistent with her 1997 report cannot be sustained. In her 1997 report, Dr. O'Rourke warned that "further professional observation and care are appropriate" because of the presence of an underlying mental illness with psychotic symptoms, which lead to, and was exacerbated by, drug use. *Exh.* 'F'. Dr. O'Rourke's recommendation made it obvious that additional investigation into Thomas Whitaker's psychological history and condition was necessary, rather than something trial counsel could forego. However, trial counsel purposely failed to investigate mitigating psychological evidence.

Finally, in 2011, Dr. O'Rourke addressed trial counsel's 2009 allegation that he made a strategic decision after consulting with her. *Exh.* 'L' (2011 Affidavit of Dr. Brendan O'Rourke). According to Dr. O'Rourke, trial counsel talked with her briefly on one occasion. The

communication was too short, as she recalls, for her to explain the 1997 results. *Id.* However, she definitely did not tell trial counsel that she had diagnosed Thomas Whitaker with narcissistic disorder or antisocial disorder. *Id.* Dr. O'Rourke states that, instead, she would have informed trial counsel that these diagnoses could not be made in adolescence. *Id.* Dr. O'Rourke would also have informed McDonald that the results of her 1997 tests indicated that Thomas Whitaker was suffering from an Axis I mental illness that included delusional thinking. *Id.*

Three things follow. **First**, reasonable counsel would have realized that the State had discovered Dr. O'Rourke's narrative discussion of Thomas Whitaker's possible personality disorders and that it would try to introduce findings that appeared adverse either through Dr. O'Rourke or other witnesses, such as Lynn Ayres. **Second**, reasonable counsel would have retained a mental health expert in order to counter the State's slanting of this evidence, and provide mitigating psychological testimony about Thomas Whitaker's serious mental illness. **Third**, the assertions made in post-conviction proceedings that trial counsel strategically decided not to investigate a mitigation defense in order to prevent the State from discovering and presenting harmful psychological evidence are fabricated responses to Thomas Whitaker's state writ.

In fact, trial counsel had **no** reason to believe his strategy of defending Thomas Whitaker against the death penalty by proving he was not a future danger through the testimony of Thomas Whitaker's father, uncle and Thomas Whitaker, himself would prevail. According to trial counsel, that strategy would only succeed if the State did not know of Thomas Whitaker's alleged personality disorders. *Exh.* 'E'. However, the State had discovered the very psychological evidence that trial counsel feared showed "antisocial [behavior], as well as being without conscious or empathy for others in a narcissistic way." *Id.* Furthermore, trial counsel

knew the state had this evidence, because the State procured Dr. O'Rourke's files through a subpoena and gave trial counsel a copy of it, along with a copy of the Ayres records containing her harmful assessment.

McDonald's efforts to exclude Dr. O'Rourke's records (the MCMI-II results) pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) on the ground that the MCMI-II was not a valid test to give to the 17 year old Thomas Whitaker, although successful, do salvage his performance. 31 RR 8-26 (*Daubert* hearing). In particular, the fact that Dr. O'Rourke's 1997 results were inadmissible does not excuse trial counsel's decision not to investigate mitigating psychological evidence that *would be* admissible. Indeed, it underscores the deficiency of trial counsel's decision not to investigate a psychological defense for the following reasons.

First, trial counsel did not know before trial that the convicting court would exclude Dr. O'Rourke's 1997 report. In order to counter harmful inferences and present mitigating psychological evidence, trial counsel should have retained a mental expert in case the trial court admitted MCMI-II. Second, if one assumes that trial counsel had good reason to believe that the Court would exclude Dr. O'Rourke's testimony, he still should have investigated a mitigation defense based on psychological evidence. Had trial counsel investigated and developed admissible testimony, such as Dr. Brown's or Dr. Harrison's findings and opinions, he would have been able to present expert testimony that the State could not rebut with the MCMI-II that Dr. O'Rourke administered in 1997. Finally, trial counsel allowed the State to sponsor damaging psychological testimony through Ayres, whom the State clearly considered to be a key punishment phase witness. 31 RR **. Trial counsel also allows prosecutors to stress the adverse opinion of this educational counselor, the "disturbing interview" that Ayres said she conducted

with Thomas Whitaker and her report that Thomas Whitaker was "narcissistic" and "he looked at people as tools." 32 RR, at 72.

Worse trial counsel, himself, legitimized Ayres' conclusion that Thomas Whitaker was antisocial. Instead of challenging the qualifications of this educational counselor to render a psychological opinion pursuant to *Daubert* and Texas Rule of Evidence 702, the record indicates that trial counsel consciously decided to allow the jury to hear Ayers' damaging testimony and also the State's harmful summary of it at the close of the case. Amazingly, trial counsel concedes that he intentionally allowed the State to introduce evidence **damaging** to his client in order to facilitate the jury's punishment phase decisions. Speaking to the jury, trial counsel states that **"I've actually tried to defend this case more on a level of a human being, as opposed to lawyering, allowed all the evidence before you, allowed everything before you so you could make this awful, awful judgment that you have to make."** 31 RR 65. In light of the fact that trial counsel purposefully let jurors hear the very evidence of personality disorders that trial counsel maintains post-conviction that he angled to keep out of evidence, the supposed strategy of excluding Dr. O'Rourke's 1997 tests results was no strategy at all. Instead, it is a demonstrably false excuse.

C. Trial Counsel's Deficient Performance Was Prejudicial.

1. The Findings of Dr. Kit Harrison Mitigate Against the Death Penalty.

During state habeas proceedings, Dr. Kit Harrison administered a battery of psychological tests and conducted extensive interviews of Thomas Whitaker, his former fiancé and his father. *Exh.* 'H', at 1. Dr. Harrison's examination revealed several clinical problems dating back to early childhood, which had not been addressed by counselors or other mental health professionals. According to Dr. Harrison,

> There were many remarkable findings relative to the forensic history and evaluation of this young man. Most prominent in the clinical picture was a tormented irrational self-concept and personal self-identity dating back to early childhood. Likely demonstrating early manifestations of social impairments most resembling several features suggestive of early Asperger's Disorder.

Id., at 2.

As had Dr. O'Rourke and Dr. Brown, Dr. Harrison also remarked on Thomas Whitaker's losing contact with reality. Dr. Harrison found that while still in high school, Thomas Whitaker became "increasingly out of touch with reality, paranoid, and delusional". *Id.*, at 3. Thomas Whitaker, according to Dr. Harrison, was alienated from a suburban culture that he believed was self-indulgent. *Id.* Dr. Harrison remarked that Thomas Whitaker "experienced increasing inner turmoil and upheaval, self-loathing, and increasingly desperate attempts to appear normal." *Id.*, at 3.

Dr. Harrison also corroborated Dr. Brown's findings that after high school Thomas Whitaker's mental condition deteriorated further. Dr. Harrison's interview of Thomas Whitaker's fiancé resulted in the finding that Thomas Whitaker "became more reclusive, bizarre, and reckless." *Id.* Dr. Harrison calculated that at the time of the offense, Thomas Whitaker's "global assessment of functioning" ("GAF") score was 25 out of 100. *Id.*, at 6. At this level (21-30), Thomas Whitaker's behavior was "considerably influenced by delusions or hallucinations OR serious impairment, in communication or judgment (e.g., sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) OR inability to function in almost all areas (e.g., stays in bed all day, no job, home, or friends)." *See, Diagnostic and Statistical Manual of Mental Disorders IV*, at 34.

a. Dr. Harrison's Findings Refute the State's Argument That Mr. Whitaker Manipulated and Deceived Others Because He Felt Superior.

Dr. Harrison's forensic analysis is diametrically opposed to the State's penalty phase evidence, and to trial counsel's *post*-trial justifications for "deliberately determin[ing]" not to put on a mitigation defense. The prosecution sponsored evidence that Thomas Whitaker manipulated and deceived Dr. O'Rourke into sending misleading recommendations to Clement High School in an effort to get Thomas Whitaker re-instated. *Id.*, at 31 RR. Through Thomas Whitaker's educational counselor, Lynne Ayres, the State sponsored evidence that Thomas Whitaker was grandiose, deceptive, and narcissistic. Ayres testified that Thomas Whitaker bragged that he, like Atlas, could carry the entire world on his shoulder and could manipulate his teachers into giving him whatever grade he wanted. 31 RR, at 74. The State emphasized that Ayres found the interview she conducted with Thomas Whitaker in 2002 very disturbing, *Id.* at 49, because, in her view, Thomas Whitaker considered himself as a criminal and thought like one. *Id.*, at 49-50. Finally, through Ayres, the State introduced testimony that Thomas Whitaker was callous and narcissistic:

> Q. Did he ever tell you whether he thought there was any point to having a social relationship with people?
>
> A. Yes. He said he did not feel that there was a point to have social relationships.
>
> ***
>
> Q. When you talked about his relationships with others, did he ever use the phrase he has no interest in relationships with friends, girlfriend or family?
>
> A. Yes.
>
> Q. In regard to his attitude about himself, did he ever say no one needs to help him, he can do it, and he can do things because he does everything well?

A. Yes.

Q. Did you reach a conclusion that the Defendant was very impressed with himself?

A. Yes.

Q. To such an extent that you were disturbed by this interview, were you not?

A. I was.

Q. Did you ever use the phrase "narcissistic" when you talked about him?

A. I did.

Id.

Dr. Harrison's professional analysis, however, undermines the State's depiction of Thomas Whitaker as manipulative and narcissistic. Instead, Dr. Harrison found that Thomas Whitaker was experiencing "increasing inner turmoil and upheaval, self-loathing, and increasingly desperate attempts to appear normal." *Exh.* 'H', at 3. Rather than being a supremacist, Thomas Whitaker was increasingly paranoid, feared ridicule, and felt others were rejecting him. *Id.* Referring to Dr. O'Rourke's 1997 analysis, Dr. Harrison found that the "psychological test of Thomas, performed by a retained psychologist on September 17, 1997," "revealed [that] this man is experiencing the clinical symptoms of a delusional (paranoid) disorder." *Id.*, at 5.

b. Dr. Harrison's Expert Findings Rebut the State's Primary Punishment Phase Theory that Thomas Whitaker Murdered His Family for Money.

Because trial counsel failed to retain a mental health expert, the State was freed from facing a rebuttal witness, and was at liberty to portray Thomas Whitaker as a self-indulgent,

spoiled young man who murdered his family because he was greedy. However, mental illness played a far more important role than venality. As Dr. Harrison found,

> Thomas is in his 29th year of life demonstrating a psychotic disorder and has yet to obtain appropriate medical management. Treatment is immediately indicated with a combination of antipsychotic medication and mood elevators as recommended by his psychiatric physician. That these murders were motivated solely by greed is not supported whatsoever.
>
> *Exh.* 'H', at 6.

c. Dr. Harrison's Finding That Thomas Whitaker Would Benefit From Medication and Therapy Rebutted the State's Contention That Mr. Whitaker's Drive to Murder His Family Made Mim an Unstoppable Killer.

The State emphasized throughout the trial that Thomas Whitaker, through extraordinary force of will and power of persuasion, had managed to convince several groups of his peers to murder Thomas Whitaker's entire family. Thomas Whitaker was portrayed as the mastermind of the scheme and the master manipulator. The repeated attempts on his parents' and brother's life, according to the State, showed that Thomas Whitaker's murderous intentions were unquenchable. According to the State,

> "[I]t doesn't matter whether you treat this Defendant with kindness, as Mr. Kent Whitaker does. It doesn't matter if you're the ideal father. If in his mind somewhere along the line he perceives it different, you are now in danger. And not only that, there's nothing you can do to stop it. Listen to me, there's absolutely nothing you can do to stop it until he's in his grave."
>
> 32 RR, at 69.

In closing, trial counsel accurately summarized the critical issue:

> "They [the prosecutors] want to show that, at every stage of the game, that Bart Whitaker is a manipulating individual, that he's smarter than everybody else, that he does this and does that, it's always for his own good, all those things. That's what they want to show you, you know. That would be something that maybe you would consider someone being a continuing threat to society. You know, look at the "M.O." though. How do you deal with other inmates when you have no money, when you have no freedom,

> when you have nothing to deal, nothing to manipulate with? All that's gone. And he took it away from himself."

32 RR, at 48.

However, because trial counsel did not retain a psychologist to counter the State's obvious strategy of portraying Thomas Whitaker as a cunning sociopath, trial counsel played into the State's hand. Trial counsel's attempt to convince the jury that Thomas Whitaker would be helpless to commit acts of violence because, in prison, "you have no money", "nothing to deal, nothing to manipulate", was damaging on multiple levels. First, trial counsel agreed with the erroneous theory that Thomas Whitaker murdered his family for money. Second, the State's rejoinder to the defense's theory that Thomas Whitaker would be helpless once incarcerated was that Thomas Whitaker did not need to pay assassins or use the threat of retaliation to induce others to commit murder. The State argued resources did not matter, because Thomas Whitaker was capable of convincing not just vulnerable individuals to carry out incredible crimes, but capable of manipulating attorneys and psychologists:

> He talked seven people – I'm talking about the five on the murders and the two on the burglaries – to do things with him. He manipulated a trained psychologist, after sessions, to write a letter saying "Don't worry, he won't do anything like this again." He even convinced Lynne Sorsby to marry him even after he was a suspect in a capital murder case and had lived a double life in college. This is a good salesman. And there's a salesman on this panel. This guy could sell ice to an Eskimo. But he doesn't do those things. He perceives things in a different way. That's the threat, the continuing threat, and it's been shown time and time and time again. Even Lynne Ayres, the educational diagnostician: "This was a disturbing interview," "narcissistic," "he looks at people as tools."

32 RR, at 71-72.

The State argued that putting Thomas Whitaker in prison would therefore not cut Thomas Whitaker off from the means ordinarily needed to convince others to carry out his murderous

directives; everyone who opposed him, including the jury and the prosecutors, would still be in mortal danger:

> That means all of us are in that position now, every one of us. Jeff, me, Marshall, we're the ones who did it. Sooner or later, he's going to turn again, and what happens then? Do I keep looking over my back for the rest of my life, years from now, five years from now? It doesn't take him long to develop this perception that he hates you, somehow you have offended him and you deserve to die.

32 RR, at 73.

Without a psychological expert to assist him, trial counsel was impotent in the face of the State's devastating argument that Thomas Whitaker's attempt on his father's life showed that he would kill anyone who rubbed him the wrong way.

d. Because He Did Not Retain a Mental Health Expert, Trial Counsel Ended Up Embracing, in Open Court, the Adverse Psychological Caricature the State Drew for the Jury.

Failure to consult a psychologist left trial counsel unable to muster a good faith argument against the State's misinformed psychological caricature of his client. In trial counsel's 2009 affidavit, he agrees with the State's pop-psychological profile of Thomas Whitaker. Throughout the affidavit, trial counsel refers to Thomas Whitaker as a sociopath and a narcissist. *Exh.* 'E'. In his closing arguments, trial counsel conceded the legitimacy of this uninformed psychological assessment. 31 RR, at 37.

> **And, you know, the State brought out the signs with Ayres, you know. That was in 2002. All right? You can read into that that he is antisocial or whatever word they want to put on that, but what you really see is an individual withdrawing, an individual withdrawing from society.** That's exactly what he's doing. That is a huge sign, and, unfortunately, Mr. Whitaker, I guess, saw that. I don't know. It was disturbing to Ayres.

Id., at 36-37.

Dr. Harrison's report, however, dispels the prosecutor's, and trial counsel's, ill conceived beliefs that Thomas Whitaker had the indiscriminate drive of a sociopath to manipulate and destroy others, no matter whom. Dr. Harrison's careful analysis, instead, demonstrates that Thomas Whitaker's anger was focused strictly on his biological family because of the conflicts within the family, which were at the root of emotional problems serious enough to make Thomas Whitaker mentally ill. As Dr. Harrison explained in his 2009 report,

> Thomas was acutely aware of open conflict and acrimony of long duration between his father and his mother's parents, in all aspects of life. … As the first born and oldest offspring to that family feud, much of the psychological angst became infused and internalized in him. Even his birth name was a vain attempt to achieve continuity and unity between the two families, he believed. Thomas Bartlett Whitaker—even his name was a lie, he concluded. He so hated that he was also a Bartlett inside and shared his mother's and brother's genetic curse, much more like a Whitaker (his father) in many ways, and so much unlike his brother and mother (Bartletts), that he lacked any ability to nullify the conflict, make peace with his inner self, or rationalize or intellectualize the problem away.

Exh. 'H'.

Furthermore, Dr. Harrison could have explained that Thomas Whitaker's descent into obsessive, delusional hatred of his biological family was not an inexorable process that could no longer be contained. Rather, Dr. Harrison would have been able to point out that this was a case where the public school system, "despite many opportunities," failed to identify Thomas Whitaker "as an at-risk child and assemble a special educational program, or alternative services under Sec. 504 of the Texas Education Agency (TEA), to address his insidious social and defiant attitudes and behaviors." *Id.* Pursuant to a thorough psychological inquiry, Dr. Harrison determined that early intervention by a psychologist would have "revealed many of his emerging issues with delusional content of thought and diminishing coping." *Id.* However, "instead, the school system expelled Thomas absent an assessment of his needs." *Id.*

Of vital importance, Dr. Harrison could also have refuted the State's insistence that Thomas Whitaker's murderous drive was sociopathic and, therefore, unstoppable. He could have provided readily understandable testimony that Thomas Whitaker would have benefited from modest pharmacological treatment. Singling out Dr. O'Rourke's report, Dr. Harrison concurred with its "discuss[ion] [of] the benefits of medication which would "modulate the threshold and intensity of reactivity" that resulted in Thomas's criminal conduct. *Id.* With psychological assistance, trial counsel could have stressed, as Dr. Harrison does, that "Thomas never received any benefit from antipsychotic medications which are well known for their efficacy in managing such symptoms." *Id.*

Because trial counsel failed to retain a psychologist, the State was also able to magnify the importance of Thomas Whitaker's very sparse record of juvenile delinquency. When Thomas Whitaker was a teen, he burglarized several public schools with a group of friends, and stole the school's computer equipment. The crime involved repelling unarmed into empty buildings. The group did not wantonly trash or destroy the facilities. Rather than fencing the equipment, the group put it in storage. However, the State made a criminal prank, which involved other adolescents (who have not gone on, as far as we know, to commit mayhem) into a manifestation of sociopathy and a precursor to murder. Trial counsel was unable to counter this devastating picture. However, a competent psychologist could have shown that what was needed was counseling and medication. Instead, Thomas's parents took action that exacerbated Thomas Whitaker's underlying mental health problems, namely, they sent Thomas Whitaker "to a more strict religious educational program at Fort Bend Baptist Academy." *Id.* As Dr. Harrison explained, this "was like jumping from the pot into the fire for him psychosocially," since he

"encounter[ed] a tighter spectrum of oppressive and non-responsive culture there than he had experienced at Clements High School." *Id.*

A psychologist could have also directly countered the State's argument that the murders in this case were the result of inexcusable narcissistic tendencies that Thomas Whitaker cultivated. According to Dr. Harrison, Thomas Whitaker, rather than being narcissistic and grasping, was repelled and alienated by what he perceived to be a materialistic and narcissistic suburban culture. *Id.* Like Dr. Brown (*Exh.* 'G'), Dr. Harrison concluded that the State's contention that these murders were motivated solely by greedy self interest was not supported whatsoever. *Exh.* 'H', at 6. Similarly, with psychological assistance, trial counsel could have undermined the State's theme that Thomas Whitaker was a spoiled child who repaid the privileges bestowed upon him with murder.

2. Consistent Reports of Substantial Mental Problems Over Time Soundly Refute the State's Speculative Notion That Psychological Testimony Would Inevitably Have Harmed Thomas Whitaker.

The central assumption behind the State's argument that trial counsel cannot be faulted for neglecting to investigate a mitigation defense based on psychological evidence is that psychological testimony could only be harmful. As State habeas counsel stressed, however, the opposite is true. Psychologists who have examined Thomas Whitaker have uniformly found indications that he suffered from a substantial mental illness that included delusional and paranoid thinking. Furthermore, these results are consistent over time. Dr. Harrison's findings regarding Thomas Whitaker's Axis I diagnoses in 2009 are consistent with Dr. O'Rourke's findings twelve years earlier, as are their recommendations for intervention with counseling and medication. Just as importantly, both psychologists discount or defer diagnoses of antisocial and narcissistic disorder.

Dr. Brown's 2005 report and Dr. Diane Mosnik's 2011 report (*Exh.* 'M') corroborate the central findings made by Dr. O'Rourke and Dr. Harrison, and disprove the State's speculation that psychological testimony would converge on diagnoses harmful to Thomas Whitaker's punishment phase defense. Based on a clinical interview and the results of objective tests, both psychologists determined that Thomas Whitaker suffered from depression, anxiety, serious problems with personal identity and delusional thinking as a consequence of these issues. Neither psychologist endorsed diagnoses of narcissistic disorder or anti-social disorder.

On December 2, 2005, 14 months before trial, Dr. Brown conducted a psychological examination of Thomas Whitaker at the Fort Bend County Jail. *Exh.* 'F'. The evaluation consisted of "a clinical interview together with the administration of a battery of psychological tests, including the Minnesota Multiphasic Personality Inventory-2, Sixteen Personality Factor Questionnaire, and the Mooney Problem Checklist." *Id.*, at 1. The psychological test results revealed "high levels of emotional disturbance and intensely felt psychological conflict." *Id.*, at 5. Dr. Brown determined that Thomas Whitaker was "seriously depressed and is having trouble controlling ideas and thoughts that he experiences as alien and disturbing." *Id.*, at 5. Crucially, Dr. Brown found that Thomas Whitaker was "endorsing many items suggestive of serious psychopathology." For example, Thomas Whitaker harbored "intense feeling of inferiority and insecurity, and feels guilty about perceived failures," but at the same time, "he [was] suspicious and distrustful of others and avoid[ed] emotional ties." *Id.*

In summary, Dr. Brown concluded that,

> [T]his is a troubled and confused young man who struggles with deep-seated feelings of inferiority and inadequacy. He has never lived up to his potential because he decided at an early age that he must protect himself against any exposure to hurt and rejection by developing a façade of cynicism and pseudo-independence. … As he became more isolated and detached from the world, his plans and ideas became increasingly unreal,

> fantastic, and peculiar. His violent actions against his family are the culmination of this pathological process, an acting-out of rage against them that had been building for years, while at the same time also serving as a desperate, bizarre plea for the attention he desired but never received. These dynamics and the psychological reasons for this offense do not make it the typical murder-robbery that would qualify for a capital murder prosecution. In this case, the primary motivation was passion rather than profit.

Id., at 5.

After a clinical interview and extensive objective testing, Dr. Mosnik arrived at similar findings.

> As can be seen from the data, there is fundamental agreement between the data from this evaluation and that from prior evaluations in the findings of anxiety disorders, signs of depression, consistent and pervasive identity issues with lack of a sense of self, inner turmoil and distress compounded by suspiciousness, resentment, and a negative misperception of others treatment of him. The constellation of these clinical symptoms has serious psychological consequences, even potentially to delusional proportions, as indicated in early assessments of the client when he was embroiled in the height of his anger and feelings of repression.
>
> The results of this psychological evaluation, as well as the results of prior psychological evaluations, revealed data to support the presence of significant mental health conditions, disorders that could have been treated successfully pharmacologically, including depression and anxiety, present throughout the client's life beginning in late adolescence. The fact that this relevant data was not appropriately recognized and utilized during the client's trial, or even as mitigating circumstances during the punishment phase, was clearly a disservice to and improper representation of the client. It appeared as though the client's prior attorney felt he could come to his own conclusions about the presence or absence of any mental health diagnoses the client may or may not have, despite his lack of any professional training in the mental health or medical fields.

Exh. 'M', at 18.

Dr. Mosnik goes on to emphasize the serious error in trial counsel's unguided determination that psychological testimony would benefit the state by confirming trial counsel's improper diagnosis of sociopathy and narcissism.

> The results of this psychological evaluation, as well as the results of prior psychological evaluations, revealed data to support the presence of significant mental health conditions, disorders that could have been treated successfully pharmacologically, including depression and anxiety, present throughout the client's life beginning in late adolescence. The fact that this relevant data was not appropriately recognized and utilized during the client's trial, or even as mitigating circumstances during the punishment phase, was clearly a disservice to and improper representation of the client. It appeared as though the client's prior attorney felt he could come to his own conclusions about the presence or absence of any mental health diagnoses the client may or may not have, despite his lack of any professional training in the mental health or medical fields.
>
> The literature is replete with discussions of misattributions by the lay public in regards to what certain psychiatric diagnoses represent and what symptoms comprise various mental health diagnoses. The fact that individuals in the lay public may inappropriately believe that an individual who engages in any criminal act carries a diagnosis of antisocial personality disorder or believe that if someone is motivated by money they are narcissistic, highlights the importance of the need for a proper evaluation to be completed by a trained professional in the mental health field to determine whether or not a mental health condition could have been a contributing factor in any criminal act.

Id., at 17.

3. Interviews of Non-Family Witnesses Attest to Mr. Whitaker's Mental Problems and Emotional Turmoil.

In State proceedings, Lynne Soresby provided important evidence regarding Thomas Whitaker's crisis of identity and inner turmoil. Co-defendant Steve Champagne has recently offered evidence regarding Thomas's alienation from his family and his odd behavior, including possible multi-substance abuse. Mr. Champagne's mother has also confirmed Thomas' total estrangement from his family, and the emotional toll these feelings appeared to have, confirming in important respects evidence from Soresby and Champagne, and contradicting the State's allegation that Thomas Whitaker was merely a narcissistic sociopath.

D. The State Court's Decision That Trial Counsel Was Effective Involves an Unreasonable Application of, or is Contrary to, Supreme Court Precedents; or is Based on an Unreasonable Determination of Facts Under Title 28 U.S.C. § 2254(D)(1) and (2)

The TCCA made the following factual findings related to Thomas Whitaker's claim that he failed to investigate and sponsor mitigating psychological evidence.

> 32. Based on his credible affidavit, Mr. McDonald spoke with Applicant's psychologist, Dr. O'Rourke [McDonald Aff at 4]. Mr. McDonald determined there was no evidence of retardation or psychological problems other than an indication that Applicant had an antisocial and narcissistic personality.
>
> 33. Based on his credible affidavit, Mr. McDonald observed that Applicant had a tendency for anti-social behavior, a lack of empathy for the feelings of others, and was, in Mr. McDonald's opinion, narcissistic.
>
> 34. Based on his credible affidavit, Mr. McDonald believed that Applicant's psychological qualities-tendency for anti-social behavior, lack of empathy for the feelings of others, and narcissism-would assist the jury in finding Applicant to be a continuing threat to society rather than mitigate against the imposition of the death penalty.
>
> 35. Mr. McDonald reasonably determined that indications Applicant was antisocial and narcissistic would support a finding of future dangerousness and that psychological testimony would not mitigate against the death penalty.
>
> 36. Based on his credible affidavit, Mr. McDonald, who is well-acquainted with Dr. Jerome Brown, determined that Dr. Brown would not provide favorable testimony in Applicant's behalf.
>
> 37. Applicant does not state in his affidavit that he is homosexual or that he has repressed that tendency, and he does not explain how his repressed homosexuality is mitigating to his case.
>
> 38. Based on his credible affidavit and his experience, Mr. McDonald knew that he could request funds from the Court to hire an investigator and a mitigation expert and that money was not an issue.
>
> 39. Based on his credible affidavit, Mr. McDonald knew that Applicant's original counsel had hired an investigator, P. M. Clinton, who did not uncover anything useful to the defense. Mr. McDonald discussed hiring an investigator with Applicant's father, Kent Whitaker, and was left with the impression that hiring investigator would be a waste of money.

40. Based on his credible affidavit, Mr. McDonald determined that any testimony from a psychologist would be harmful to Applicant and allow the State to show that Applicant did not have a conscience, was narcissistic, and could not be remorseful.

41. Based on the record and the Court's own personal recollection, there was never a question of Applicant's competency to stand trial.

42. The news article attached to Applicant's application as Exhibit 7 quotes the presiding juror as saying, "I was praying he would show repentance and give me a reason not to pass that judgment on him." This quote corroborates trial counsel's belief that Applicant needed to convince the jury that this was a one-time event for him, that he had changed, had forgiven his father for whatever transgressions he thought his father had committed against him, and that he was remorseful.

43. Based on his credible affidavit, Mr. McDonald knows Dr. Kit Harrison personally and knows about his testimony. Mr. McDonald would not have hired Dr. Harrison as an expert in this case, if he had felt an expert was needed.

44. Based on his credible affidavit, Mr. McDonald is aware of the ABA stance on mitigating evidence. Mr. McDonald believes it is appropriate to retain a psychological expert when, unlike Applicant, the defendant is mentally retarded or suffers some psychological problem that makes the defendant less blameworthy.

45. Based on his credible affidavit, Mr. McDonald found no mitigating evidence and made a deliberate determination not to pursue the mitigation issue.

46. In his application for writ of habeas corpus, Applicant does not present the types of mitigating evidence uncovered by the applicants in *Rompilla v Beard*, 545 US 374 (2005), *Wiggins v. Smith*, 539 U S 510 (2003), or *Williams v. Taylor*, 529 US 362 (2000), such as, severe physical or sexual abuse while a child, being left alone for lengthy periods of time and being forced to eat paint chips, garbage, or to beg for food, being beaten, molested, or raped, living on the street, living in a home with urine, feces, dirty dishes, and trash, living with intoxicated parents, borderline mental retardation, education only to the sixth grade, violent beatings and fights between his mother and father, alcoholism in his family or drug abuse.

47. Based on the record, and the Court's own personal recollection, Applicant was raised by loving parents in an upper middle class home in Sugar Land, Texas, was intelligent, attended Baylor University, and was given every opportunity to succeed.

48. Based on the record, and the Court's own personal recollection, the evidence that Applicant had planned and participated in the murders of his mother and younger brother was overwhelming and included evidence that:

a. Applicant had conceived three plans for murdering his family before attempting to kill them the first time;

b. Applicant had tried to kill his family twice before;

c. Applicant had lied about graduating from Sam Houston State University knowing that his parents would purchase a Rolex watch for him as a graduation gift and knowing that he had not attended school since Spring 2003 and had a 1.41 grade point average;

d. Applicant had dinner with his family in celebration of his fake graduation, then escorted his family home to be gunned down just as he had planned;

e. Applicant lived with his father after the murders and denied his involvement in the murders;

f. Applicant stole $10,000 from his father and fled the country for nearly three years; and

g. On the anniversary of the deaths of his mother and brother, Applicant called his father to complain about his attorney's representation.

49. Based on the reporter's record, and the Court's personal recollection, the jury deliberated on punishment all afternoon and were sequestered overnight.

50. In light of Mr. McDonald's review of the evidence and independent investigation, Applicant's father's forgiveness and request for a life sentence as punishment for Applicant's murdering his wife and younger son, and the request for a life sentence from Applicant's mother's family, Mr. McDonald's strategic decision to not pursue the mitigation issue was reasonable and not deficient.

51. Applicant fails to prove by a preponderance of the evidence his allegations of deficient performance in allegedly failing to conduct any significant preparation for the punishment phase of trial or to present alleged mitigating psychological evidence.

52. Even if Mr. McDonald's strategic decision were deficient, Applicant fails to prove by a preponderance of the evidence that, but for trial counsel's failure to present psychological testimony showing Applicant had repressed homosexual tendencies all his life or was bi-sexual, was antisocial, narcissistic, manipulative, incapable of controlling his delusional thinking, has multiple personalities and an

> extra Y chromosome, there is a reasonable probability that he would have been sentenced to life.
>
> 53. Applicant fails to prove by a preponderance of the evidence that, but for trial counsel's alleged failure to prepare for the punishment phase of the trial, there is a reasonable probability that he would have been sentenced to life.

Based on the forgoing factual findings, the TCCA adopted the following conclusions of law:

> 8. Mr. McDonald reasonably determined that indications Applicant was antisocial and narcissistic would support a finding of future dangerousness and that psychological testimony would not mitigate against the death penalty and no deficient performance is shown.
>
> 9. In light of Mr. McDonald's review of the evidence and independent investigation, Applicant's father's forgiveness and request for a the sentence as punishment for Applicant's murdering his wife and younger son, and the request for a life sentence from Applicant's mother's family, Mr. McDonald's strategic decision not to pursue the mitigation issue was reasonable and was not deficient.
>
> 10. Applicant fails to prove by a preponderance of the evidence his allegations of deficient performance in allegedly failing to conduct any significant preparation for the punishment phase of trial or to present alleged mitigating psychological evidence.
>
> 11. Even if Mr. McDonald's strategic decision were deficient, Applicant fails to prove by a preponderance of the evidence that, but for the omission of the alleged mitigating psychological testimony about Applicant's repressed homosexual tendencies, his being bi-sexual, antisocial, narcissistic, manipulative, incapable of controlling his delusional thinking, multiple personalities, and extra Y chromosome, there is a reasonable probability that Applicant would have been sentenced to life imprisonment.

1. The Actual Basis For the TCCA's Decision Must be Examined For Factual Reasonableness and Conformance to Supreme Court Precedents.

Under *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011), if the State court does not articulate the rationale for its decision, a federal habeas court hypothesizes as to the State court's reasoning. Because the TCCA decision incorporates an expansive list of findings and legal conclusions, the *Richter* standard does not apply, *see, Walker v. McQuiggan*, --- F.3d ----, 2011 WL 3873787, *7 (6th Cir. 2011), and the habeas court does need not engage in counterfactual

analysis of what "arguments or theories" "could have supported, the State court's decision." *Richter*, 131 S.Ct. at 786. AEDPA review, instead, must focus on the extensive, enumerated findings and conclusions constituting the TCCA's opinion. *See, McQuiggan, supra.*

2. The Finding of Facts, on Which the TCCA's Opinion Regarding Counsel's Effectiveness Depends, are Fatally Infected With Multiple Unreasonable Errors.

The TCCA's findings suffer from three general deficiencies that clearly render them unreasonable. Foremost, is a misunderstanding of what the psychological evaluation of mental illness involves. Related to this error are findings that misstate the analysis and conclusions of the psychological experts who evaluated Mr. Whitaker before and after trial. Finally, the findings are subjective. Virtually every one is a statement about what things trial counsel believed, and not a finding that trial counsel justifiably held these beliefs, nor a finding that the propositions that the TCCA decided trial counsel believed were true or supported by the evidence. Furthermore, the findings of fact adopted by the TCCA are mistaken down to their last details.

Finding 32 mistakenly implies that Dr. O'Rourke was Thomas' psychotherapist at the time of trial. It also erroneously indicates that Dr. O'Rourke informed Mr. McDonald that (i) Thomas Whitaker suffered from antisocial and narcissistic personality disorders and (ii) also stated that he did not exhibit any other psychological syndromes. *Findings #32.* Dr. O'Rourke's April 21, 2011, affidavit confirms the falsity of each proposition. As Dr. O'Rourke stresses, she determined in 1997 that the anti-social and narcissistic traits that Thomas exhibited at age 17 could not be extrapolated into adulthood. *Exh.* 'L'. The results of the MCMI-II she administered also indicated that "there is reason to believe that [Thomas Whitaker] is experiencing the clinical symptoms of a delusional (paranoid) disorder (e.g., irrational jealousy, ideas of reference)."

Indeed, Dr. O'Rourke's records indicated that Thomas Whitaker suffered from a treatable mental disorder for which he was not getting the proper psychiatric therapy. Thus, Dr. O'Rourke's 1997 records, which were presented to the trial court in post conviction proceedings,[6] show that her testing supported the conclusion that "it would be advisable to ameliorate this patient's current state of anxiety or hopelessness by the rapid implementation of supportive psychotherapeutic measures or targeted psychopharmacologic medications." As Dr. Harrison points out, this is consistent with findings he made in 2009. Finally, Dr. O'Rourke clarifies in her 2011 affidavit that trial counsel *only* spoke with her briefly about her report on one occasion, countering any suggesting that trial counsel adequately investigated Thomas Whitaker's psychological history.

Finding 33 states that trial counsel "**observed** that Applicant had a tendency for anti-social behavior, a lack of empathy for the feelings of others, and was, in trial counsel's opinion, narcissistic." As Dr. Harrison points out, this finding rests on an erroneous understanding of mental illness and personality disorders. *Exh*. 'M.1', at 1. Antisocial personality disorder, narcissistic personality disorder, and sociopathy or psychopathy, must be diagnosed after a careful history and examination. *Id.* Each disorder is defined by multiple factors or traits, which a clinician must inquire into, test for, and record. *Id.* Without a proper investigation, these complex psychological categories cannot be "observed," certainly not by laypersons with no training, and trial counsel admitted in closing arguments that he had none. *Id.* Trial counsel clearly did not follow any recognizable protocols, nor create any records supporting his "observations". *Id.*

The second sentence of Finding 33 suggests that Dr. O'Rourke informed trial counsel "that there was no evidence of retardation or psychological problems other than an indication that Applicant had an antisocial and narcissistic personality." However, Dr. O'Rourke's 1997

[6] See State's Answer to Applicant's Original Application for a Writ of Habeas Corpus, Exh. 'C'.

report (results of the MCMI-II) indicates that an Axis I diagnosis of delusional disorder marked by paranoid features should be considered. *Exh.* 'F', at 4-5. In Dr. O'Rourke's 2011 affidavit, Dr. O'Rourke denies the State's insinuation that she told trial counsel that Thomas Whitaker did not have psychological problems besides being antisocial and having narcissistic personality. *Exh.* 'L'. In addition to being clearly erroneous, these "facts", on which the TCCA decision rests, show tell-tale signs of fabrication.

Finding 34 is a statement about trial counsel's beliefs. To the extent that it implies McDonald believed that Thomas Whitaker suffered from the personality disorders listed, and that psychological investigation would just confirm them, it is clearly erroneous for the same reasons Finding 33 is. Furthermore, it ignores the fact that a jury needed a psychological explanation for the State's evidence that Thomas engaged in anti-social conduct, lacked empathy and was narcissistic, which State's evidence, trial counsel conceded during closing argument, trial counsel intentionally allowed into evidence to facilitate the jury's "awful, awful judgment." 32 RR 65.

The assertion in Finding 35 that trial counsel reasonably determined that "indications Applicant was antisocial and narcissistic would support a finding of future dangerousness and that psychological" misfires. True, juries tend to consider this type of evidence unfavorably if it is not refuted or explained. However, it is an absurd basis for finding *effectiveness* of counsel in light of the fact that trial counsel intentionally let "indications that Applicant was antisocial and narcissistic" into evidence through Ayres and then permitted the State to argue this evidence in closing. 32 RR 72. Furthermore, the determination that "psychological testimony would not mitigate against the death penalty" is speculative and false. Psychological findings of Dr. O'Rourke and Dr. Harrison show that testimony from qualified practitioners would have refuted

the harmful, incompetent testimony that trial counsel intentionally allowed the State to introduce through Ayres so the jury, in trial counsel's words, could make its "awful, awful judgment."

Finding 36 is another statement about trial counsel's personal opinion, this time, his opinion of Dr. Brown. On the other hand, the implication that trial counsel consulted with Dr. Brown and thereafter came to the conclusion that Dr. Brown's testimony would be detrimental is a false and misleading implication. In 2005, Dr. Brown drafted a very sympathetic report that described a forlorn defendant whom Dr. Brown diagnosed with a delusional disorder. *Exh.* 'G'. Dr. Brown also flatly contradicted the State's theory that Thomas Whitaker murdered for money. *Id.*

Finding 37 betrays very basic misunderstandings of psychology and the evidence. The implication is that the contention in State court was that repressed homosexuality is mitigating badly distorts the record. Dr. Harrison explained that Thomas was conflicted about his sexuality and gender/sexual identity. From an early age, he expressed preference and displayed mannerisms typically associated with children raised as females, and persisted even though his parents, particularly his father, took what he thought were corrective steps to prevent Thomas from acting femininely. Thomas' fundamentalist religious upbringing and schooling was alienating and oppressive because it reinforced traditional gender roles and condemned deviations from them in the harshest terms. The *conflict* - not Thomas' sexual preference taken in isolation - caused by Thomas' receptivity to "feminine ... interests, speech and behavior" with the image he knew his parents' desired, and with the institutions that were essential to the family's identity and social well being, contributed directly to Thomas' psychological turmoil. *Exh.* 'M.1'.

Finding 40 on its face is simply a statement about trial counsel's subjective beliefs. The inference that these beliefs are factitive and that "any psychological testimony would inevitably harm Thomas Whitaker" is contradicted by pre-trial and post-trial psychological evaluations in this case. Dr. O'Rourke, Dr. Brown, and Dr. Harrison all found significant signs of serious mental illness.

Finding 42 refers to a news article quoting a juror who said after the trial that he prayed Thomas "would show repentance and give me a reason not to pass that judgment on him." However, this is irrelevant, except as confirmation that trial counsel put on an incompetent punishment phase defense and, specifically, failed to prepare his witnesses. The comment highlights the serious mistake of having Thomas testify without having a way to explain to the jury why Thomas's affective responses are, at times, somewhat blunted. That Thomas may have had fundamental difficulties with empathy and reciprocal communication, the gold standard of many Axis I conditions arising out of the formative years, could have been explained in a germane way to the jury by a number of testifying psychologists available in the Houston area.

As for the need to show the jury that the offense was "a one-time event", and that Thomas "had changed" and "forgiven his father", it is difficult to imagine why a reasonable attorney representing a client with Thomas's psychological and behavioral traits would think he could achieve these goals *without* the assistance of a psychologist or psychiatrist.

Finding 43 again may be an accurate statement about trial counsel's attitude towards Dr. Harrison. However, it does not excuse trial counsel's refusal to consult in a meaningful manner with any psychologist at all. Furthermore, it indicates that the TCCA badly misunderstands the applicable standard. A defendant does not have to demonstrate that defense counsel should have retained at trial the same expert who now supports his post-conviction pleadings. The

constitutional inquiry is whether trial counsel's failure to develop the **type** of psychological evidence that supports the claims for habeas relief fell below reasonable professional standards.

The assertion in Finding 44 that trial counsel believes it is appropriate to retain a psychological expert when, unlike Applicant, the defendant is mentally retarded or suffers some psychological problem that makes the defendant less blameworthy, is another piece of biographical information about trial counsel. The inference suggested, which is that Thomas does not "suffer some psychological problem that makes the defendant less blameworthy," is based on the mistaken "observations" of a witness who is incompetent to render such an opinion. It is falsified, as well, by the psychological tests and analyses of qualified expert witnesses who examined Thomas before and after trial.

TCCA's 45th Finding states that based on his credible affidavit, trial counsel found no mitigating evidence and made a deliberate determination not to pursue the mitigation issue. However, this does not address the reasonableness of trial counsel's investigation. The implication that there actually was no mitigating evidence to be found is groundless. Dr. Brown's 2005 report and Dr. Harrison's findings in 2009 show there was considerable evidence that Mr. Whitaker suffered from a mental illness that affected his thinking and conduct leading to the crime. This is classic mitigating evidence. Trial counsel did not find mitigating evidence because he made a clearly deficient decision not to have Thomas evaluated by a qualified psychologist or psychiatrist.

In Finding 46, the TCCA draws a contrast between Thomas Whitaker's case and the social situations and histories of petitioners to whom the Supreme Court has granted relief. Finding 46 betrays a misunderstanding of mental illness. Poverty and abuse are not the only causes of mental illness and psychological turmoil. Furthermore, the evidence recited in Finding

46 can often be effectively presented without the assistance of a psychological expert. In contrast, the mitigating evidence in Thomas's case had to be developed and presented through a mental health expert. The biological and genetic aspects of antisocial behavior could have been explained to the jury by a psychologist, as well as the ramifications of parental neglect of emerging symptoms of personality and Axis I disorders is an area of mitigation not explored.

Finding 47 focuses on the Whitaker family's household income, suburban environment and the advantages that redounded to Thomas Whitaker. However, as Dr. Harrison points out, the Finding ignores the fact that individuals in Thomas's circumstances can and do develop significant psychological syndromes that adversely affect their emotions and judgments. The Court also ignores inter-familial difficulties within the immediate family and with his mother's relatives, the explanation of which would have cast Mr. Whitaker in a much more sympathetic light. *Exh.* 'M.1'.

3. The TCCA's Conclusions of Law Incorporate Unreasonable Factual Findings and Violate Supreme Court Precedents.

Conclusion of law eight (8) repeats the errors that pervade factual finding 35 – i.e., the false premise that Applicant actually suffered from "antisocial and narcissistic" personality disorders -- thereby making explicit that the TCCA's decision regarding deficiency rests on unreasonable findings.

Conclusion nine (9), on the other hand squarely conflicts with the Supreme Court's admonition that the development of one defensive strategy does not absolve counsel from conducting a reasonable investigation into other punishment phase defenses. *See,Wiggins*, 539 U.S. at 421 (citing *Strickland*, 466 U.S. at 673).

Similarly, conclusion ten (10) is directly contrary to the holding in *Wiggins*, *supra*. Contrary to what the TCCA assumes the law implies, a habeas applicant does **not** have to

establish that his trial counsel failed to engage in "any significant preparation" or that he failed to investigate and sponsor any mitigating evidence. Instead, the test is whether trial counsel unreasonably failed to meaningfully investigate significant leads to important mitigating evidence. Trial counsel obtained Dr. O'Rourke's 1997 test results and spoke to Dr. O'Rourke briefly. However, that does not satisfy Supreme Court law, *see, Wiggins, supra,* especially when the test results state that "on the basis of the test data it may be assumed that the patient is experiencing a severe mental disorder," that "further professional observation and care are appropriate," and concludes with the recommendation that "it would be advisable to attend to and ameliorate this patient's current state of anxiety or hopelessness by the rapid implementation of supportive psychotherapeutic measures or targeted psychopharmacologic medications." *Exh.* 'L', at 2, 6. In the face of clear indication that Thomas Whitaker suffered from mental illness, trial counsel's failure to retain a mental health expert to investigate, interpret and present a mental health defense, clearly was constitutionally deficient.

The TCCA prejudice analysis applies *Strickland's* second prong to facts distorted by erroneous findings implying that an investigation into mitigating mental health issues would reveal nothing but harmful psychological evidence. Conclusion of Law #11 confirms that the TCCA only considers the psychological evidence to be allegedly mitigating, but not actual mitigating. *Conclusions of Law* #11. The TCCA then listed psychological conditions with which Thomas Whitaker was **not** diagnosed – narcissism, anti-social behavior, uncontrollable delusional thinking[7] – as (i) the evidence that he would have presented to the jury and (ii) made this undiagnosed conditions the focus of its prejudice analysis. *Id.* Since the TCCA ignored the Supreme Court's instruction to engage in a "probing prejudice inquiry" into actually mitigating

[7] The 1997 MCMI-II results and Dr. Harrison in his 2009 report state that Thomas Whitaker would likely respond well to therapy and targeted psychopharmacological treatment.

psychological evidence, *see, Sears* 130 S.Ct. at 3265, and instead rested its decision on misdiagnoses made by unqualified witnesses, the decision at once violates clearly established Supreme Court precedents and rests on an unreasonable determination of facts. An evidentiary hearing should therefore be granted to decide Thomas Whitaker's ineffectiveness claim *de novo*.

II. TRIAL COUNSEL'S FAILURE TO PREPARE HIS PUNISHMENT PHASE WITNESSES DEPRIVED THOMAS WHITAKER OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

"The failure to prepare a witness adequately can render a penalty phase presentation deficient." *Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009) (citing *Douglas v. Woodford*, 316 F.3d 1079, 1087 (9th Cir. 2003)). In *Groseclose v. Bell*, 130 F.3d 1161, 1166 (6th Cir.1997) counsel was found ineffective because he failed to prepare adequately for mitigation four witnesses. As a matter of course "thorough preparation demands that an attorney interview and prepare witnesses before they testify." *United States v. Rhynes*, 218 F.3d 310, 319 (4th Cir. 2000) (*en banc*). As a result, "[n]o competent lawyer would call a witness without appropriate and thorough pre-trial interviews and discussion." *Id.* Disbarment has been the fate for incompetent representation that included failure to prepare or interview witnesses. *See, In re Warmington*, 212 Wis.2d 657, 668, 568 N.W.2d 641 (1997) (lawyer disbarred for, among other things, "failing to supervise the preparation of an expert witness"); *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94, 96 (1993) (failure to interview witnesses cited among reasons for suspending attorney).

A. Trial Counsel's Decision Not To Prepare Punishment Phase Witnesses Was Deficient.

In response to the allegation that trial counsel did not prepare Kent Whitaker for his testimony, trial counsel admits that,

> Regarding the testimony of Kent Whitaker, it is true that I told him that I did not want to tell him what to say, as it would sound rehearsed. I based that statement on the fact that I had seen his statements quoted in the paper as well as heard them in my office when I was having him tell me his life story. I believed that Kent Whitaker honestly believed what he was saying and he honestly wanted the jury to spare his son's life. He also believed that God's will would be done.

Exh. 'E', at 8-9.

Trial counsel clarifies how *little* he did to prepare Kent, when he compares what he did to prepare his other punishment phase witness, Bo Bartlett, to the efforts he made with Kent Whitaker. In trial counsel's words, "when I presented Bo Bartlett as a witness, I had also discussed with him his testimony much in the same manner as I did with Kent. I basically told both to tell how they felt in front of the jury." *Id.*, at 9. Doing little more than instructing a witness to "tell how they felt in front of the jury" is, on its face, a failure to prepare the witness.

As trial counsel's affidavit attests, trial counsel did not go over the damaging records of Lynn Ayer with either Bo Bartlett or Kent Whitaker. Trial counsel failed to inquire into whether Kent Whitaker thought his son had changed, and failed to prepare him to answer questions regarding his views about the State's decision to seek the death penalty. Trial counsel also failed to prepare Kent Whitaker to answer the State's sharp cross examination regarding whether he felt betrayed and manipulated by his son, failed to advise him to expect cross examination regarding the privileges and efforts he had made to provide for his child, and failed to prepare him for questions regarding his awareness of adverse psychological information in Ayers' and Dr. O'Rourke's reports.

Clearly, trial counsel's admissions and the State courts' findings conclusively demonstrate that trial counsel failed to prepare his witnesses for direct examination and failed to

provide advice regarding what to expect on cross examination. The constitutional deficiency of this performance is uncontestable.

B. Failure To Prepare Punishment Phase Witnesses Was Prejudicial.

Trial counsel's affidavit and the State court's findings of fact and conclusions of law illustrate the extraordinary harm that counsel's failure to prepare punishment phase witnesses caused. Trial counsel maintained that his punishment phase strategy was to convince the jury that Thomas was not a future danger. *Exh.* 'E', at 7. In order for that strategy to work, trial counsel had to convince the jury that Thomas had changed. The most important witness was Kent Whitaker.

As trial counsel's affidavit makes excruciatingly clear, trial counsel's proof that his son had changed depended on Kent Whitaker testifying that he had seen important, fundamental changes in his child's thinking and outlook since his arrest. However, trial counsel did not inquire into how Kent would respond on direct or cross to the question regarding Thomas's future dangerousness to society. Trial counsel did not prepare Kent Whitaker to explain why he thought his son had changed, or find out if he believed this. Trial counsel basically told Kent Whitaker to speak from the heart. *Exh.* 'E'. The devastating effect of trial counsel's failure to discharge basic duties to prepare his most important punishment phase witness is reflected in trial counsel's admission that he was "surprised" when Kent Whitaker honestly testified that he did not have any evidence that Thomas would *not* be a future danger to society.[8]

Failure to prepare Kent for the State's cross-examination not only played into the State's hand, it undermined Thomas's own testimony. The State's theory at punishment was precisely that Thomas was still capable of deceiving his father and, therefore, capable of deceiving the

[8] Q. Do you have any evidence to contradict that your son is not going to be a continuing threat to society?
A. I can't read his heart, Mr. Felcman. May I comment? 32 RR, at 178.

jury. Trial counsel's opening remarks show that he realized that the State would drum this theory home. *Id.*, at 53. The jury could not reasonably conclude that they had better insight than Kent into Thomas's heart, i.e., his intentions and tendencies. With Kent Whitaker testifying that he had no proof that Thomas would desist from scheming and manipulating others into committing criminal acts of violence, the jury had every reason to conclude that there wasn't any.

Contrary to trial counsel's punishment phase plans, Kent Whitaker actually testified that his motive for asking the jury to spare his son had nothing to do with the future dangerousness issue. Because he had not been given the most basic instructions – that on cross the best policy is to answer straightforwardly without providing any more information than is necessary – Kent Whitaker, without being solicited, explained that he was **not** asking the jury to spare his son because he believed Thomas had changed and would no longer be a threat to others. 32 RR, at 168. Kent testified, instead, that he wanted the jury to give Thomas a chance to accept the Lord. After the State's cross revealed that Kent had no proof that Thomas's supposed homicidal tendencies had waned, Kent testified as follows:

> I don't think you understand the basis for my -- my arguing against the death penalty in this case. I am a loving father, don't want my son to die. I admit it. That's, let's call it, a third of it. I want a relationship with my son, even if it's in jail, where I can find out why this happened, but the majority of the reason for my objection to the death penalty is because I can't read his heart. While I believe that the person that came back from Mexico is different from the person who left when he ran away, I don't know that for sure, but the only bottom-line important factor or the single most important thing in my life right now is that my son go to heaven, and if he has not accepted responsibility in his heart for this, if he has not asked the Lord for forgiveness -- I have forgiven him, I forgave whoever was involved, but the important one is the Lord. If he has not done that, I want the jury to give him as much time as possible so that he can reach that conclusion.

Id.

Trial counsel's affidavit makes clear that trial counsel, because he did not prepare his witnesses, was (i) no more aware of Kent Whitaker's motives for testifying than the prosecutor, and (ii) had completely different expectations for Kent's testimony. *Exh.* 'E'. Furthermore, the "surprise" testimony that Kent Whitaker gave doomed the strategy of contesting the future danger issue with Thomas Whitaker's testimony that he had undergone a religious renewal or conversion. Indeed, Kent Whitaker's testimony that the jury should give Thomas Whitaker as much time as possible to accept the Lord cut against this grain. It showed that as far as Kent Whitaker could tell, Thomas Whitaker had not become a sincerely religious person by the time of trial. Because trial counsel did not prepare his witnesses, or even bother to find out what they would say to obvious cross-examination questions, Thomas Whitaker was put in the position of having to convince the jury that he was credible after they heard his own father's doubts about his piety.

According to trial counsel's 2009 affidavit, his secondary goal was to convince the jury to spare Thomas Whitaker for Kent Whitaker's sake. *Exh.* 'E'. This required Kent Whitaker to convince the jury that seeking the death penalty would not bring closure, but only cause him more pain. Trial counsel, therefore, absolutely had to prepare Kent's response to attempts by the State to use the authority and prestige of the district attorney's office to elicit statements deferential to its charging decision. Trial counsel's surprise is again a testament to his failure to prepare Thomas Whitaker for this easily anticipatable line of questioning. As a result, Kent Whitaker conveyed the impression at trial that he considered that the State's decision was reasonable or justifiable, rather than mean-spirited or vindictive. Because trial counsel had not prepared, trial counsel failed to rehabilitate Kent Whitaker on re-direct with testimony about how Kent Whitaker had beseeched the prosecutor on bended knee not to seek the death penalty.

Instead, it is clear from the state courts' finding of fact that the jury was left with the feeling that Kent Whitaker would be OK with, rather than devastated by, the death of his son.

III. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE STATE'S USE OF THE PROFFER DEPRIVED THOMAS WHITAKER OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

A. Failure to Object to the Proffer Was Deficient.

Although Felcman announced, during his direct examination of Kent Whitaker, that the contents of the proffer that Cogdell and Ardoin had attempted to arrange could not be used for any purpose, trial counsel still failed to object as Felcman proceeded to use the proffer to impeach Kent Whitaker during guilt-innocence. Trial counsel also failed to object while Felcman used the document on cross-examination to demolish Thomas Whitaker's chances of convincing the jury that he had taken responsibility for the offense and felt deeply remorseful. Failure to object pursuant to TRE 410 was clearly deficient.

The notion that allowing Felcman to use the proffer to impeach defense witnesses was a strategic move to bring out Thomas Whitaker's willingness to enter a plea does not pass muster. The record clearly and convincingly shows that trial counsel did not find out from Cogdell what caused plea negotiations to break down, and did not ask Cogdell about the proffer and the circumstances under which Felcman procured it. Indeed, the record demonstrates that trial counsel did not know that the proffer existed until Felcman sprung it on Kent and Thomas Whitaker at trial. Speaking of the negotiations between Cogdell and the District Attorney, trial counsel states,

> "I have no idea what they [sic., Cogdell and the D.A.] were talking about, but, obviously, there is some miscommunication going on, because they're talking about trying to settle this case at that time, trying to not have to put a jury in the box to make a life-and-death decision, not having to put the Whitakers and the Bartletts through this horrible event, and somehow it breaks down. Now, where does it break down? We know. We know by the way that Mr. Felcman reacts in

> the courtroom with it. It breaks down with this phone call to his dad talking about a number of years. You know, "bring in the big guns." You know, Dan Cogdell is a big gun, there's no question about it. Okay? And apparently, somebody else in his office has been over there preparing proffers, and the proffers are wrong.

Id. 41.

Finally, the record reveals that trial counsel did not obtain a copy of the proffer from Felcman at trial even though Thomas Whitaker stated he had not written nor reviewed it. Trial counsel does not ask to inspect the document, nor does he refer to it during redirect in order to rehabilitate his witness. The fact that trial counsel states that "the proffers are wrong," shows that trial counsel did not even ask to see the proffer in order to prepare for closing argument, since there is nothing factually incorrect in this document. *See, Exh.* 'J.1'.

B. Trial Counsel's Failure to Object Was Prejudicial.

For reasons stated in CLAIM 'I' *supra*, the facts and argument of which are incorporated by reference, the State's unimpeded use of the proffer devastated the defense's theory of change and remorse that trial counsel maintained he attempted to sponsor.

IV. TRIAL COUNSEL'S FAILURE TO DEVELOP A COHERENT TRIAL STRATEGY VIOLATED THOMAS WHITAKER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Trial counsel admitted to the jury that there was no question about Applicant's guilt when he told them there "has never been a need to have this trial," 25 RR, at 56, and that the purpose of the trial was to get a life sentence. Trial counsel's decision to have Thomas Whitaker refuse to enter a plea, 32 RR, at 197, meant the judge had to enter a "not guilty" plea. Article 27.16(a), C.Cr.P. It soon became obvious, during Felcman's cross-examination of Thomas Whitaker, this incoherent position was highly prejudicial:

> A. (The Defendant) I don't know. That never entered my mind, sir. I was always under the impression from the very beginning there was no other

> outcome from this, there could be no other outcome other than a guilty verdict.
>
> Q. (Mr. Felcman) How could there not be another outcome from these ladies and gentlemen when they decide guilty or not guilty?
>
> A. (The Defendant) That was my feeling and the impression that my attorney had given me.
>
> Q. Well, then, what was this, "I refuse to plea" and make the Judge up there enter a plea of not guilty, if you didn't think maybe this jury panel over here may find you not guilty?
>
> A. I don't know. That was not what I wanted to do, but this is all very -- this is all huge to somebody sitting in my chair, when you have an attorney that's been practicing law for 30 years tell you you're not going to do something one way. I listened to him, and I didn't agree with it at the time, and I don't agree with it now, but that was the way it was done.
>
> Q. You don't want to really drag Mr. McDonald into this, do you, that somehow he made you do this?
>
> A. I took his advice, sir, so it was my decision, yes, but it was his very strong decision.
>
> Q. You were in this courtroom when these jurors heard from Mr. McDonald that he's trying to seek justice on this case, did you not?
>
> A. Yes, sir.
>
> Q. But then you refused to plead guilty where you could have just gotten up and said, "Ladies and gentlemen, I did this"?
>
> A. Yes, sir.

32 RR, at 195.

Trial counsel ultimately objected, leading to a bench conference in which he stated:

> (Mr. McDonald) I thought we made this really, really, really very clear about this plea. We had a conference call about it, it's available to us. He can't come back here and complain about that. I actually, on the record, entered the plea. He did not. Okay? I argued to the jury the reason I did that. He wants to call it legal maneuvering, and he knows what it is. The bottom line is, if he enters a plea of guilty, then the accomplice testimony is all that has to be offered. They are seeking the death penalty. I am trying to

> get life. I am trying to actually get him to plead to life. He would have pled guilty if he'd have given him life, but why are we going over this stuff over and over?
>
> (Mr. Felcman) Because he brought it up on the direct, that it was his idea to do not guilty.
>
> (Mr. McDonald) It was -- he just got through telling you I'm the lawyer. Do you think he knows the law that you would enter a plea?
>
> (The Court) I'm going to sustain the objection.
>
> (Mr. Felcman) Okay, Judge.
>
> (End of bench conference)

Id., at 195-196.

Although the lead prosecutor argued that he was engaged in this line of questioning because Thomas Whitaker "brought it up on the direct, that it was his idea to do not guilty," the reverse actually took place. Shortly after being cross examined about the decision not to plead, Thomas Whitaker testified that "[t]hat was not what I wanted to do" and that his decision was based on trial counsel's advice. 32 RR, at 196.

A guilty plea is traditionally taken to be a public acceptance of responsibility and a demonstration of a willingness to accept the consequences. Trial counsel's incoherent strategy prejudiced Thomas Whitaker by depriving him of this most important indication of remorse. The decision to contest guilt-innocence also wasted valuable resources, and needlessly exposed his client, and Kent Whitaker, to impeachment. Trial counsel knew that it was essential to establish the integrity and sincerity of his client. Because trial counsel announced in his opening remarks, 25 RR, 51-58, that the case will be about punishment, an average juror would conclude that Thomas Whitaker contested his guilt in the hopes of prevailing on a legal technicality or by

legal trickery. Putting the jury through a week of unnecessary testimony on guilt-innocence was therefore prejudicial under *Strickland.*

V. CUMULATIVE ERRORS OF TRIAL COUNSEL DEPRIVED MR. WHITAKER OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION.

A. The Decisions of Counsel Violated Professional Standards at Every Turn.

As the Supreme Court recently instructed in *Padilla v. Kentucky*, 130 S.Ct. 1473, 1483 (2010), the ABA Guidelines, while not binding, are important for measuring the performance of counsel. *Id.* ("We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ... ."). The ABA emphasizes that in capital cases, defense attorneys representing defendants with a history of mental illness must obtain all psychological records, consult a mental health expert, and investigate a mitigation defense. *2003 ABA Guidelines* § 4.1 (A)(2), and *Commentary* ("In particular, mental health experts are essential to defending capital cases."). The ABA standards require co-counsel in capital cases, *Id., at* § 4.1(A)(2), and retention of an investigator. *Id. Commentary, A. The Investigator* ("The assistance of an investigator who has received specialized training is indispensable to discovering and developing the facts that must be unearthed at trial."). ABA standards for far less critical types of cases require counsel to prepare witnesses, let alone key punishment phase witnesses. Counsel must also object to harmful evidence. However, Thomas Whitaker's attorney failed in all these respects.

B. The Cumulative Error Was Prejudicial.

If trial counsel makes multiple deficient decisions, the Court should consider the cumulative effect of the errors in order to determine prejudice under *Strickland. See,* W*illiams v. Quarterman*, 551 F.3d 352, n.3 (5th Cir. 2008). In this case, the errors set out in sections I-IV,

supra, had a devastatingly synergistic effect. Collectively, they deprived Mr. Whitaker of all his defenses at the punishment phase.

Counsel deliberately decided not to sponsor a mitigation defense and maintains he concentrated on contesting future dangerousness instead. Based on this reasoning, counsel failed even to consult with a psychologist about Mr. Whitaker's known mental health and emotional problems. However, because counsel did not prepare his key punishment phase witnesses, he did not know that their testimony would undermine his strategy for contesting the future danger special issue.

The cumulative effect of counsel's deficient decisions left Thomas Whitaker without any defenses at the punishment phase. Kent Whitaker could not support counsel's primary strategy of showing that Thomas was no longer a future danger because Thomas had undergone significant changes in outlook and values since the crime. Kent testified, instead, that he could not look into his son's heart. Kent then explained, to counsel's needless "surprise", that he was asking the jury to sentence Thomas to life in order to give him the greatest opportunity to make changes, implying, thereby, that he did not believe Thomas had made a meaningful religious conversion. This undermined counsel's frail hope of convincing the jury that Thomas had undergone a religious transformation. Finally, counsel's failure to object to the State's use of the proffer meant that even the woeful strategy of expressing remorse was devastated.

Importantly, the State courts' findings of fact and conclusions of law confirm (i) that counsel failed in the manner described above and (ii) that in so doing, counsel badly prejudiced his client's opportunity for a life sentence.[9] Clearly, relief based on ineffective assistance of counsel is warranted. This Court should order a new punishment phase.

[9] For example, *FF&CL # 54, 55, and 56* confirm that trial counsel expected that Kent Whitaker would speak to changes he had seen in Thomas and argue with the prosecutor about his charging decision. The findings confirm

CLAIM THREE

THOMAS WHITAKER'S DEATH SENTENCE IS ARBITRARY AND EXCESSIVE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE THE PUNISHMENT IS BASED ON UNRELIABLE SPECULATION ABOUT HIS FUTURE BEHAVIOR.

A. By Requiring the Jury to Speculate About a Defendant's Future Dangerousness, the Texas Capital Sentencing Scheme Produces Inherently Arbitrary Death Sentences and Therefore Violates the United States Constitution.

By requiring juries to speculate about a defendant's future dangerousness, the Texas capital sentencing scheme produces inherently arbitrary death sentences for two reasons. First, the alternative sentence of life without parole compels juries to speculate about specific future security risks in prison, a task for which the jury is not competent and which does not bear on a defendant's moral culpability. Second, decades of evidence now confirm that predictions of future dangerousness are inherently unreliable.

1. The Alternative Sentence of Life Without Parole Undermines the Doctrinal Basis for Permitting a Capital Jury to Base a Sentencing Decision on its Assessment of a Defendant's Future Dangerousness.

When the Supreme Court decided *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding Texas's use of future dangerousness in its sentencing scheme), and *Barefoot v. Estelle*, 463 U.S. 880 (1983) (permitting the admission of psychiatric testimony about future dangerousness), capital defendants in Texas would become eligible for parole if sentenced to life in prison rather than death. A "life sentence" was not truly a life sentence; defendants could, and did, gain

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trial counsel was surprised when Kent Whitaker failed to do this. As Kent Whitaker points out, his "layman's understanding is that you should prepare your witnesses so you are not surprised. I have to keep coming back to this point: What kind of judge would read this finding and think it shows that the attorney was doing his job?" *Exh*. 'N' (2011 Affidavit of Kent Whitaker).

release from confinement. *Jurek* and *Barefoot*, which sanctioned Texas's unique system of sentencing capital defendants to death based entirely on a prediction of their future dangerousness, were predicated on this very fact.

This fact, however, is no longer true. Indeed, since *Barefoot* was decided, of the thirty-five U.S. jurisdictions currently permitting the death penalty (thirty-four states and the federal government), at least twenty-five, or nearly three-quarters, have introduced life without parole as a sentence for capital-eligible murder.[10] Since 2005, when it enacted life without parole, Texas has been included in this larger group. In other words, for the past six years – and at the time

[10] *See,* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.); 1993 Ariz. Legis. Serv. ch. 153 (West) (codified as amended at Ariz. Rev. Stat. Ann. § 13-751 (2011)); 2002 Colo. Sess. Laws. 1 (codified as amended at Colo. Rev. Stat. § 18-1.3-1201 (2010)); 1985 Conn. Pub. Acts No. 366 (codified as amended at Conn. Gen. Stat. §§ 53a-35b, -35c, -46a (2011)); 2002 Del. Laws. ch. 424 (codified as amended at Del. Code. Ann. tit. 11, § 4209 (2011)); 1994 Fla. Laws. ch. 228 (codified as amended at Fla. Stat. § 775.082 (2010)); 1993 Ga. Laws 1654 (codified as amended at scattered sections of Ga. Code. Ann. tit. 17 (2010)); 2003 Idaho Sess. Laws ch. 19 (codified as amended at Idaho Code Ann. § 19-2515 (2010)); 1993 Ind. Legis. Serv. P.L. 250 (codified as amended at Ind. Code. § 30-50-2-3 (2010)); 2004 Kan. Sess. Laws ch. 102, repealed by 2010 Kan. Sess. Laws ch. 136 (to be codified in July 2011) (preserving sentence of life without possibility of parole for capital murder); 1998 Ky. Acts ch. 606 (codified at Ky. Rev. Stat. Ann. § 535.025 (West 2010)); 1987 Md. Laws 1048 (codified at Md. Code Ann., Crim. Law §§ 2-303, -304 (2010)); 1984 Mo. Laws S.B. 448 (codified as amended at Mo. Ann. Stat. § 565.020 (West 2010)); 1995 Mont. Laws. Ch. 482 (codified as amended at Mont. Code Ann. § 45-5-102 (2009)); 2002 Neb. Laws 3d Special Sess. L.B. 1 (codified as amended at Neb. Rev. Stat. § 28-105 (2010), invalidated by *State v. Thorpe*, 783 N.W.2d 749 (Neb. 2010)); 1994 N.C. Sess. Laws (1st Extra Sess.) ch. 21 (codified as amended at N.C. Gen. Stat. Ann. § 15A-2002 (West 2010)); 1995 Ohio Laws File 50 (S.B. 2) (codified as amended at Ohio Rev. Code Ann. § 2929.03 (West 2011)); 1987 Okla. Sess. Law Serv. 96 (West) (codified as amended at Okla. Stat. Ann. tit. 21, § 701.9 (West 2011)); 1995 S.C. Acts 83 (1995) (codified as amended at S.C. Code Ann. §§ 16-3-20, 24-13-100 (2010)); 1993 Tenn. Pub. Acts ch. 473 (codified as amended at Tenn. Code Ann. § 39-13-204 (West 2011)); 2005 Tex. Sess. Law Serv. ch. 787 (West) (codified as amended at Tex. Penal Code § 12.31 (West 2009)); 1992 Utah Laws ch. 142 (H.B. 73) (codified as amended at Utah Code Ann. § 76-3-206 (West 2010); 1994 Va. Acts. 2d Special Sess. ch. 2 (codified at Va. Code Ann. § 53.1-165.1 (West 2011)); 2001 Wyo. Sess. Laws ch. 96 (codified as amended at Wyo. Stat. Ann. § 6-2-101 (West 2010)).

Mr. Whitaker was sentenced to death – the alternative to death in a capital trial was true life in prison.

Only nine of the states that provide for true life sentences (including Texas) expressly contemplate that the jury will make a finding of future dangerousness in determining whether a capital defendant will live or die.[11] Like Texas, none of these jurisdictions had an available sentence of life without parole when *Jurek* was decided.[12] *Jurek* and *Barefoot* were decided in a context that presumed an offender's possible release if he was not sentenced to death.

In addition to having been decided in a context where the potential punishments differed from those currently available in Texas, both *Jurek* and *Barefoot* accepted a capital jury's prediction of a defendant's future dangerousness because this practice was regarded as similar to other predictions about a criminal defendant's future conduct. As the Court put it:

> The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. Any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus

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[11] Oregon and Texas require a finding of future dangerousness for a death sentence. *See*, Or. Rev. Stat. § 163.150(b) (2009); Tex. Code Crim. Proc. Ann. art. 37.071 (West 2009). In Virginia, a finding of future dangerousness is one of two possible prerequisites. *See*, Va. Code Ann. § 19.2-264.4(c) (2010). In Idaho, Oklahoma, and Wyoming, future dangerousness is a statutory aggravating factor. *See*, Idaho Code Ann. § 19-2515(9) (2010); Okla. Stat. Ann. tit. 21, § 701.12 (West 2011); Wyo. Stat. Ann. § 6-2-102(h). In Colorado, Maryland, and Washington, the lack of future dangerousness is a statutory mitigating factor. *See*, Colo. Rev. Stat. § 18-1.3-1201(4)(k) (2010); Md. Code Ann., Crim. Law § 2-303(h)(2)(vii) (2010); Wash. Rev. Code § 10.95.070 (2010).

[12] For the adoption of life without parole by Colorado, Idaho, Maryland, Oklahoma, Texas, Virginia, and Wyoming, *see, supra* note 1. Oregon and Washington implemented life without parole in 1977, one year after *Jurek*. *See*, *Norris v. Bd. of Parole and Post-Prison Supervision*, 952 P.2d 1037, 1041 (Or. Ct. App. 1998) (explaining passage of statute authorizing life without parole as sentence for aggravated murder); *State v. Frampton*, 627 P.2d 922, 928 (Wash. 1981) (describing sentence of life without parole as part of capital sentencing statute passed in 1977).

> basically no different from the task performed countless times each day throughout the American system of criminal justice.

Barefoot, 463 U.S. at 897 (quoting *Jurek*, 428 U.S. at 275-76). The Court analogized the prediction a capital jury had to make to other predictions involving how someone would behave outside of prison. That is, in each of the instances identified by the Court in *Barefoot*, an experienced professional evaluates a person's potential dangerousness *in society at large* to determine whether that person should be imprisoned.

The analogy on top of which the decision in *Barefoot* rested is no longer sound. Because the typical alternative to a death sentence in Texas (and elsewhere) is life without parole, a lay jury must now speculate about a defendant's future dangerousness *in prison* to determine whether he should be executed. Consequently, a capital jury's task in speculating about future dangerousness is no longer like others "performed countless times each day," but is instead highly unusual. Neither courts nor jurors are typically competent to evaluate security risks inside prison walls. Indeed, courts often acknowledge that they lack expertise in such matters, deferring instead to prison administrators. *See, e.g.*, *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987); *Turner v. Safley*, 482 U.S. 78, 84-85 (1987); *Taylor v. Johnson*, 257 F.3d 470, 474 (5th Cir. 2001). It should go without saying that insofar as courts are not competent to assess security risks in prison, juries are a fortiori not competent to predict specific *future* security risks in prison "beyond a reasonable doubt." Tex. Code Crim. Proc. Ann. art. 37.071(2)(c) (West 2011). In short, because life without parole is now the common alternative to a death sentence, prohibiting juries from speculating about future

dangerousness would no longer "call into question those other contexts in which predictions of future behavior are constantly made." *Barefoot*, 463 U.S. at 898.[13]

Beyond the fact that *Barefoot* and *Jurek*, which upheld the Texas scheme of basing a death sentence on a prediction of future dangerousness, were decided in the context of a statutory scheme that is no longer in place, the requirement that juries predict specific future security risks in prison produces arbitrary death sentences for three distinct reasons. First, because the issues are so arcane and foreign to jurors, trial counsel, and even judges, the risk of error is unacceptably high. Even seemingly minor mistakes by experienced witnesses can make the critical difference between life and death. For example, in *Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010), a prison investigator erroneously testified that a defendant sentenced to life rather than death would be eligible to move from G3 to G2 inmate classification status within prison after ten years of incarceration.[14] *Id.*, at 286. This testimony had enormous impact. As the jury explained in a note to the trial judge, the decisive factor in its decision to sentence Mr. Estrada to death was the possibility that the offender might eventually move to the lower level of classification. *Id*. As it happened, however, that testimony was erroneous; Mr. Estrada would never have been eligible for a less restrictive classification than G3. *Id.*, at 287. A jury sentenced

[13] Moreover, because future dangerousness predictions involve predictions about behavior inside prison, capital sentencing proceedings are increasingly dominated by arcane testimony addressing inmate classification, security procedures, and other minutiae of prison life foreign to jurors if not judges. *See, e.g.*, *Coble v. State*, 330 S.W.3d 253, 287-90 (Tex. Crim. App. 2010) (describing extensive sentencing-phase testimony about prisoner classification system and prison assault reporting mechanisms); *Sparks v. State*, 2010 WL 4132769, at *22-23 (Tex. Crim. App. Oct. 20, 2010) (same); *Espada v. State*, 2008 WL 4809235, at *10 (Tex. Crim. App. Nov. 5, 2008) (same); *Prystash v. State*, 3 S.W.3d 522, 528 (Tex. Crim. App. 1999) (describing hypothetical testimony applying prison classification system to defendant).

[14] The differences between these classifications are: G3 inmates can only be housed in dormitories within the main unit of a prison building, while G2 inmates can be housed in physically separate dormitories; and G3 inmates are restricted from certain vocational training depending on its location. *See,* Unit Classification Procedure (Revision to October 2003 Inmate Classification Plan), Texas Department of Criminal Justice, July 2005, Attachment 2.00A.

a capital defendant to death because a prison official testifying at the trial made a technical error about a single provision of the Texas Department of Criminal Justice's inmate classification scheme. The *Estrada* case demonstrates how basing a sentencing decision on a prediction of future dangerousness inside prison creates an unacceptably high risk that a defendant will be erroneously sentenced to death. This risk violates bedrock principles of Eighth Amendment doctrine. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring) (noting that Eighth Amendment demands "extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, *or mistake*") (emphasis added).[15] Consequently, the scheme violates the constitutional requirement that capital sentencing proceedings be *more* reliable than others because "death is qualitatively different" from other punishments. *Woodson*, 428 U.S. at 305; *see also Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Second, even if the jury had perfect knowledge and special competence in these matters, it is hard for anyone to predict future dangerousness in a high-security prison environment based on a defendant's experiences outside prison. The psychiatric community widely acknowledges that "predictions of violence concerning settings very different from those in which violence has occurred in the past will be highly subject to error." Thomas R. Litwack & Louis B. Schlesinger, *Assessing and Predicting Violence: Research, Law and Applications*, in *Handbook of Forensic Psychology* 205, 214 (Irvin B. Weiner & Allen K. Hess eds., 1987). Risk factors for violence in prison differ from risk factors for recidivist violence in wider society. Past violence and the severity of the offense that put a person in prison do not correlate strongly with prison violence.

[15] As is discussed further below, even if all testimony is accurate, the conclusions the jury draws from it are inherently unreliable, so the risk of error remains unacceptably high.

See, Brief of Amicus Curiae American Psychological Association in Support of Appellant at 20, *United States v. Fields*, 483 F.3d 313 (5th Cir. 2004) (No. 04-50393), available at http://www.apa.org/about/offices/ogc/amicus/fields.pdf (citing Jack Alexander & James Austin, *Handbook for Evaluating Objective Prison Classifications* 25 (Nat'l Inst. of Corrs. 1992)). Indeed, "there is counter-intuitive evidence that inmates who have committed more serious offenses in the community and thus face longer sentences have more favorable prison adjustments." Mark D. Cunningham et al., *An Actuarial Model for Assessment of Prison Violence Risk Among Maximum Security Inmates*, 12 Assessment 40, 42 (2005). Violent behavior outside of prison is an inadequate foundation even for actuarial predictions of violence in prison. It is surely not reliable enough to serve as the basis for a judgment beyond a reasonable doubt that a particular defendant will probably commit future acts of violence in prison.

Third, even if a jury's speculation about specific future security risks in prison were reliable, it would fail the constitutional requirement that a death sentence reflect the particular defendant's moral culpability. Defendants may be sentenced to death if and only if they are sufficiently morally culpable. *See*, *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (only those with "extreme culpability" eligible for capital punishment); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (prohibiting execution of mentally retarded persons because they are "categorically less culpable"). This culpability must be determined by an individualized assessment of the particular offender. *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Lockett*, 438 U.S. at 600.

Jury speculation about a defendant's future dangerousness in prison, however, is often more about the nature of prison than the nature of the defendant. In *Estrada*, for example, the jury sentenced the defendant to death because it believed that he would become eligible for a less

restrictive inmate classification. The belief was wrong – but it would have been correct under a previous version of the Texas Department of Criminal Justice's inmate classification plan. *See, Estrada*, 313 S.W.3d, at 287. Security risks in prison depend upon prison resources, conditions, and management practices. None of these factors bears upon the defendant's culpability for his past acts. The defendant's crime cannot be morally graver simply because the prison system has not been successful in reducing inmate violence. If the life-or-death decision turns on prison management techniques, the resulting sentence cannot be a "reasoned moral response to the defendant's background, character, and crime." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

2. Evidence Now Confirms That Predictions of Future Dangerousness are Inherently Unreliable.

The *Jurek* Court found that predicting future dangerousness, while "difficult," was still possible. *Jurek*, 428 U.S. at 274. The *Barefoot* holding that there was no constitutional bar to the admission of psychiatric testimony on future dangerousness similarly relied on the Court's judgment that "[w]e are not persuaded that such testimony is almost entirely unreliable…." *Barefoot*, 463 U.S. at 899. In formulating these views, the Court depended upon "first generation" evidence on the reliability of predictions of future dangerousness. *Cf.* John Monahan, *The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy*, 141 Am. J. Psychiatry 10, 10 (1984). Now that hundreds of capital defendants have been labeled future dangers by juries over the course of several decades, new evidence has emerged, and that new evidence demonstrates unequivocally that these predictions are, in fact, "entirely unreliable."

An actuarial study of Texas inmates convicted of capital murder found that the expected rates of violence would be very low for a prisoner convicted of capital murder serving a life sentence with an average duration of forty years. The overall likelihood of inmate-on-inmate homicide would be only 0.2 percent, and the likelihood of an aggravated assault on a correctional officer would be only 1 percent. *See*, Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. Crim. L. & Criminology 1251, 1261, 1264 (2000). This data not only suggests that bona fide cases of future dangerousness are infrequent but also that it is virtually impossible to predict future dangerousness in this context with any degree of scientific accuracy. Because the "base rate" of violence is low – few persons are incarcerated under those conditions, and they commit relatively few acts of violence – it is difficult to predict any *specific* occurrence of violence, for it is difficult to isolate the causal factors that produce violence in the first place. *See*, Brief of Amicus Curiae American Psychological Association in Support of Appellant at 18-19, *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007), *available at* http://www.apa.org/about/offices/ogc/amicus/fields.pdf.

Empirical research confirms that predictions of future dangerousness wrongly identify non-dangerous defendants as dangerous. A recent study of a group of capital inmates predicted to be future dangers demonstrated that none had committed homicide in prison, and only 5.2 percent had committed a serious assaultive act. The overwhelming majority had only minor disciplinary infractions, and over 20 percent had none at all. *See,* John F. Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is it Time to "Disinvent the Wheel?,"* 29 Law & Hum. Behav. 55, 62-63 (2005). In *Barefoot*, the Supreme Court reached the decision to permit the jury to predict future dangerousness because it was not persuaded that

such predictions are "entirely unreliable"; indeed, the Justices seem to have believed that such predictions are accurate approximately one-third of the time. *See, Barefoot*, 463 U.S. at 900-01 & n.7. However, studies of Texas death row inmates' behavior conducted since *Barefoot* was decided entirely undermine the factual predicate of *Barefoot* and reveal that predictions of future dangerousness are wrong in more than 95 percent of cases. *See*, Jessica L. Roberts, Note, *Futures Past: Institutionalizing the Re-Examination of Future Dangerousness in Texas Prior to Execution*, 11 Tex. J. C.L. & C.R. 101, 121 (2005).[16]

One reason why jury "predictions" of future dangerousness produce so many false positives is that they may simply be proxies for jurors' guesswork about a defendant's release

[16] For additional scholarship since *Barefoot* confirming the overwhelming consensus that predictions of future dangerous are grossly inaccurate and produce frequent false positives, see Mark David Albertson, *Can Violence Be Predicted? Future Dangerousness: The Testimony of Experts in Capital Cases*, 3 Crim. Just., Winter 1989, at 18 (describing consensus among experts that predictions are mostly inaccurate); William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 Ariz. L. Rev. 889, 907 (2010) ("The incontrovertible scientific evidence demonstrates that future dangerousness determinations are, at best, wildly speculative."); Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 Cornell L. Rev. 989, 1031 (1996) ("Unfortunately, our power to predict future dangerousness seems on a par with our power to predict next month's weather."); Steven G. Gey, *Justice Scalia's Death Penalty*, 20 Fla. St. L. Rev. 67, 118 (1992) ("No jury has the power to ascertain with 100 percent certainty the future actions of the defendant, yet Texas requires the jury to do just that."); Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 Wm. & Mary Bill Rts. J. 345, 371-72 (1998) ("The use of the 'future danger' aggravating factor as a tool for determining who receives the death penalty is highly suspect. … Even ignoring the potential unreliability of testimony from mental health professionals, every first-degree murder defendant reasonably could be found to be a future danger because he has been convicted of murder."); Grant Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. Contemp. Legal Issues 61, 85 (1999) (explaining mental health professionals' "grave doubt" about predictions of dangerousness); Irene Merker Rosenberg, Yale L. Rosenberg & Bentzion S. Turin, *Return of the Stubborn and Rebellious Son: An Independent Sequel on the Prediction of Future Criminality*, 37 Brandeis L.J. 511, 519 (1998-99) ("a substantial body of literature suggests that prophecy of this sort is a very speculative business, resulting in massive inclusion of persons who would not, in fact, engage in the predicted anti-social behavior"); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. Pa. L. Rev. 97, 110-11 (1984) (describing false positive rates as high as 92 percent).

from prison. A study of death penalty jurors has examined the relationship between jurors' beliefs about the available alternatives to the death penalty and their beliefs about the defendant's future dangerousness. *See*, William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 659-70 (1999). Jurors who believed that a defendant might be released from prison in the near future were no more likely to report that the prosecution introduced evidence that the defendant was a future danger, but more likely to find that the defendant *was* a future danger. *Id.*, at 669. In other words, jurors with earlier estimates of a defendant's release from prison were predisposed to "believe the evidence 'proved'" the defendant's future dangerousness. *Id*.

The problem is, however, that these jurors' estimates of the defendant's possible release date were factually incorrect. "Hence, jurors who wrongly believe that such an offender would be released in less than ten years may well see him as a greater potential threat to society, as more 'dangerous,' than those who believe release will come only after twenty or more years." *Id.*, at 667. Requiring juries to predict future dangerousness, then, may allow "mistaken estimates of the defendant's early parole or release from prison [to] be bootstrapped into capital sentencing by being surreptitiously incorporated into the … judgment of future dangerousness." *Id.*, at 667-68. The jury's consideration of future dangerousness is not based on reliable information about the particular defendant, but instead serves as a conduit for jurors' prior assumptions – often inaccurate – about the defendant's possible release.

In any case, the most relevant question is not whether *any* defendant, or even some non-trivial percentage of defendants, labeled a future danger later committed an act of violence. The reliability of a prediction cannot be ascertained by asking whether it is "always wrong." *Barefoot*, 463 U.S. at 901. After all, if a jury randomly picked defendants' names out of a hat

and then "found" that the selected defendants were future dangers, the "prediction" would ultimately appear to be "right" in some cases. But the prediction itself would have no value and would be considered inherently unreliable. It would just be a random guess – the very definition of arbitrariness. *Cf. Nixon v. United States*, 506 U.S. 224, 253-54 (1993) (Souter, J., concurring) (observing that making a decision on the basis of a coin flip would warrant judicial intervention).

The crucial question, therefore, is whether defendants labeled future dangers actually commit future acts of violence at a significantly higher rate than defendants not labeled future dangers. Comparing these two classes of defendants is the only way to show that the "prediction" offers any more information than an arbitrary guess. The Constitution demands *heightened* reliability in capital sentencing proceedings. *See, Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). If a prediction is to form the basis for a death sentence, it must be more accurate than random speculation. Relying on mere guesswork violates the Constitution's command that "the death penalty be inflicted evenhandedly, in accordance with reason and objective standards, rather than by whim, caprice, or prejudice." *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from the denial of cert.).

Comparative data show that prisoners labeled future dangers turn out to be no more dangerous than prisoners not labeled future dangers. One study compared the behavior of former death row prisoners who were once judged to be future dangers against the behavior of prisoners convicted of capital murder who received life sentences. When both groups of offenders were among the general prison population, the supposed future dangers "were not a threat to the institutional order" and indeed had a *lower* rate of assaultive institutional misconduct. In fact, their rate of violent misconduct in prison was lower than the rate among the general prison population as a whole. *See*, James W. Marquart, Sheldon Ekland-Olson & Jonathan Sorensen,

Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?, 23 Law & Soc'y Rev. 449, 464 (1989). No evidence shows a significant correlation between predictions of future dangerousness and higher rates of actual future dangerousness.

The inherent unreliability of predictions of future dangerousness may explain why all other judgments of future dangerousness in the legal system are routinely reviewed for continued accuracy. *Barefoot* emphasized that psychiatric testimony can be used in other contexts to determine whether a person poses a threat to others. *See*, *Barefoot*, 463 U.S. at 898. As a result, excluding it from death penalty proceedings would be like "disinvent[ing] the wheel." *Id.*, at 896. Yet capital sentencing is the only context in which a prediction of future dangerousness is irrevocable.

In *Barefoot*, the Court cited *Addington v. Texas*, 441 U.S. 418 (1979), to note that psychiatrists may evaluate a person's future dangerousness in the context of civil commitment proceedings. *Barefoot*, 463 U.S. at 898. *Addington* required a clear-and-convincing-evidence standard for civil commitment proceedings and endorsed expert psychiatric interpretation to evaluate whether a mentally-ill person is dangerous. *Addington*, 441 U.S. at 429. Yet *Addington* also observed:

> There is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous. … The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts.

Id., at 429-30. *Addington* clearly identified the incompatibility of predicting future dangerousness with the need for conclusive proof of "specific, knowable facts" in punishing criminal conduct. This case, cited to support *Barefoot*'s observation that future dangerousness can be evaluated, actually supports the proposition that it cannot be evaluated with sufficient

accuracy to enable its proof beyond a reasonable doubt. This is, of course, the standard of proof required by the Texas capital sentencing scheme. Tex. Code Crim. Proc. Ann. art. 37.071(2)(c) (West 2011).

Since *Jurek* and *Barefoot* were decided, moreover, many states and the federal government have passed statutes, known as sexually violent predator acts (SVPAs), to expand civil commitment to violent sex offenders. These statutes require regular reassessment of committed persons' status,[17] further demonstrating that predictions of future dangerousness must be continually revisited if they are to be used at all. In upholding the constitutionality of Kansas's SVPA, the Court noted: "The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement," including a prediction of future dangerousness. *Kansas v. Hendricks*, 521 U.S. 346, 364 (1997). Texas's SVPA similarly requires a biennial examination of committed persons and a biennial review of the prediction of future dangerousness by a judge. Tex. Health & Safety Code Ann. §§ 841.101, 841.102 (West 2011).

The legal significance of periodic review is that these statutes are civil rather than punitive, for they only aim to confine a person until "his mental abnormality no longer causes him to be a threat to others." *Hendricks*, 521 U.S. at 363. But if periodic review is required to determine whether a person is still "a threat to others," then the initial prediction of future

[17] *See, e.g.*, Ariz. Rev. Stat. Ann. § 36-3708 (2011); Cal. Welf. & Inst. Code. § 6605 (West 2010); Fla. Stat. § 394.918 (2010); 725 Ill. Comp. Stat. Ann. 207/55 (West 2011); 42 Pa. Cons. Stat. Ann. § 6404 (West 2011). Civil commitment statutes for mentally-ill persons who pose a danger to themselves or others similarly provide for periodic review. *See, e.g.*, Tex. Health & Safety Code Ann. § 574.066 (West 2011).

dangerousness is *necessarily inadequate* beyond its initial shelf life of one or two years. SVPAs acknowledge on their face that a single prediction of future dangerousness is not reliable enough to justify long-term detention. This widespread acknowledgment of the inadequacy of predictions of future dangerousness was not available when *Jurek* and *Barefoot* were decided, as Washington passed the Nation's first SVPA in 1990. *See,* Nathan James et al., Cong. Research Serv., RL34068, Civil Commitment of Sexually Dangerous Persons 1 (2007).

Indeed, the Texas statute, which is unique in not actually detaining committed persons, acknowledges that a single prediction of future dangerousness is not even reliable enough to serve as the basis for more than two years of outpatient treatment. *See,* Tex. Health & Safety Code Ann. § 841.081; *In re Commitment of Fisher*, 164 S.W.3d 637, 642 (Tex. 2005). A fortiori, then, a single prediction of future dangerousness cannot be reliable enough to serve as the basis for a death sentence.

In sum, while the first-generation evidence did not persuade the *Jurek* or *Barefoot* Court that predictions of future dangerousness are inherently unreliable, new evidence indisputably confirms that they are. Death sentences that rely on such predictions, therefore, condemn defendants to death on the basis of meritless random guesses. A death sentence based upon a "prediction" of future dangerousness is no less arbitrary than a death sentence based on random lottery – or, for that matter, a mandatory death sentence. *Cf. Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). It is particularly problematic that the legal system's *only* irrevocable judgment of future dangerousness is found in capital sentencing proceedings. The inability to reassess unreliable predictions of future dangerousness further undermines the accuracy of any decision based on them.

B. Mr. Whitaker's Death Sentence, Imposed After the Jury Predicted He Would be a Future Danger, Violates the Eighth and Fourteenth Amendments to the United States Constitution Because it is Excessive and Disproportionate.

Excessive punishments are cruel and unusual and are, therefore, prohibited by the Constitution. *See, Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring). A punishment is unconstitutionally excessive if it does not contribute to the goals of punishment – retribution and deterrence – and is thus a needless infliction of pain and suffering or is grossly disproportionate to the severity of the crime. *Coker v. Georgia*, 433 U.S. 584, 592 (1976); *Gregg*, 428 U.S. at 173, 183 (1976). Mr. Whitaker's death sentence is excessive because there is a clear national consensus that the type of crime Mr. Whitaker committed does not warrant the death penalty and when speculation about future dangerousness determines which defendants are sentenced to death, the resulting sentence fails to serve the purpose of either retribution or deterrence.

1. There is a Clear National Consensus That the Specific Type of Crime Mr. Whitaker Committed Does Not Warrant the Death Penalty.

The national consensus is that an individual who has killed at least one parent is not deserving of the death penalty. Because the Eighth Amendment derives its "meaning from the evolving standards of decency that mark the progress of a maturing society," a punishment's excessiveness must be evaluated against objective indicia of public attitudes. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Objective criteria, such as "public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions" must be considered in determining whether a punishment is excessive. *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *see, also, Furman*, 408 U.S. at 277 (Brennan, J., concurring) ("Rejection by society, of course, is a strong indication that a severe punishment

does not comport with human dignity."). Statistics regarding the frequency with which juries return a sentence of death reveal societal attitudes concerning whether a particular crime or a particular class of offenders is deserving of the death penalty. *See, Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008). In Texas, the treatment of offenders similarly situated to Mr. Whitaker reveals a state-wide consensus that such defendants are not deserving of the death penalty.

In sentencing him to death, Mr. Whitaker's jury unanimously found that Mr. Whitaker "would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann. art. 37.071 (West 2011). The cases of similarly-situated defendants reveal that judges, juries, and prosecutors do not consider defendants who commit murders similar to the one for which Mr. Whitaker was convicted to be deserving of the harshest penalty. Undersigned counsel conducted a survey of all fifty states, dating back to 1975, and located 114 decided cases in which an individual murdered at least one parent. *See, Exh.* 'O'.

Of the twenty-two Texas cases (not including Whitaker), a jury imposed a death sentence in only five. *See, Exh.* 'O'. Justice Brennan likened this occurrence to a "lottery system" and noted that "[w]hen the punishment of death is inflicted in a trivial number of cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily." *Furman*, 408 U.S. at 293 (Brennan, J., concurring). The facts surrounding the 2003 murders of Rick and Suzanna Wamsley are remarkably similar to the facts in Mr. Whitaker's case. *See, Wamsley v. State*, No. 2-06-089, 2008 WL 706610 (Tex. App.—Ft. Worth, Mar. 13, 2008) (mem. op.). In that case, Fort Worth prosecutors sought death against Andrew Wamsley and two others for the brutal stabbing and shooting of Wamsley's parents. *Id.*, at *1. Wamsley and the two female codefendants met on several occasions at a restaurant to plot the murders. *See,* Glenna Whitley & Andrea Grimes, *Family Plot*, Dallas Observer News, July 15, 2004, *available*

at http://www.dallasobserver.com/2004-07-15/news/family-plot/. The jury convicted Wamsley of capital murder, but the jury did not find that Wamsley was a future danger and sentenced him to life. *See, Wamsley*, 2008 WL 706610, at *1. Wamsley's case illustrates the trend in Texas toward finding this class of offenders not to be a future danger and not deserving of a death sentence. Juries realize that individuals who kill their parents are not a future danger because they have no motivation or purpose to harm any other group of persons, inside or outside of prison. The Texas Court of Criminal Appeals recently held similarly regarding parents who kill their children. *See, Berry v. Texas*, 233 S.W.3d 847, 863 n.5 ("Children who kill their parents cannot commit that offense again . . .").

The data also reveals that prosecutors in Texas do not believe that defendants who kill a parent are a continuing threat to society and, thus, deserving of the death penalty. In the Texas cases in which it is known whether the prosecutor sought death, the prosecution did not seek death in the majority of cases. *See, Exh.* 'O'. This data further demonstrates that Mr. Whitaker's death sentence is disproportionate and arbitrary. For example, twenty-five year old Justin Smith of Matagorda County was charged with capital murder after he killed both of his parents and wrapped their dead bodies in plastic. *See,* Anne Marie Kilday, *Man Suspected of Shooting Parents Captured at Ski Resort,* Houston Chronicle, January 8, 2005, http://www.chron.com/disp/story.mpl/metropolitan/2983947.html. After the murders, Mr. Smith was seen at a bar playing pool with his father's prized cue, then telling a friend that his father would not find out. *Id*. Mr. Smith also lied to authorities about the whereabouts of his parents, then fled the county with his wife and child. *Id*. After Mr. Smith was finally arrested, he expressed remorse about the killings and ultimately pled guilty to capital murder with an agreed life sentence. *Id*. Though Mr. Smith had a prior juvenile record that included charges of burglary

and forgery, the prosecutor ultimately offered a plea deal to spare the family further pain and suffering. *See, Smith Pleads Guilty to Murder,* Bay City Trib., July 8, 2006, *available at* http://groups.yahoo.com/group/Texasdeathpenaltynews/message/3837. Mr. Smith's case is quite similar to Mr. Whitaker's case – both defendants were young men who fled after the murders for which they were convicted, both expressed remorse, both had prior juvenile records involving non-violent offenses, and in both cases, the family expressed a desire to spare the life of the defendant despite the pain he caused. Outside of Texas, the results are even more telling. In the ninety-two non-Texas cases identified by undersigned counsel, only five defendants were sentenced to death. *See, Exh.* 'O'. In the case of Blaine Ross of Florida, the court recently granted a retrial because police interrogators failed to timely advise Mr. Ross of his *Miranda* rights. *See,* Todd Ruger, *New Trial for Man Convicted of Killing Parents*, Herald-Trib., May 27, 2010, *available at* http://www.heraldtribune.com/article/20100527/breaking/100529747. Eric Hanson of Illinois was sentenced to death in 2005 for killing four people, including both his parents. Because Mr. Hanson was convicted in Illinois where the Governor recently abolished the death penalty, his death sentence was commuted to life without parole on July 1 of this year. *See,* Ariane De Vogue & Barbara Pinto, *Illinois Abolishes the Death Penalty; 16th State to End Executions*, ABCNews.com, Mar. 9, 2011, http://abcnews.go.com/Politics/illinois-16th-state-abolish-death-penalty/story?id=13095912. Deondre Staten was sentenced to death in California for killing both of his parents. *People v. Staten,* 24 Cal. 4th 434 (Cal. 2000). Of the five non-Texas, death-sentenced defendants located by undersigned counsel, Mr. Staten's sentence is the only one that has been upheld.

The data reveals that in California prosecutors and juries overwhelmingly favor life imprisonment over the death penalty for offenders who kill their parents. For example, in the

case of Lyle and Erik Menendez, both brothers were given life sentences for the 1989 murders of their parents. *See, Menendez Brothers Sentenced to Life in Prison*, N.Y. Times, July 3, 1996, *available at* http://www.nytimes.com/1996/07/03/us/menendez-brothers-sentenced-to-life-in-prison.html. The prosecution urged the jury to impose death sentences based on the brutal facts of the crime and the brothers' casual spending spree with their inheritance, but the jury sentenced them to life imprisonment rather than to death. *Id.* In 1995, Dana Ewell and Joel Radovcich were convicted in California of murdering Mr. Ewell's parents and sister. *See, Son, Friend Convicted of Killing Parents, Sister*, L.A. Times, May 13, 1998, *available at* http://articles.latimes.com/1998/may/13/news/mn-49271. Prosecutors argued that the murders were motivated by Mr. Ewell's desire to inherit the family's fortune. *Id.* The jury in that case deadlocked on punishment, despite evidence that Ewell and Radovcich carefully plotted to kill Ewell's entire family for an eight million dollar inheritance. *See, People v. Ewell*, No. F0303191, 2004 WL 944479, at *1, 20 (Cal. Ct. App. May 4, 2004). After the jury deadlocked, the prosecutor decided to forego a retrial of the penalty phase, and Mr. Ewell was sentenced to three life sentences without the possibility of parole. *Id.*

California juries are not alone in regularly choosing not to sentence defendants similarly situated to Mr. Whitaker to death. In 1991, Matthew Heikkila brutally murdered both parents with a sawed-off shotgun and boasted about wanting to kill his girlfriend if he had more bullets. *See,* W. Jacob Perry, *A Horror That Shocked Bernards Township*, Bernardsville News, Jan. 28, 2011, http://newjerseyhills.com/bernardsville_news/news/article_f9d972cc-295f-11e0-b242-001cc4c002e0.html. Prosecutors presented evidence of Mr. Heikkila's various run-ins with the law and chilling threats directed toward his well-respected parents. *Id.* The New Jersey jury

found Mr. Heikkila guilty of murdering his parents but chose to spare his life though the prosecutor sought death. *Id*.

Prosecutors regularly decide not to seek death in cases that involve precisely the type of crime committed by Mr. Whitaker. *See, Exh.* 'O'. For example, Oregon prosecutors decided not to seek the death penalty in the 1997 murders of Henry and Mercedes Niiranen. *See,* Tara Burghart, *Murderer Yearns for Birth Parents*, The Seattle Times, Mar. 19, 2000, http://community.seattletimes.nwsource.com/archive/?date=20000319&slug=4010728. Instead, Patrick Niiranen, their adoptive son, received a life sentence for pleading guilty to two counts of aggravated murder and burglary. *Id*. In Connecticut, Patrick Campbell was not charged with a capital felony for beating his adoptive parents to death with a sledgehammer, then burning their bodies. *See, State v. Campbell*, 617 A.2d 889, 892 (Conn. 1992).

The data reveals a national consensus that offenders who kill at least one parent are not a continuing threat to society deserving of the death penalty. Because so few individuals sit on death row for these types of crimes, the death penalty is an excessive punishment in these cases.

2. When Future Dangerousness Determines Whether a Defendant Lives or Dies, the Resulting Death Sentence Cannot Serve the Purpose of Either Retribution or Deterrence and Is, Therefore, Excessive.

"The death penalty is said to serve two principal social purposes: retribution and the deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Unless applying the death penalty "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund v. Florida*, 485 U.S. 782, 798 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

The jury must decide that a defendant poses a future danger to sentence a person convicted of capital murder to death. *See*, Texas Code Crim. Proc. Ann. art. 37.071 (West 2011). When future dangerousness determines whether a defendant lives or dies, the resulting death sentence primarily serves the purpose of incapacitation, not retribution or deterrence.

First, by definition, basing a punishment on future dangerousness cannot serve the purpose of retribution. Retribution expresses "society's moral outrage at particularly offensive conduct." *Gregg*, 428 U.S. at 183. It is the belief that a wrongdoer deserves to suffer for past acts. It is inherently unrelated to a person's future conduct. There can be no retribution for future dangerousness.

Second, a punishment based upon future dangerousness does not deter. The very idea of predicting future dangerousness assumes that some people are so inveterately dangerous that they will necessarily commit violence even in a high-security prison environment—that the only way to prevent them from engaging in future violence is to kill them. This is, in fact, precisely what the State and its witnesses routinely tell sentencing juries. *See, e.g.*, *Berry v. State*, 233 S.W.3d 847, 863 (Tex. Crim. App. 2007) (prosecutor stating "Some people are just evil"); *Battaglia v. State*, 2005 WL 1208949, at *4 (Tex. Crim. App. May 18, 2005) (psychiatrist testifying that defendant's conscience would not stop him from committing future crimes); *Cook v. State*, 821 S.W.2d 600, 602 (Tex. Crim. App. 1991) (prosecutor stating "Dr. Grigson told you that the man was impossible to rehabilitate"). Prospective offenders are unlikely to be deterred by a punishment they cannot receive. This is why deterring "capital crimes" – not deterring all crimes through some generalized expression of toughness – is a possible purpose of the death penalty. *Gregg*, 428 U.S. at 183. The future dangerousness requirement, if taken seriously, means that only inveterately dangerous persons can get the death penalty. If only inveterately

dangerous persons can get the death penalty, then inveterately dangerous persons are the only prospective offenders who might be deterred by it.

But a person is inveterately dangerous *precisely because he cannot be deterred*. A deterrable person cannot be deemed a future danger beyond a reasonable doubt because, by definition, any threat he may pose could be neutralized by appropriate incentives. Consequently, the future dangerousness requirement – if it were possible to implement with accuracy – would limit the death penalty to non-deterrable persons. Because punishments deter persons who could possibly receive them, a punishment reserved for non-deterrable offenders will deter no one. Consequently, where a finding of future dangerousness is the basis for the death penalty, deterrence cannot be its purpose.

Because basing a death sentence on future dangerousness serves the purpose of neither retribution nor deterrence, incapacitation is the only penological interest it can advance. But "incapacitation has never been embraced as a sufficient justification for the death penalty." *Spaziano v. Florida*, 468 U.S. 447, 461-62 (1984). If incapacitation alone could justify the death penalty, then "mandatory death penalty statutes would be constitutional, and, as we have held, they are not." *Id.*, at 478 n.19 (Stevens, J., concurring in part and dissenting in part). Indeed, if incapacitation could even be the primary justification for the death penalty, there would be no absolute bar to the execution of minors and mentally retarded persons. These persons may not be executed because they are less morally culpable for their crimes, *see Roper v. Simmons*, 543 U.S. 551, 567 (2005); *Atkins v. Virginia*, 536 U.S. 304, 306 (2002), but their diminished culpability does not necessarily bear on the need to incapacitate them. Even if a mentally retarded offender could be predicted with total certainty to be extremely dangerous in prison, the Constitution would prevent Texas from executing him. Incapacitation, therefore, cannot be the

death penalty's primary aim. Yet it *is* the primary aim when future dangerousness is the deciding factor between life and death. Punishments based on future dangerousness are disproportionate in all circumstances to the underlying offense because they fail the Constitution's requirement that they measurably serve the purpose of retribution or deterrence.

C. Because Mr. Whitaker Poses no Danger in a Prison Environment, the Jury's Determination of Future Dangerousness is Unreliable and False, and the Resulting Death Sentence Violates the Constitution.

Mr. Whitaker has committed no violent acts while incarcerated. His impeccable disciplinary record demonstrates that he poses no threat to guards or fellow inmates. The jury's prediction that he posed a future danger has been proven to be inaccurate.

The punishment that depends upon this inaccurate prediction is not the reliable, reasoned determination of culpability that the Constitution demands. Because Mr. Whitaker's sentence is based on a factual inaccuracy, it should be vacated. In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the jury found an aggravating circumstance based on a defendant's prior conviction; when that conviction was reversed after the death sentence had been imposed, the Court vacated the sentence. In *Johnson*, later developments revealed that the death sentence was unreliable and arbitrary because it was "predicated, in part, on a … judgment that is not valid now, and was not valid when it was entered…." *Id.*, at 585 n.6. Mr. Whitaker's sentence is also predicated on an assessment that has been proven invalid.

1. The Statements of Those Who Knew Mr. Whitaker While He Was in Mexico Demonstrate That He Is Not a Future Danger.

Mr. Whitaker also demonstrated shortly after his offense that he was fully capable of living non-violently and compassionately in society at large. Residing in Cerralvo, Mexico, Mr.

Whitaker developed a loving relationship with the Salinas family, whom he met by chance. Mr. Whitaker lived peaceably and was a valued member of the local community.

The Salinas family knew Mr. Whitaker as "Rury." *See, Exh.* 'P' (Affidavit of Silvia Edith Salazar Toscano), at 4; *Exh.* 'Q' (Affidavit of Ubaldo Salinas Muñoz), at 4. Mr. Whitaker worked in a furniture store owned by the Salinas family. *See, Exh.* 'P', at 5-8; *Exh.* 'Q', at 11. The Salinas family knew Mr. Whitaker to be a dedicated worker who was always willing to put in extra hours if needed. *See, Exh.* 'P', at 6-7; *Exh.* 'Q', at 12. The Salinas family, including the usually untrusting Homero Salinas, grew to trust and love Mr. Whitaker like he was a member of their family. *See, Exh.* 'P', at 9-10; *Exh.* 'Q', at 13. Store-owner Homero Salinas never trusted any of the workers in his furniture store to the degree he did Mr. Whitaker and allowed him to do work usually only entrusted to family members. *Id.* Mr. Salinas trusted Whitaker with all aspects of the furniture store including taking payments and running the store by himself. *See, Exh.* 'P', at 8; *Exh.* 'Q', at 14.

Mr. Whitaker became much more to the Salinas family than just an employee at their furniture store. He was a close friend who often shared dinner with and spent the night at the family's home. *See, Exh.* 'P', at 10; *Exh.* 'Q', at 21, 25. He shared in the family's Christmas celebration. *See, Exh.* 'P', at 13. He dated Homero Salinas's daughter, Sindy, and the two would often attend mass together. *See, Exh.* 'P', at 12. Sindy's brother, Ubaldo, recalled a time when she was sick and Mr. Whitaker cared for her. *See, Exh.* 'Q', at 33. Whitaker would often babysit the younger Salinas children. *See, Exh.* 'P', at 14. The family felt that Thomas was a member of their family. *See, Exh.* 'P', at 15.

After learning that Mr. Whitaker had been convicted of capital murder, they could not believe it was the same person that they had grown to know and love. *See, Exh.* 'P', at 24; *Exh.*

'Q', at 18, 22, 36. Even after being convicted, were Mr. Whitaker allowed to return to Mexico today, the Salinas family would again welcome him into their house as a member of their family. *See, Exh.* 'P', at 22.

2. His Impeccable Record While Incarcerated Both Before Trial and at the Polunsky Unit Demonstrates that Mr. Whitaker is Not a Future Danger.

While awaiting trial, Mr. Whitaker spent time in several detention facilities without incident. Mr. Whitaker lived in general population dormitories with low-level offenders, without incident. He worked in a kitchen with other inmates, behaving irreproachably even as he had access to potentially dangerous equipment. He was one of a select few inmates who cleaned one facility's administrative offices. He was routinely shuttled from one facility to another with large groups of inmates because of renovations being done to the Fort Bend County Jail. Even after being convicted of capital murder, while waiting to be transported to a TDCJ facility, Mr. Whitaker was housed with the general population at the Fort Bend County Jail. If jail administrators believed that Mr. Whitaker posed any serious threat while incarcerated, he would have been treated differently.

In nearly four-and-a-half years on death row, Mr. Whitaker has similarly posed no danger. When inmates in the Texas Department of Criminal Justice have to be made to do something involuntarily because they will not obey a command, use of force measures must be taken. Correctional officers have never had to use force to get Mr. Whitaker to comply with one of their orders the entire time that he has been incarcerated at the Polunsky Unit. *See, Exh.* 'R'. According to correctional officers currently employed at the Polunsky Unit on death row, Mr. Whitaker is completely cooperative and always follows orders. *See, Exh.* 'S' (Affidavit of [redacted], at 4; *Exh.* 'T' (Affidavit of [redacted], at 4. The correctional officers stated that

not only have they never had any problems with Mr. Whitaker, they know of no correctional officers who have. *See, Exh.* 'S', at 4-5; *Exh.* 'T', at 4. A disciplinary report and hearing record is generated at the Polunsky Unit any time any rule is violated and the violation cannot be resolved informally. *See,* Tex. Dep't of Criminal Justice, Disciplinary Rules and Procedures for Offenders 1-2 (Corr. Inst. Div. 2010), *available at* http://www.tdcj.state.tx.us/publications/cid/Disciplinary_Rules_and_Procedures_for_Offenders_April_2010.pdf. Mr. Whitaker's disciplinary records contain only four of these reports for the entire period that he has been incarcerated at the Polunsky Unit and none are for violent offenses. *See, Exh.* 'U'. His classification history records which record that Mr. Whitaker has been on level 1 for almost the entire time that he has been incarcerated at the Polunsky Unit, are further evidence of his cooperative and nonviolent behavior. *See, Exh.* 'V'.

The Salinas family observed that Thomas Whitaker worked to improve himself during his time in Mexico by learning Spanish and taking guitar lessons. *See, Exh.* 'Q', at 5, 17. During his time at Polunsky, Mr. Whitaker continues to devote his time and energy to self-improvement. He is taking classes by correspondence and is on track to earn a bachelor's degree from Adams State College. *See, Exh.* 'W'. Mr. Whitaker is planning to begin taking classes by mail from the Dominguez Hills campus of California State University in the fall of 2012 in pursuit of a Masters of Arts in the Humanities. He is an accomplished writer, recently earning a national award from the PEN American Center Prison Writing Program Literacy Contest. *See, Exh.* 'X'. On his own initiative, he has successfully completed courses in subjects ranging from philosophy to Bible study. He has actively pursued a program of rehabilitation and reconciliation with his father, the surviving victim of his offense. Not only does Mr. Whitaker seek to better himself, as

Correctional Officer [redacted] has observed, he encourages those around him to better themselves. *See, Exh.* 'S', at 6.

Mr. Whitaker's pattern of behavior since his offense conclusively demonstrates that he does not pose a threat of violence to others, particularly in a prison environment. He is not – and, since his offense, never has been – a "future danger." Because his sentence is predicated on a factually inaccurate judgment, that sentence is arbitrary and violates the Constitution.

CLAIM FOUR

DEATH BY LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., AMEND. VIII. Mr. Whitaker has been sentenced to die by lethal injection. This method of administering the death penalty was challenged recently on the ground it constitutes cruel and unusual punishment. *Brown v. Crawford*, 4:05-cv-746 (8th Cir. 2005). Petitioner requested a stay of execution from the Supreme Court, which was denied. Sup. Ct. No. 04-10165 [05-2310]. However, scientific investigation into the administration of three drug "cocktails" similar to that used in Texas call into question whether the practice is humane. *See, Prisoners 'aware' in executions*, http://news.bbc.co.uk/2/hi/health/4444473.stm.

> Writing in the Lancet, the researchers, led by Dr Leonardis Koniaris, said: "We certainly cannot conclude that these inmates were unconscious and insensate." "However, with no monitoring and with little use of the paralytic agent, any suffering of the inmate would be undetectable." They add: "The absence of training and monitoring, and the remote administration of drugs, coupled with eyewitness reports of muscle responses during execution, suggest that the current practice for lethal injection for execution fails to meet veterinary standards." In an accompanying editorial, the Lancet said: "Capital punishment is not only an atrocity, but also a stain on the record of the world's most powerful democracy." "Doctors should not be in the job of killing."

On Eighth Amendment grounds, Thomas Whitaker requests relief from his sentence of death, and leave to supplement his briefing with developing medical and forensic evidence.

REQUEST FOR RELIEF

WHEREFORE, Thomas Bartlett Whitaker, requests that this Court:

1. Issue a writ of habeas corpus to have him brought before it, to the end that he may be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death.

2. Grant him an evidentiary hearing at which he may present evidence in support of the foregoing claims, and allow him a reasonable period of time subsequent to any hearing this Court determines to conduct, in which to brief the issues of fact and of law raised by this petition or such hearing.

3. Grant a certificate of appealability with respect to any claim that is denied.

4. Grant leave to brief, through separate pleadings, issues regarding the State courts' satisfaction of standards under 28 U.S.C. § 2254(d) and § 2254(e).

5. Grant such other relief as law and justice require.

Respectfully submitted,

HILDER & ASSOCIATES, P.C.

By: /s/ *James G. Rytting*

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VERIFICATION

I, James Rytting, state that to the best of my knowledge, the facts alleged in support of the claims in this case are true and correct, under penalty of perjury, as proscribed by Title 18 U.S.C. § 1746; and I hereby sign on behalf of Petitioner, Thomas Bartlett Whitaker.

/s/ James G. Rytting
James Rytting

CERTIFICATE OF SERVICE

On October 14, 2011, Respondent was served by ECF with this Amended Petition.

/s/ James G. Rytting
James Rytting

LIST OF EXHIBITS

‘A’ - 2009 Affidavit of Dan Cogdell

‘B’ - 2009 Affidavit of James “Jimmy” Ardoin

‘C’ - 2009 Affidavit of Assistant District Attorney Fred Felcman

‘D’ - 2009 Affidavit of Norman Kent Whitaker

‘E’ - 2009 Affidavit of Randy McDonald

‘F’ - 1997 Report of Dr. Brendan O’Rourke

‘G’ - 2005 Report of Dr. Jerome Brown

‘H’ - 2009 Report of Dr. Kit Harrison

‘I’ - Subpoenas served on Dr. Brendan O’Rourke

‘J’ - Affidavit of Assistant District Attorney Jeff Strange

‘J.1” – January 5, 2006, Proffer

‘K’ - Pre-Trial Notes of Dr. Brendan O’Rourke

‘L’ - 2011 Affidavit of Dr. Brendan O’Rourke

‘M’ - 2011 Report of Dr. Diane Mosnik

‘M.1’ - 2011 Report of Dr. Kit Harrison

‘N’ - 2011 Affidavit of Kent Whitaker

‘O’ - Excel Spreadsheet

‘P’ – Affidavit of Silvia Edith Salazar Toscano

‘Q’ – Affidavit of Ubaldo Salinas Muñoz

‘R’ – TDCJ letter regarding no Use of Force Reports

‘S’ – Affidavit of [redacted]

‘T’ – Affidavit of [redacted]

‘U’ – TDCJ Disciplinary Report and Hearing Record

‘V’ - TDCJ Unit Classification Committee History Form (and Subsequent Hearings)

‘W’ – Academic Transcript - Adams State College, Colorado

‘X’ – Letter from PEN Prison Writing Program

EXHIBIT "A"

CAUSE NO. 42969

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

AFFIDAVIT OF DAN LAMAR COGDELL

STATE OF TEXAS }

COUNTY OF HARRIS }

Before me the undersigned authority, on this day personally appeared Dan Lamar Cogdell who, after being by me duly sworn, deposed on his oath and stated as follows:

My name is Dan Lamar Cogdell. I am over the age of 18 and am mentally capable of making this affidavit. I am an attorney at law, licensed to practice in the State of Texas, and have held Bar Number 04501500 since I was licensed on November 5, 1982. I have engaged, almost exclusively, in the practice of criminal law since that time. The facts in this affidavit are from my own personal knowledge.

I am familiar with the facts and circumstances of the case of Mr. Bartlett Whitaker as an attorney in a professional capacity. I am a friend of Mr. Whitaker's uncle, Bo Bartlett. We remain good friends. I have also known Kent Whitaker, Bartlett Whitaker's father, for almost as many years and consider him a friend as well.

I first became acquainted with Bartlett Whitaker during the time I represented him after he had burglarized several public schools while a high school student. When Patricia and Kevin Whitaker were killed, and it became somewhat apparent that Mr. Whitaker was being viewed as a suspect, Kent Whitaker, his father, retained me to represent his son. There was a great deal of public attention on this case in the media and both Kent Whitaker and Thomas Bartlett Whitaker wished my professional assistance. I agreed to represent Mr. Whitaker in this matter. I did so with the understanding that should the Bartlett family become opposed to my continuing representation at some point in the future; I could withdraw from the case as long as it was not to the detriment of my client. I would not, of course, either violate the attorney-client privilege or in any way

engage in conduct which was not in the best interest of Bartlett Whitaker's legal interest. Bartlett Whitaker fully understood and agreed to this proviso. Accordingly, I undertook, along with my assistant, James Madison "Jimmy" Ardoin III, representation of Mr. Whitaker in this case.

In the early stages of my representation of Mr. Whitaker, we did not (of course) engage in plea negotiations. This was true for a variety of reasons. First and foremost, no charges had been filed. In the early stages of my representation, Mr. Whitaker was (in my opinion) a suspect but it was not a certainty that he (or anyone else) would be charged in this matter. Indeed, charges were not filed until well after a year following my assuming responsibility for Mr. Whitaker. Secondly, Mr. Whitaker steadfastly maintained his innocence at that point. It was only later (after he fled to and returned from Mexico following the filing of charges against him) that he made admissions of guilt to me, that any negotiations were attempted. By the time of Mr. Whitaker's return, the case against him was fairly set-at least as to guilt or innocence. The co-defendants had, by that point, cut deals with the State and had agreed to testify against him. Indeed, by this point in time, the co-defendants had made very detailed statements describing not only their roles but that of Whitaker which were both externally and internally consistent. Simply put, by the time Whitaker was "returned" to the States from Mexico the evidence against him was, in my opinion, overwhelming (at least as to the guilt-innocence phase).

I did believe that, based upon the consistent positions of both the Bartlett and Whitaker families, that there was a real possibility that the death penalty could be avoided. After all, these families were the real "victims" of the offense and both were adamantly opposed to the imposition of the death penalty. At the request of Bartlett Whitaker (and based upon our belief of what was in his best interest in attempting to avoid the death penalty) we began negotiations with the goal of obtaining life sentences. I believed, based on my experience, that the facts of the case, the timing of the commission of the offense as well as the "law and order" climate within the community, that a death sentence could be a very likely result of a trial on the merits. Our negotiations were primarily conducted with Fred M. Felcman, Assistant District Attorney for Fort Bend County.

During this period of time, Mr. Ardoin and I were approached while in public by Mr. Felcman. 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. Upon this representation, and in reliance on the good faith of Mr. Felcman in making the offer, we approached Mr. Whitaker and he agreed to

supply such a proffer as desired by Mr. Felcman. Of course, this statement was to be expressly protected by Rule 410 of the Texas rules of Evidence and would be inadmissible against him in the event the case was not resolved by agreement. Of course, it should also be mentioned that (as the State was already in possession of the details of the offense which had previously been provided to them by the co-defendants), I believed that providing this information was in Mr. Whitaker's best interests. Relying upon the protection of Rule 410 and on the good-faith of the prosecutor, Mr. Felcman, the decision was made to provide such a statement in the hopes of persuading the State not to seek the death penalty.

My associate, Mr. Ardoin, worked with Mr. Whitaker, using his words, and wrote out a multi-page document which we had printed. When we presented the document to Mr. Felcman he acted "upset" that it did not contain "any mention of remorse" on Mr. Whitaker's part. Of course, this reaction by Felcman came as a complete surprise to us as we were specifically told by him not to include any discussion of remorse. Felcman used the absence of any display of remorse or sorrow as a basis to "reject" the proffer and the State continued to pursue the death penalty. Given that the document had been secured with the specific admonition that remorse be avoided within the document, and its absence was the reason for its rejection, we became concerned that Mr. Felcman had no intentions of not pursing the death penalty and we were simply being "played". I recall (after Felcman continued to pursue the death penalty despite the submission of the proffer) being told by Felcman that "the only way I will agree not to pursue the death penalty is if Bo Bartlett comes to my office and begs me not to pursue the death penalty". It is my understanding that Bo Bartlett then did exactly that ("beg" Felcman not to pursue the death penalty).

Again, despite complying with this specific request, the State continued to indicate that it would pursue the death penalty. At some point, my efforts at plea negotiations ceased. The tension between me and Felcman was fairly specific at this point. I was angry at Felcman (as I had done exactly as he had asked in terms of providing the proffer as directed) and I felt some specific resentment towards me by him. I had concerns that either Felcman was so acrimonious towards me that my presence was actually a deterrent towards resolving the case or that he never had any intention of not pursuing the death penalty, or both.

Shortly after this I was approached by and spoke with Mr. Whitaker's uncle, Bo Bartlett. Bartlett expressed to me the family's desire that I not continue as Mr. Whitaker's attorney. Given our prior agreement in this regard, I discussed the request with Mr. Whitaker who agreed with that decision. To be frank, my efforts to resolve the case had failed and I believed that (in addition to respecting the desires of the family) another lawyer might be better able to convince the State to abandon the death penalty. I

believed that my withdrawal would provide another lawyer (who had not been involved in the negotiations detailed above) the opportunity for resolution short of trial which was in the best interests of the client. I refunded any unearned fees to Kent Whitaker and attempted to assist in the transition of the case over to the attorney who would replace me.

Discussions were had with regard to my associate, Jimmy Ardoin, continuing on the case with another, more experienced trial lawyer taking the lead. Eventually a list of three attorneys in whom I had confidence was provided to Kent Whitaker. Randy McDonald was eventually hired.

I had several conversations with Mr. McDonald prior to and following his taking over representation of Mr. Whitaker. I reviewed with him all the details of the history of the case and my dealings with Felcman. I explained to him my understanding of the desire of not only Kent Whitaker to have the State not seek the death penalty, but a parallel desire on the part of the Bartlett family. I communicated my desire to assist in any way I could, as well as my belief that Kent Whitaker had not only an incredible love for his son but sufficient financial resources to assist Mr. McDonald as needed in the defense.

I told Mr. McDonald of what I knew about the facts of the case. I also told him of a statement I had heard made by an ex-supervisor of Mr. Whitaker (when Whitaker was working in a nearby restaurant) wherein it was asserted that Mr. Whitaker "was a homosexual". I had also relayed that comment to Whitaker himself during the period of my representation of him and he strongly denied that it was true. I knew that the family did not perceive Mr. Whitaker as a homosexual. I informed Mr. McDonald that I had confronted Mr. Whitaker with this information and that he had, in fact, denied being homosexual. I do not know what, if any efforts, Mr. McDonald made to determine if the statement made to me was correct and, if it was, what effect that information would have had on the trial of the case.

Lastly, it is my considered opinion that the trial of this cause had to be about either some form of mitigation or an absence of future dangerousness or a combination of both. Practically speaking, there was virtually no doubt as to Whitaker's guilt or as to the facts and circumstances of the crime. The facts of the case were, suffice it to say, horrific as Whitaker had (on more than one occasion) plotted the deaths of his father, mother and brother and had eventually been instrumental in having both his mother and his brother killed. Those facts and circumstances, without some form of explanation for those actions, would very likely lead a jury in that community to assess the death penalty.

FURTHER AFFIANT SAYETH NOT.

Dan Lamar Cogdell

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

Rosalinda G. Nuñez
Notary Public, State of Texas

ROSALINDA G. NUNEZ
NOTARY PUBLIC, STATE OF TEXAS
COMMISSION EXPIRES:
MAY 4, 2010

EXHIBIT "B"

No. 42969

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

AFFIDAVIT OF JAMES MADISON ARDOIN III

STATE OF TEXAS)

COUNTY OF HARRIS)

Before me the undersigned authority, on this day personally appeared James Madison Ardoin III, who, after being by me duly sworn, deposed on his oath and stated as follows:

My name is James Madison Ardoin III. I am over the age of 18 and am mentally capable of making this affidavit. I am an attorney at law, licensed to practice in the State of Texas. I have held Bar Number 24045420 since I was licensed on November 5, 2004. I have engaged, almost exclusively, in the practice of criminal law since that time. The facts in this affidavit are from my own personal knowledge.

I am familiar with the facts and circumstances of the case of Thomas Bartlett Whitaker, having been brought into the case in my professional capacity by Dan Cogdell, an attorney with whom I am associated. I first became acquainted with Mr. Whitaker through that employment.

As a part of that representation, I had several conversations with Mr. Whitaker. After Mr. Cogdell withdrew from representation, attempts were made to continue my representation but the decision was made to continue with Mr. Randy McDonald as Mr. Whitaker's only attorney.

Mr. Cogdell did not engage in plea negotiations at the beginning of the representation since Mr. Whitaker steadfastly maintained his innocence. It was only later, after Mr. Whitaker went to and returned from Mexico, that any negotiations were attempted. By the time of Mr. Whitaker's return, the case against him was fairly set, at least as to

guilt or innocence as the co-defendants had been co-operating with the State and would be providing significant evidence against Mr. Whitaker.

We began negotiations with the goal of obtaining life sentences because it was believed, based on Mr. Cogdell's experience, the facts of the case, the timing of the commission of the offense as well as the law and order climate within the community, that a death sentence would be the probable result of a trial on the merits. Our negotiations were primarily conducted with Fred M. Felcman, Assistant District Attorney for Fort Bend County.

During the course of those negotiations, 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. Upon this representation, and in reliance on the good faith of Mr. Felcman in making the offer , we approached Mr. Whitaker and he agreed to supply such a proffer as desired by Mr. Felcman. Of course, the proffer would be protected by a Rule 410 agreement and would not be admissible against Mr. Whitaker in the event the case was not resolved by a plea agreement

I worked with Mr. Whitaker in preparing the document, using his words, and produced a multi-paged document which we then had printed. When we presented the document to Mr. Felcman, he was upset, and rejected the proffer as the basis for a life sentence offer, because it "did not contain any mention of remorse" on Mr. Whitaker's part.

This abrupt turnabout was totally unexpected and for it to be the reason the proffer was rejected and the death penalty remained an option, was beyond belief. Given that the document had been secured with the specific admonition that remorse should be avoided within the document, we were stunned when we learned that its absence was the

reason for its rejection. Following this interchange, the plea negotiations ceased.

Shortly after this Mr. Cogdell was approached by and spoke with Mr. Whitaker's uncle, Bo Bartlett, who expressed to him the family's desire that he not continue as Mr. Whitaker's attorney. Given the prior agreement in this regard, the request was discussed with Mr. Whitaker who was neither surprised nor angry, nor did he object. My active involvement with the case was terminated at this time.

FURTHER AFFIANT SAYETH NOT.

James Madison Ardoin III

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

Rosalinda G. Nunez

Notary, State of Texas

ROSALINDA G. NUNEZ
NOTARY PUBLIC, STATE OF TEXAS
COMMISSION EXPIRES:
MAY 4, 2010

EXHIBIT "C"

NO. 42,969

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
VS.	§	FORT BEND COUNTY, TEXAS
	§	
THOMAS BARTLETT WHITAKER	§	400TH JUDICIAL DISTRICT

AFFIDAVIT OF FRED M. FELCMAN

Before me the undersigned authority, on this day personally appeared Fred M. Felcman who, after being duly sworn, deposed on his oath the following

"My name is Fred Felcman. I am the first assistant district attorney of Fort Bend County, Texas. I, along with Jeff Strange, were the attorneys representing the State in the capital murder trial of Thomas Bart Whitaker aka Bart Whitaker. I have been practicing law for over 30 years with a heavy emphasis on criminal law, although I am not board certified. I have lived in Fort Bend County my entire life, except for college and law school, and am well acquainted with the make-up and values of the county. I started out in the DA's office in 1976, went into private practice in 1981, and came back as first assistant in 1991. I have tried numerous death penalty cases, the first being in 1978.

The writ is frivolous, consisting of tabloid gossip and no legal significance. Based upon the defendant's actions before and after the murders, the defendant's psychological profile prior to the murders, and now the defendant's website, it would require an absurd or ridiculous conclusion that the defendant Whitaker does not meet the standards for the imposition of the death penalty.

Appellate counsel should have filed an "Anders brief" but because he failed to do so, I must now answer some of the comments or complaints by appellate counsel but I will be brief. Simply stated, the defendant was convicted and received the death

penalty because of the defendant and nothing else - the evidence gathered by detectives Marshall Slot and Billy Baugh, along with myself and ADA Jeff Strange, met the burden of proving the defendant's guilt and easily established the criteria for the defendant to receive the death penalty. Both Dan Cogdell and Randy McDonald realized this and knew that the only avenue available was to use any negotiations as a defense to receiving the death penalty. I , Jeff, Dan, and Randy knew the evidence showed the defendant with prior criminal background; showed a defendant capable of massive manipulation and deceptions of all person he associated with, including professional psychologists and attorneys; showed psychological evaluations that warned psychologists of severe narcissism and/or sociopathy; and showed a narcissistic personality that used people as tools, with absolutely no remorse for his actions or empathy for his victims. The evidence showed that the only person who wasn't duped by the defendant prior to the murders, was a Ms. Ayers, who was afraid to meet with the defendant after one counseling session due to a severe "Atlas complex".

Dan and Randy never outright told me that "plea-negotiations" would be the defense in this matter - not the evidence or the law but the willingness of the defendant to accept life sentences, but over the course of time, it became clear. Even though negotiations are not admissible under the Texas Rule Evid 410, it seemed inevitable that the desires of Kent Whitaker that the State not seek the death penalty would come in and from that, the offer by the defendant to plead to life. I was friendly, courteous and respectful toward Dan Cogdell while he was on the case and didn't feel any animosity toward him when he withdrew. Why Dan thought our relationship was "acrimonious" and why this is the reason he withdrew is baffling to me. Although I do not have personal knowledge of what he told Kent Whitaker, the book by Kent Whitaker says the only reason Dan withdrew was because of his friendship with Tricia's side of the family. Dan told Jeff and myself that his relationship with the Bartlett family was also the reason Dan withdrew; he never

mentioned any other reason. I thought it was a wise thing for Dan to withdraw because he expressed the conflict he felt due to his closeness to Tricia and her side of the family - I was relieved when Dan withdrew because that issue would now be moot. I just recently went to one of Dan's parties in December of 2008 with associate Judge Ruiz - I had a very friendly and warm talk with Dan, met his wife who gave me a hug after Dan told her I was the prosecutor on the Whitaker case, and had an enjoyable time at the party. Dan even said he understood the decision by District Attorney John Healey to seek the death penalty. Not at any time did I ever sense any anger or animosity whatsoever, and that is why I am puzzled by Dan's affidavit. The only thing I can think of is that at one time Dan told me he personally thought that the defendant was remorseful, but that was before Marshall Slot received the monitored phone calls of the defendant - and now Dan maybe embarrassed that he said such a thing, but that is pure speculation on my part. The phone call occurred on the anniversary of the murders and was made by the defendant to his father - instead of being remorseful as was being portrayed to me, the defendant called his father to gripe that his attorney Dan Cogdell had told him that the offer would be a number of years, not life or death; that they were not paying money for some public defender, that the Mr. Ardoin, Dan's associate was being pushed around by the State; and that the "big guns" needed to come into play. Of course, after that, any illusions the defendant was casting about being remorseful dissipated into the wind. Whether Dan told the defendant that an offer for a term of years was forthcoming meant little to me as the phone call was the defendant's choice, not Dan's - it merely showed that any opinion about the defendant being remorseful was wrong (on the stand, the defendant thought the number of years may be around 90 - how he came up with that number, who knows). The phone helped reveal some of the defendant's personality and was played for the jury.

The public meeting Mr. Cogdell sets out in his affidavit was accidental. After lunch, the prosecutors go to some store on shop for about 15 minutes. We went to

"Best Buy" and I saw Dan and Jimmy. We talked about the case since it was set for that day. I believe Dan said something about how despicable the actions of the defendant were but that he believed the defendant to have some remorse. My opinion was different and that true remorse is not negotiated but comes from within. That was the entire conversation and it lasted five minutes at the most. 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. Simply stated, the "proffered statement"given to me was of absolutely no legal detriment to the defendant - it wasn't even signed. I called Detective Marshall Slot the day I received the letter, who drove over to get a copy - he told me the facts were wrong in it. I did not know for certain until trial that Dan or his associate had prepared it. Both Kent Whitaker's book and the testimony elicited from the defendant state that Dan did not consult with the defendant before sending me the letter.

I met Randy McDonald about the same time as Dan withdrew, and Mr. McDonald was exactly as his reputation was recited in the father's book - intelligent and experienced. He never misled me or engage in unnecessary legal maneuvers. Mr. McDonald knew that the evidence was overwhelming in favor of the defendant receiving the death penalty and he engaged in sincere negotiations with the only asset he had in his favor - Kent Whitaker's desire that the death penalty not be sought. Patricia Whitaker's side of the family would also express their desire but it was less emphatic. Despite the rules of evidence not allowing such testimony, Jeff and I

promised Mr. McDonald, Mr. Whitaker and Mr. Bartlett that they could express their desires before the jury. This decision was both objective and subjective. Pragmatically I knew without it being presented, a jury may feel deceived in not knowing and appellate procedure being what it is on death penalty cases, it would be an complaint on appeal as I would be depriving Mr. McDonald of his only real defense or argument to assess life. However, also pragmatically, any opinion asking for a life sentence would be worthless unless the person conceded that the defendant killed his family and I could use that to prove the defendant's guilt. Sympathetically, I felt for Kent Whitaker and he needed to have the chance to speak his feelings and it was solely for Mr. Whitaker that Jeff and I agreed - however, I felt the defendant had so easily deceived Kent Whitaker over the years that his request would not aid the jury in answering the "death penalty" questions.

All conversations with Kent Whitaker and Bo Bartlett that Jeff, Marshall, Billy and I had were relayed to District Attorney John Healey. Mr. Healey and Jeff also met with Mr. Bartlett without me being present. After all conversations, Mr. Healey determined that the evidenced warranted the seeking of the death penalty. We then went to trial.

Mr. McDonald told the jury in his opening statement that the jury would find out that a trial was unnecessary, i.e., the defendant was willing to plead guilty and serve a life sentence. The statement was consistent with the defense by Mr. McDonald. The appellate attorney complains that the "proffered statement" should not have been used by the State but fails to appraise the court that the rules of evidence do not prevent its use once the subject of "negotiations" is presented. Under the defensive theory, which was sound legal strategy in face of the evidence, the "proffered statement" would be a plus for the defendant, e.g., I tried to confess but my attorney Dan Cogdell screwed-up, which is what the defendant and father said from the stand. (Page 227) However, there were two major problems with this argument - A Christmas card the defendant sent me and the defendant's background.

A few weeks before trial, the defendant, without knowledge of Randy McDonald, sent me a Christmas card wishing me a Merry Christmas and asking that I set aside the nastiness I see in my profession and concentrate on my family. The defendant also threw in how he was a lost soul and had found his way home. There was no mention of his family or simple statement of sorrow in killing them, just a cryptic message from the defendant. The card was placed into evidence to show the manipulative way the defendant speaks and to show he could have conveyed "remorse" if he so wanted. Also, by this time, the defendant's history of lies, deceit, avarice, and violence was well documented and had come back to haunt him with the verdict of death.

The appellate attorney also makes a complaint that Mr. McDonald failed to use a psychologist/psychiatrist in the defense of Bart Whitaker, supposedly to show something meaningful. The defendant's website also gripes about this failure. However, the defendant had already been treated/examined by psychologist Brendan O'Rourke. In 1997, after the defendant committed multiple burglaries of schools, the defendant's family had the defendant examined by by Dr. O'Rourke. Dr. O'Rourke administered the "Millon Multi-Axial Clinical Inventory" test, with the test results being the defendant had a "narcissistic" personality with an over-inflated sense of importance, and was a person easily provoked and may express sudden and unanticipated brutality; the final paragraph warned the psychologist that the defendant was extremely manipulative and any dealings with the defendant should be guarded. Dr. O'Rourke ignored these results and wrote a glowing letter to the school about how the defendant had "self-corrected" and should be allowed back in school. Of course, Dr. O'Rourke was absolutely wrong because the defendant continued to engage in fraud, culminating in the murder of his family. I sought to introduce these findings and the letter but Mr. McDonald was successful in keeping out the test results. However, the letter was still admissible and I placed Dr. O'Rourke on the stand to show how easily the defendant fooled and/or manipulated

a supposed expert into writing such a beneficial letter. If Mr. McDonald had attempted to use any psycho-babble in his defense, the test would have come in as rebuttal, along with any evaluations from psychologists/psychiatrists to rebut any defense. (As a note, due to television's interest in the case, e.g., "48 Hours, Oprah Winfrey. 20/20", the State now has two psychiatric/psychologist's opinions that the defendant is, of course, a narcissistic sociopath. Also, it now seems the appellate psychologist Kit Harrison believes the "Millon" diagnosis of the defendant was valid - i.e., the defendant is a narcissistic sociopath who is dangerous - but in some sort of strained psychological logic that this is somehow mitigating.)

It is difficult to list the many contrary statements the defendant has said about his feelings or emotions. The appellate psychologist is just reiterating one of the defendant's fabrications, to-wit: I didn't feel loved. Of course, this is just a lie by the defendant to manipulate sympathy. During the trial, the defendant admitted that he told Ms. Ayers he felt like "Atlas" and didn't need anyone but then said that was a lie to cover his feelings of inadequacy and but now in his website, he again proclaims his superiority by stating his opinion of everyone else being a dunce, evil, etc. Recently on the defendant's website, the defendant has a new rationalization for his personality - I am so sensitive I had to disconnect from the world because of the world's violence, i.e.; how could a caring person not disconnect in view of the horrors committed by the world's population, and why can't you understand I am so emotional that I had to kill my family. ("I feel everything. Too much. I get overloaded and only then, do I withdraw. No one ever noticed I never ate my dinner when I was younger when we watched the news at the table"). Thus, all the defendant does is change his strategy/reason/rationalization/feelings to some form of "psychobabble" for killing his family and deny it was some mundane or pedestrian scheme to get money or cover his lies about school.

Overall, Bart Whitaker feels himself so vastly superior to everybody that whatever he wants or desires is rightfully his - in his website, the defendant rambles

on about his moral and intellectual superiority and how everyone in the prison system are Gestapo or dunces; the defendant Whitaker even talks of how killing a mosquito in his cell means more to him than the antics of people who oppose him. (The website says that the defendant's proclamations will soon be in Spanish so that more of the world can read the wisdom of Bart Whitaker).

In achieving what he believes is rightfully his, the defendant will tell the person what they want to hear and uses that tool in attempts to further his interests or to achieve his goal. This manipulation technique of lying and fooling people has been on a scale that is difficult to believe but it has successfully used by the defendant repeatedly - for example: father, I am graduating from college; father, I didn't plan to kill you; father, I didn't do it; father, I changed after being shot; fiancee, I didn't do it and I love you; jury, I am really remorseful and fully responsible; district attorney, I hold no animosity toward you; etc. The most obvious proof of the defendant's ability to manipulate is this - the defendant got three separate groups to engage in three separate conspiracies to murder the Whitakers, and he accomplished it by merely telling the groups what they wanted to hear.

The defendant is now talking differently because he knows his readers/listeners/helpers need to hear different things, to-wit: I was convicted on a "quirk of the law" and was only peripherally involved in the murders; my attorney was a snake and only interested in money; foreman, you committed murder when the jury answered the questions; the guards are stupid; Texas justice is wrong; "fairness" in the American courtroom is an illusion; the assistant district attorney has a "sewer spigot" for a mouth; etc. Even behind bars, the defendant is still successful in manipulating people and the proof is this one simple fact - the defendant has managed to get someone to create a website and transcribe the defendant's notes of self-righteousness, conceit, and absolute lack of remorse, and then publish those on the website - it is almost beyond belief but that is exactly what someone is doing. Somehow this person completely ignores that the defendant was able to hide his

failure to attend college from his family and fiancee; that he engaged in at least three conspiracies to murder his family; that the defendant was never deterred in his goal despite having been caught; that he had himself shot to cover the crime; that he attended his family's funeral with the community without a hint of guilt; that he attempted bribe a witness while jokingly referring to himself as a mastermind criminal; that the defendant continued to scheme to kill his father while at the same time convincing his father he was innocent; that he stole money and fled the country but not before spending the night at a fancy hotel; etc. The person doing this even ignores new information about the defendant talking about killing his girlfriend's family in Mexico. And that is the danger of this defendant - he gets people around him to forget what he has done and see a false image of the defendant. Indeed, a mere glance at the relationship between the defendant and his father before the murders shows that any concession or accommodation given to the defendant, or any refusal to believe or failure to understand what the defendant is capable of committing, has dire consequences as the defendant will use these mistakes to further his own goals, whatever they may be. I believe Dan Cogdell knew this because of the conversations I had with him but I am not sure; I am far more certain that Randy McDonald was aware of this and as Kent Whitaker's book details on page 131, Mr. McDonald was the first person to tell the defendant to quit trying to fool Mr. McDonald.

To illustrate why the writ is mainly gossip and has no legal significance, appellate counsel has attached an affidavit from the defendant's ex-fiancee, who states that in addition to be an accomplished liar, the defendant is also a homosexual. How that is material or relevant is beyond any explanation; it is voyeurism at it's worse. If the State had sought to introduce an opinion about the defendant's sexual orientation during the trial, can you imagine the outcry that would have caused. The trial judge would have never let it in and groups would have been forming because the core of this affidavit is to show how maladaptive the defendant is, and that homosexuality is a possible reason for the defendant murdering his family. But

appellate counsel seems to be content to now interject it and hopefully the appellate court will find him in contempt for attaching the affidavit

The appellate counsel also complains that Mr. McDonald failed to present evidence supporting the notion that the defendant didn't deserve the death penalty. This position is not only silly but goes against the reasoning of Furman v. Georgia. The overturning of the death statutes was because the United States Supreme Court wanted factors or issues to be answered by the jury, and not a simple question of whether the defendant s deserved death; by this, a consistency would be established. Appellate counsel appears to want to go back to pre-Furman days.

Finally, what difference does it make whether Jeff or I were nice to Dan Cogdell, or if Dan was mean or abusive or courteous; there is absolutely no due process violation or constitutional violation that has occurred in this case that would somehow question the validity of the judgment. To gripe about who did what during negotiations is silly and especially galling when it was the defense that brought up negotiations during the trial and there was no objection to any of it. The reason plea negotiations are not admissible is because it would prevent earnest negotiations; however, here the negotiations were going to be the defense because it showed supposedly the defendant taking responsibility. But attorneys complaining about how they were treated during the negotiations, as Dan now complains, is far removed from that and would how been totally immaterial to the pleadings and absolutely irrelevant to issues - a trial about punishment for a defendant who murdered his family would have become a trial about attorneys, which seems to be what appellate counsel believes it should be. Indeed, it would has become so ridiculous that appellate counsel believes a defendant can chime in and give an opinion how "duplicitous" the State was in it's dealings, even though it was the defendant and/or Dan and Jimmy who sent an letter with facts that were wrong that was not adopted by the defendant. It is distressing that appellate counsel believes that the federal writ system is for this purpose of gossip and I regret that I had to engage in it because it trivializes the

crime; obscures the fair and error-free trial; diminishes the efforts of Mr. McDonald and Mr. Cogdell in a needless and frivolous manner; and reduces the death of Kevin and Patricia Whitaker, along with Kent Whitaker's suffering, to some side-note event of plea negotiations instead of the trial and legal punishment of the defendant.

I have attached the following to this affidavit:

1. A letter from Randy McDonald;
2. The April 17, 2009 website of the defendant; and
3. The defendant with Kevin Whitaker, one hour before the murders.

Fred M. Felcman

SWORN TO AND SUBSCRIBED BEFORE ME this the 20th day of October, 2009.

YOLIE L. GARCIA
Notary Public, State of Texas
Commission Expires 03-27-2011

Notary, State of Texas

RANDY MCDONALD, P.C.
ATTORNEY AT LAW
3000 SMITH STREET
HOUSTON, TEXAS 77006

BOARD CERTIFIED CRIMINAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

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March 13, 2007

John Healey
District Attorney, Fort Bend County
301 Jackson Street
Richmond, TX 77469

Dear John:

I am writing this letter to advise you that I certainly appreciated all courtesies extended to me by the district attorney's office throughout the trial of Bart Whitaker. In particular, Wanda was very helpful in coordinating witnesses as well as keeping the families together throughout the trial.

Obviously, Fred Felchman is a seasoned trial lawyer and did a great job in allowing me to try the case as best I could.

On another note, I think you should know that I watched Jeff Strange, who is already a good lawyer, develop into a great trial lawyer. His opening final argument during the punishment stage was one of the best I had ever witnessed. Not only did he carry the bulk of the State's witnesses, but he did an incredible cross examination of Bo Bartlett and actually allowed the jury to know that Bo Bartlett did not hold anything against the district attorney's office in their decision in this case.

Again, I want to thank your office personnel, especially Wanda, for all the assistance during the trial. I also wanted to let you know, in my humbled opinion, what a great job both Fred and Jeff did.

Yours truly,

Randy McDonald

RAM/lm

EXHIBIT "D"

No. 42969

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

AFFIDAVIT OF NORMAN KENT WHITAKER

STATE OF TEXAS }

COUNTY OF FORT BEND }

Before me the undersigned authority, on this day personally appeared Norman Kent Whitaker, who, after being by me duly sworn, deposed on his oath and stated as follows:

My name is Norman Kent Whitaker. I am over the age of 18 and am mentally capable of making this affidavit. I am the father of Thomas Bartlett Whitaker, the Applicant in the action in which this affidavit is being filed.

I am familiar with the facts and circumstances of the case of Thomas Bartlett Whitaker, as I employed counsel for my son and maintained close contact with all of the attorneys who worked on his case. I first met Dan Cogdell, an attorney who initially represented Thomas, when Dan was a young man, as he was a friend of the Bartletts, my wife's family. My wife and I employed him to represent Thomas following Thomas' arrest for burglary prior to his senior year in high school. When the murders occurred in this case, I turned to him once again. I made it clear to Mr. Cogdell that I would spare no expense to save Thomas from the death penalty and am convinced that he knew and understood that instruction. I did not know or understand that Mr. Cogdell would withdraw from the case if the Bartlett family desired him to do so. Following Thomas' return from Mexico, Dan decided to withdraw given his prior relationship with the Bartlett family. He provided me with a list of attorneys' names and I hired Randy McDonald from that list.

I believed that Thomas, due in part to his history and the evaluations done on him in the past, and due to the facts of the case as they developed, had to be evaluated for psychological problems as there was surely something which had caused him to act in this brutal fashion. I had expressed these thoughts to Mr. Cogdell, and based upon his suggestion Dr. Brown was selected to see Thomas. Nothing came of it as Dr. Brown, due to jail restrictions, was kept from a full evaluation. When Mr. McDonald was hired, I renewed my thoughts, requesting that Mr. McDonald have my son evaluated by a mental health professional as

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

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

Notary, State of Texas

LAURIE C. DAWSON
My Commission Expires
May 31, 2011

EXHIBIT "E"

CAUSE NO. 42,969 HC1

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

AFFIDAVIT OF RANDY MCDONALD

My name is Randy McDonald. I am over the age of eighteen years and have personal knowledge of the facts stated herein.

I have been licensed to practice law in the State of Texas since May 1979 and I am currently, and have always been, in good standing. I am Board Certified in Criminal Law and have been since 1985, being re-certified every five years. I am approved for appointment to represent indigent defendants in capital cases in the Second Administrative District, both first and second chair.

I have been ordered by Judge Vacek to reply to the Writ filed by Thomas Bartlett Whitaker, hereinafter referred to as Bart Whitaker.

I did in fact represent Bart Whitaker at his trial in 2007 in the 400th Judicial Court of Fort Bend County, Texas.

Some time in April or May, 2006, I became aware that the Fort Bend County District Attorney's office was going to seek the death penalty against Bart Whitaker. Dan Cogdell, a lawyer who I used to office with, had spoken to me about helping him select a jury in the event Bart Whitaker's case went to trial. At some point in time (before being retained by Kent Whitaker) negotiations between Dan Cogdell and the Fort Bend County District Attorney's office had broken down. I was called to Dan Cogdell's office to meet Kent Whitaker. It was my understanding that several other lawyers had been interviewing to assist Mr. Cogdell in representing Bart Whitaker. I met Kent Whitaker in Dan Cogdell's office and had a brief discussion with him regarding his son's case. Upon meeting Kent Whitaker, it was clear to me that he believed that his son committed the offense of capital murder and was upset about the fact that the district attorney's office was seeking the death penalty as opposed to a life sentence. Upon meeting Kent Whitaker, I asked him why he thought that his son committed the killings, and he responded that he thought Bart had done it just to see if he could. I informed Kent Whitaker that if that was the case, it would be very difficult to keep Bart Whitaker off of Death Row.

My first contract with Kent Whitaker was drawn up by Dan Cogdell and he set the fee for that. It was my understanding that my job was to make a court appearance and attempt to request that the State not seek the death penalty and obtain a Life sentence. In fact, the first court setting I went to I had a television interview. I told the interviewer that I was there to seek

justice and that justice was not the death penalty for this case. Kent Whitaker and I felt that justice would not be served if Bart received the death penalty.

I did, in fact, have several discussions with the district attorney's office and two rather lengthy meetings with District Attorney John Healey. Present at one of those meetings was Assistant District Attorneys Fred Felchman and Jeff Strange. I discussed with the district attorney's office my proposal to obtain two consecutive life sentences and even more sentences to be stacked and run consecutive if they would withdraw their request for the death penalty. It became evident in those discussions that the district attorney's office felt like if they did this for Bart Whitaker, then what would they say to the next family regarding seeking the death penalty. This case was unique in that the victim and the victim's family wanted Bart to receive a life sentence, as opposed to the death penalty. In other cases that I have handled, no victim or victim's family have ever come to the aid of a criminally accused defendant.

Part of my strategy at that time was to make the district attorney's office understand if they proceeded with a trial, it would be a long hard battle; voir dire taking up to two to three months, and the court trial to follow. I have a great deal experience in voir dire in capital cases. My first capital defense was in 1984, and because of my ability to eliminate jurors, the State offered my client life. Unfortunately, he refused and did in fact receive the death penalty. I have taught Trial Advocacy at Bates School of Law with Robert Hirshorn and we taught voir dire techniques.

The meetings with the district attorney's office were an attempted by me to convince the them that, even though the evidence was overwhelming, a death penalty sentence would not necessarily be the end result of a trial, but more importantly, the fact that the trigger man in this case, as well as the getaway driver, were going to make deals and not be subject to the death penalty. I was also aware of the fact that all of the other co-conspirators in the extraneous attempts to kill the Whitaker family by Bart, would involved no sentencing to any of those individuals as they would obtain immunity both in Fort Bend County as well as from the other counties in which they could be charged.

Part of the theme of the negotiations was to convince the district attorney's office of how unfair it was to prosecute Bart Whitaker for the death penalty when no one in victim's family wanted him to receive the death penalty. And yet, not prosecute all the other actors that were involved, that ultimately made this offense possible. This notion was firmly rejected by the district attorney's office of Fort Bend County.

It became obvious to me that we were headed to trial. I had already obtained the entire discovery, including the offense report, a number of CDs with the voices of all the co-conspirators making statements to the police. I had received all the witness statements, as well as available to me many records at the district attorney's office including the school records and many other miscellaneous records.

When it became apparent that Dan Cogdell was going to withdraw from the case, he and I drove to the location that Bart had been transferred to in Limestone County. It was Dan who told him that Dan may become a witness, and would withdraw. Personally, I believe Dan was

withdrawing because of his closeness and friendships with Bo Bartlett and his sister, the victim in this case. This fact is my opinion offended Kent Whitaker.

Even after the meeting with Bart Whitaker where Dan described that he would withdraw, his withdrawal was not forthcoming for some time. It was apparent that I was the lead attorney regarding making contact with the district attorney's office for plea negotiations.

Because the plea negotiations were not successful, I began to prepare for trial. I listened to all the taped conversations, reviewed offense reports and had many discussions with Kent Whitaker. Several times, Kent Whitaker came to my office and he described his life, childhood, marriage, his raising of Bart and what problems that Bart might have and what type of life that Bart lived. I believed that Kent was very forthcoming about all the information, and as I understood it, he did not understand how Bart had gone so wrong because he had every opportunity in the world.

Kent Whitaker was a religious person and a man of great faith. As the facts were laid out, it became clear that he had forgiven whoever the shooter was prior to discovering that it was in fact his son, Bart Whitaker. I believe that he thought that if he could forgive anybody else for this horrible crime, then he can also forgive his son. During these interviews, I had learned that Dan Cogdell had employed an investigator by the name of P.M. Clinton before charges were filed against Bart Whitaker, and, basically, no information was obtained that would be helpful to the defense of Bart Whitaker. I discussed with Kent Whitaker, the hiring of an investigator, and it was my belief that he did not believe that the hiring of P.M. Clinton had been successful and had been a waste of money. That is not to say that money was an issue in my decision making process of whether to hire an investigator because I was aware that even if Kent Whitaker could not afford to hire a private investigator, that the Court upon filing of an Ex Parte motion that Bart Whitaker was not capable of hiring an investigator, that it would have been incumbent upon Judge Vacek to appoint one for me. The decision I made not to hire an investigator was made because I did not see any useful information that an investigator could supply because the facts were so overwhelming that Bart was in fact, guilty, and this trial would be resolved in the punishment phase of the trial.

In my discussion with Kent and Bart Whitaker, I was never able to obtain any information that would make Bart Whitaker any less blame worthy of committing this offense. Nor was I able to find any mitigating evidence that would allow him to be any less blameworthy. I have read Dr. Harrison's report and do not find that the information that Bart Whitaker was delusional, homosexual and narcissistic to be something that makes him less blameworthy, but I do find it to be something that a jury could consider to make him a future threat.

The third issue in a capital murder scheme in Texas was the issue that evidence of some mental issue or abusive issue or something in the defendant's life that would cause him to be less morally blameworthy could be used. In other words, if he had a disease, mental illness, retardation, or something that would cause a jury to set aside a death penalty case because his conduct would not be his fault. Nowhere in the background with interviews of Kent Whitaker or anybody else make Bark Whitaker any less blameworthy for his conduct. He planned and

participated in three attempts and a final completion of the murder of his mother and brother. He even had himself shot to escape suspicion.

It came to my attention that Dan Cogdell had also employed Dr. Jerome Brown, a well known psychologist in the Harris County Court system as Dr. Brown used to work for the Harris County, county jail. I had a conversation with Dr. Brown once I was the lead lawyer in the case, and expressly asked Dr. Brown to not interview Bart Whitaker anymore. It was my understanding that Dr. Brown did not interview Bart to the degree that he made any statements to Dr. Brown regarding this case. I am familiar with Dr. Brown and once testified against him in a competency proceeding wherein he believed that the defendant was competent to stand trial. Based on my testimony, the jury found the defendant incompetent, rejecting his testimony. I am aware of the ABA stance on mitigating evidence, and many times when mental retardation or other psychological problems are involved making the defendant less blameworthy, I think it is appropriate to retain such experts so that the jury would have some understanding of a defendant's background. My conversations with Bart Whitaker as well as my conversations with a psychologist, Dr. O'Rourke, indicated to me that there would be no evidence of retardation or psychological testimony other than the fact that Bart had previously tested in 1997, by way of the Millon test, and the results indicated that he had an antisocial and narcissistic personality. My conversations with Bart also indicated that perhaps he had this tendency for anti-social behavior as well as the lack of empathy for the feelings of others and was somewhat, in my opinion, narcissistic. In my opinion none of these qualities would assist the jury in finding he was less blameworthy, but would assist the jury in finding that he would be a continuing threat to society.

After having a discussion with Dr. O'Rourke, who also was the psychologist for Kent Whitaker, I made the determination that I would not be pursuing the third issue in the capital murder theme of mitigation and that any testimony from a psychologist would be, not only harmful, but would allow the State to bring forth evidence attempting to show that Bart Whitaker did not have a conscious, was narcissistic, and therefore, could not be remorseful for the acts that he committed. As a trial strategy, early on, after my conversations with Bart and my understanding of the other records regarding his psychological state, I made a deliberate determination that I would not be pursuing the mitigation issue in this case, as I found no evidence of mitigation. For the record, money was not an issue; it was simply based on trial strategy, and my conversations with Kent Whitaker about Bart's background and activities as well as my understanding of the complete offense report and statements of witnesses, and my conversations with Dr. O'Rourke. This would, of course, include the records of Tarnow & Associates, Dr. Debra Stokan and Lynne Ayers. I determined that, if I could, I would prevent all this testimony from being before the trier of fact because I thought, as a matter of strategy it would be harmful to Bart Whitaker and harmful to the trial strategy that I believed I would put forth. My strategy was to show that Bart was not a future threat to society, in an attempt to have a least one juror answer the specific question regarding his future dangerousness in a negative way.

At some point in time in the Fall of 2006 it was clear that I was going to be the first chair, even though, in the event of a trial, I was still attempting to negotiate with the State a plea bargain. The fee structure that I set with Kent Whitaker had increased to approximately $100,000 based on the prior contract that Dan Cogdell drew up and the modification made by me

as the trial attorney. Throughout the preparation of the trial, I continued to discuss with Bart Whitaker as well as the district attorney's office the possible plea negotiations that we would be willing to do. Also, because I knew I would be the lead chair in the case, and a final trial fee had not been set, I attempted to find other lawyers that I thought were qualified to assist me in this trial. My fee had been set at $100,000 to be paid in two payments of $45,000 and $55,000. And that was based on the contract that Dan Cogdell had prepared. Once it was learned that I would not be second to Dan Cogdell, I did pursue two other board certified criminal lawyers, one of which I had already tried a capital murder with, but both declined to go to Fort Bend County for what would be a rather lengthy voir dire process that would take them out of their practice for up to four months. I offered both attorneys $75,000. I discussed this with Kent Whitaker and, even though I did not believe that money was an issue, I was aware of his financial state that he had been bought out for approximately $300,000 from the construction company that he had worked for many years, by Bo Bartlett. It was my understanding that the other money that I received prior to this was money that had been given to Bart as a gift from his grandmother and was Bart's money that Kent was using. I actually set a fee of $200,000 that Kent bargained down to $180,000 to which I agreed. If either of the lawyers had changed their mind about assisting me I would have paid them out of my fee. The fee was very reasonable considering the time I spent on this case and the amount of time I was in Court.

It became apparent that this case would proceed to trial and the trial date being set for the later part of January, 2007. All through the months of July, August, September, October, November and December, I was constantly preparing for trial, reviewing the massive hours of taped conversations. It seemed like everything in this case was tape recorded by the investigating officers. Also, a massive offense report (well over 1000 pages). I would daily review something in preparation for trial. However, I still had hope that if I could make jury selection hard on the district attorney's office, they would eventually accept our plea negation offer for consecutive life sentences.

In December, 2006, I received a call from Assistant District Attorney Fred Felchman indicating that Bart Whitaker had sent him a Christmas card. Felchman felt like Bart Whitaker was asking to speak with him and Bart had made some innuendo or threat to Fred's family. At first, I thought he was joking because Bart Whitaker had been instructed to not have any contact with any individuals. As far as I knew, even his conversations with his dad were no longer taking place on the phone. If they spoke on the phone they would not talk about anything to do with the case. It became apparent to me that this cemented in Felchman's mind that this case would not ever end in a plea bargain. Because of the Christmas card that Bart sent to the prosecutor (certainly, without advising me or his Dad) set the tone of the prosecution. Up until that point, I truly believed that I would be able to cause lengthy litigation to occur before a jury was selected and, ultimately, receive a plea bargain.

After the Christmas card was sent to the prosecutor by the defendant, I felt like this case was going to trial. Most voir dires I have done on previous capital cases, I had done exclusively and not allow my second chair to handle voir dire. The reason for this is that I felt like I had to speak to every perspective juror that eventually became a juror and one does not know who is going to be a juror until after talking with the potential juror and getting a feel for him/her. The allegations that I was not effective for not hiring an investigator, a mitigation expert or

psychologist, or second chair, in my opinion are not founded. Each decision I made, I made with a certain trial strategy and for reasons that were ultimately put into place at trial.

Regarding the Court staff saying I told them I was tired is absolutely correct. I told them on a daily basis that I was tired. The staff always treated me well, but I knew they were friends with the prosecutor and were not sympathetic to Bart Whitaker. My thought was that maybe the State would think I was tired and I would be able to get that one juror I was looking for. The truth is selecting a jury in these cases on a daily basis is a difficult and stressful situation, but not one that I have not gone through many times. Frankly, I enjoy the voir dire process of a capital murder more than any part of the trial. Be certain, at no time, because of my alleged fatigue was I ever unable to continue in the manner which applied to the theory of the case. Also, as part of the strategy, I never revealed that Bart would testify. I knew that Fred thought that the only way that Bart would receive a Life sentence would be if he testified. I tried to keep them off-balance as to my theory of the case that Bart was not a continuing threat to society.

Regarding the allegation that Bart was considered the second chair, it would be my statement that is not true. Clearly, during the voir dire process, I would talk to Bart regarding the prospective jurors. Mainly, I asked Bart with each perspective juror I thought I would select, if he felt like he could talk to this person. If he did not feel like he could talk to this person, we did not put this person on the jury. Several of the jurors were very religious and Bart was very helpful regarding scripture that I could cite to see how they felt about the scriptures. I probably did mention to Bart that this would be a good time to have second chair and that would only apply in the case where I was equivocating on whether or not to select a juror. The only juror that I can recall equivocating about turned out to be the foreman of the juror. It was opinion that the juror could be the type of person that would be strong whichever way he went. He was from West Texas, an EMT and a person who saved lives. He was also the only person on the juror who had previous jury experience. At this point in time, I wish that I had not selected him as a juror because I think he was in fact the one that convinced the other jurors not to vote to give Bart Whitaker life. And, yes, it is always nice to have a second opinion, but many times, when you have a trial strategy and it is not aligned with the other person's trial strategy, you can become equivocating on these jurors and not get a good feel for them and make mistakes in jury selections. One of the reasons that I had only two death penalty verdicts (one verdict being reversed and resentence to Life after a second trial) is because of my ability to select a jury.

The trial strategy in this case was to get as many jurors as we could to sympathetic to the religious beliefs and the forgiveness offered by Kent Whitaker and Bo Bartlett and their belief that Bart should not receive the death penalty. Also a part of that strategy would be to show how unfair it was for Bart Whitaker to be the only one to receive the death penalty with all the other co-defendants either receiving immunity, fifteen years, and the shooter, Life. Ultimately, I believe with the exception of the foreman, we did have a good jury to consider this case. In my discussions, whether true or untrue, with the jury after the trial, I was told that at one time, they were six/six regarding the first issue. My trial strategy was to at least have one hold out and Bart would receive a Life sentence. The theory presented at trial was that this was his one case and he had been obsessed with committing this crime until it was complete. Once the crime was complete, he offered no threat to anybody as he had no tools to convince people to commit other crimes. Ultimately, this was rejected by the jury, and they answered the first issue "yes".

Part of the trial strategy was that we wanted to appear before the jury as taking responsibility for our actions because the evidence was overwhelming in that regard. However, one of the issues the State still had to prove was that the accomplice testimony evidence had to be corroborated. Also, as a trial strategy, I wanted to hear all the bad information up front, separating the guilt/innocence stage and the punishment stage. I reasoned that if Bart Whitaker ever plead guilty, the guilty plea itself would corroborate some of the testimony and it would be unnecessary for the jury to hear about the previous attempts at the guilt/innocent stage. In other words, on a plea of guilty, the State would only offer evidence sufficient to find him guilty of the capital murder. Then at the punishment stage, bring all these witnesses to let the jury know at that point in time how many attempts Bart had made. I did not want the jury to hear that testimony at the same time I was offering testimony from the family to spare Bart's life. As a trial strategy, I did not want to plead guilty. At no time did I discuss with Bart Whitaker entering a plea of guilty, unless there would have been a specific performance of a plea bargain. However, I came upon a strategy wherein we could under Article 26.12 of the Code of Criminal Procedure, where we could simply not enter a plea and the Judge would enter a plea of not guilty for us. I reasoned that the jury would not actually hear Bart Whitaker say "not guilty". Therefore, when he did testify, which was always going to be the case, he would not have to explain why he had pleaded not guilty. During the testimony, this somewhat backfired, as the State attempted to made a big deal about Bart not taking responsibility. I do not think this had anything to do with the jury's verdict. It was a trial strategy for Bart to not ever have to say before the jury that he was "not guilty". I do know that Bart would have pleaded guilty in the event a plea bargain was offered. The strategy was meant to accomplish separation in the Trial from his bad act and the punishment evidence from his family. It is also the reason I did not cross Kent in the guilt/innocence stage. My belief is that the State called him as the fact witness to get his pleas of mercy and the fact that Bart had changed before the jury and before the jury heard of the bad acts committed by Bart.

Regarding Ken Whitaker's statement that I said Bart was as good as any second chair, I probably made that statement. It was my way of encouraging Kent about Bart's participation in the trial. One needs to remember, Bart is a very smart person, unfortunately, very manipulative. Bart does have a way of looking at people and determining how he could use their feelings and determine whether they are lying about their feeling. Bart was useful. But the question proposed to him was "is this a person that you feel like you can talk to?" In other words, is this a person you can convince that you are in fact remorseful and not a threat because this was a onetime event for you and you are deserving of a Life sentence? Other than that, and the scriptures, Bart's participation in the voir dire was somewhat limited.

Regarding statements made in the affidavits by Bart and Kent Whitaker concerning the preparation for trial, at all times, my conversations with Bart Whitaker were in preparation of his testimony. One of the problems that Bart Whitaker's testimony presented was that he was believed by the prosecution to be a very manipulative individual. In my opinion, that belief is justified. My first conversations with Bart, it appeared to me that he was attempting to manipulate me in the common scheme and method that he manipulated individuals to participate in this offense with them by simply stating what they wanted to hear. I attempted to assist Bart by playing to his strength which is brilliant memory regarding certain individuals. Most of the

discussions with Bart were not putting words in his mouth, but trying to indicate to him how he could show himself to be a person with feelings and that he was not manipulative as the State was saying. Every conversation that I had with Bart Whitaker had something to do with him being able to convey these feelings. During the voir dire process, every day at some point in time I would have more conversations regarding his testimony. Clearly, if I was asking about if you could talk to this person regarding your feelings about this offense, and would sometime select that person as a juror, would indicate that we were constantly talking about his testimony. It is true that I would never put words into his mouth because I feel like that jury would see through that as phony. Bart is who he is. The way he represents things can only be done in his way. There were many hours of conversations with Bart regarding his testimony. Unfortunately, Bart would continue his manipulative ways and would try to see how I felt about the fact that he wanted to be an assassin after fleeing to Mexico, that of the people he hated the most was his Mother as opposed to his Father. Clearly, all the evidence indicated that he hated his Father the most during the offense, and changed his mind because his father was now helping him. Other statements by Bart were manipulating and raise only posed to test me and for him to figure out if I was really involved in his case. Even before Bart's testimony at trial, I asked him if he was up to it and if he had any questions about what our theory of the case was. He always knew he would testify at trial. I did not believe that a jury would forgive him for these horrendous acts, if Bart did not ask for their forgiveness and show he had changed and accepted his Father's forgiveness as well as forgiving his Father for whatever transgressions he had felt that his Father had made. Bart believed this as well and I believed that he was up for the task of convincing the jury he had changed. Kent believed Bart had changed. One of my concerns was that the jury might look at his father's actions as further proof that Bart was still manipulating his father in order to save his life. There was a long period before Bart was arrested that his father did not believe Bart was involved despite the Police proving the obvious. I believe that Kent could only testify in his own words about how Bart had changed. As you can read from the trial testimony, it appeared that Bart was not successful in convincing the jury that he had true remorse and had in fact changed. The most telling part of the testimony was the cross-examination regarding the Christmas card that Bart had sent Fred Felchman and Bart's explanation of it. I believed that the jury believed that the card was an attempt to manipulate the prosecutor. Therefore, the jury must have believed that Bart was not remorseful nor had he changed.

Since the trial, I have seen Bart Whitaker interviewed on Oprah and he made a statement to the interviewer that he had made to me before. The statement was he looked like a normal person, but he did not have the same feelings as a normal person. Of course, there were other indications of being antisocial, as well as being without conscious or empathy for others in a narcissistic way. Any evidence of that before the trier of fact would absolutely not be mitigating in any way, and would also show that he was a future threat to society. The offering of psychological testimony would only further produce these feelings. In my opinion, Bart would have had no chance of having any issue answered in a negative way to procure the Life sentence.

The coup de gras in my representation of Bart Whitaker was the Christmas card that he sent. He did so one month before trial. I think the Christmas card made it personal for the prosecutor, such that there would never be a plea bargain and Bart was shown, once again, to be manipulative and continue to be manipulative and indicated no change.

I reasoned, as a strategy, that the only way we could overcome all the evidence as well as the Christmas card would be in Bart's own explanation of it. And to testify that we did not discuss his testimony would be a completely false statement.

Regarding the testimony of Kent Whitaker, it is true that I told him that I did not want to tell him what to say, as it would sound rehearsed. I based that statement on the fact that I had seen his statements quoted in the paper as well as heard them in my office when I was having him tell me his life story. I believed that Kent Whitaker honestly believed what he was saying and he honestly wanted the jury to spare his son's life. He also believed that God's will would be done.

Kent was called to testify by the State as their first witness. I did not question him at the guilt/innocence under the same theory that I wanted to present all of our side of the evidence at one time after the State had presented all of their most negative evidence at the guilt/innocence stage and have the two separated. Kent was the one that brought the proffer letter into evidence. The proffer letter to me was of no moment, because it was never going to be admissible and never was admissible. In fact, Bart acknowledged on cross-examination that he was not the author of the letter and the contents were not necessarily true, even though the jury did not know what the contents were. It did, however, allow us to get in our plea bargain offers to the State as well as their plea bargain with the other individuals, namely, the shooter, when they were not seeking the death penalty.

Unfortunately, when Kent Whitaker testified, it appeared to me that he was trying to appear so honest and neutral, that he did not answer the questions in a way that I anticipated he would answer, especially, regarding Kent's feelings towards the district attorney's office. His testimony appeared as if he was okay with their decision and that he understood their decision. My understanding was that we disagreed vehemently with their decision and thought they were prosecuting this case in an abusive discretion. Also, during Kent's testimony, he had always said to me that he thought Bart had changed and he had been forgiven and Bart should get a Life sentence. Kent's testimony before the jury was he couldn't tell what was in Bart's heart and Bart appeared to have change to him but that Kent did not know whether in fact Bart had changed. That testimony was less than affirming the fact that Bart, in fact, changed. Because of those answers, I limited his testimony to some degree, as I was fearful that he was going to continue the lines of being so overly fair that he was not projecting to the jury what he really, truly believed that Bart had changed and he should get the Life sentence as opposed to the death sentence because he was not a threat to anybody anymore.

When I presented Bo Bartlett as a witness, I had also discussed with him his testimony much in the same manner as I did with Kent. I basically told both to tell how they felt in front of the jury. Bo, in my estimation, did a good job of telling the jury how he (as a representative of the Bartlett family) felt. They wanted Bart's life spared. Bo Bartlett had sponsored the theory that he thought a life sentence was worse than a death sentence and that was the desire that the Bartlett family wanted in this case.

In summary, once I was retained on the case, I prepared a trial strategy in order for just one juror to believe that Bart was not a future threat. We never allowed the State to know he would testify. In fact, we indicated that Bart would not be testifying throughout voir dire. Always, Bart Whitaker was going to testify because I believed that the only way he could possible receive a Life sentence because of the horrendous crime that had been committed and the several attempts to commit the same crime in the past, would be before the jury. The only hope, in my opinion, that Bart could receive a Life sentence, was that the jury believed that after committing this crime, he was not as manipulative, he did have feelings, he did care for his father, and he was very remorseful for his conduct. That coupled with the father's plea for mercy and the forgiveness from the jury, as well as the Bartlett's family request for Life, was our complete case. Any attempt to offer the non-existing mitigating evidence or the psychological testimony, in my opinion, even to this day, would have been only harmful to Bart and helpful to the State in getting the death penalty.

In reviewing all the tactics that I applied, even at this time, I would pursue the same tactics because I do not feel there was any other alternative that would give Bart Whitaker a chance at a Life sentence. I did not feel, on a personal level, that my final argument was as good as it could have been. I, in fact, told Kent Whitaker that on the day of the argument. Not to make excuses, because I was fully prepared to make an argument, and believed that my general reputation was that I am capable of making good arguments, but I believed that the interruptions by the court reporter saying that she could not hear me, while I spoke in a soft voice to the jury, interrupted my train of thought and, sometimes I would not follow through with what I was talking about, or I would go to a different subject. I believed that the jury could hear me and the Court reporter could not hear me and some of the people in the audience could not hear me. The court room was in such a way that caused an echo when you moved from behind the lectern. I have never liked to argue behind a lectern and, therefore, I did not feel like I made the points that I felt like I should have made on my closing argument.

I have since tried a case in that same courtroom to a not guilty verdict, and my argument was always at a high tone. The problem with a capital case is when you are pleading for someone's life, it is not proper to scream at the jury. My personal feeling is that my attempts to speak to them in a soft forgiving voice would have been effective had I not been interrupted and lost my train of thought.

Once again, as far as having a second chair, it would have been nice, but most of the capital voir dires that I have done, I've done independently. Regarding the trial strategy, I really don't know of any other trial strategy that could have been forthcoming in this type of case when the evidence is so overwhelming regarding guilt/innocence and the crime is so horrific to begin with. Even though the trial was stressful with the schedule of Court voir dire of four days a week, I did not feel like I was as tired as portrayed by me to the Court staff, but in fact, was quite energized by the whole process. As a trial lawyer, I truly enjoy being in trial more than anything else. If I had it to do all over again, I still would not hire mitigation expert nor an investigator because neither one would proved valuable to any theory of the case that I could possibly come up with. In fact, I think just the opposite. If I had tried to present some mitigating evidence through psychological testimony if would have been more harmful and less likely that Bart would receive a Life sentence. I believe the difference would be to show, quite the opposite, the

fact that Bart is a manipulating psychopath and has not changed, and probably, not capable of change. That is what I believed the psychological testimony would have shown.

The only trial strategy was in fact to obtain a jury that would ultimately be forgiving and pay attention to the fact, and believe, that this was a onetime event, and since the victim's family wanted Bart to receive a life sentence, that they would answer the question that he was not a continuing threat. With the exception of the foreman of the jury, who I believed persuaded the other jurors that Bart was a continuing threat to society because he was so manipulative based on his testimony and the cross-examination regarding the Christmas card, I believed that we had a good jury. The object for the defense was just to find one juror that believed that and, until just before the verdict, I actually believed that we had been successful in doing so.

Everything that I did in this trial had a strategy and a reason and one could always second guess the strategy and reasons, but, even to this day, I believe that with all my thirty years of trial experience, I would still approach the case the same way. If I had made a better argument by connecting my thoughts, I still believe we might have been successful in obtaining a Life sentence. I still feel that the only way Bart could have received a Life sentence was if he could convince the jury that he had changed, had asked for forgiveness, that he had forgiven, and he no longer had any desires to attempt to manipulate people. Unfortunately, his testimony indicated that he was trying to manipulate the prosecutor weeks before the trial. But, I also believe that if Bart would not have testified that the jury would have been out a short period of time because of the horrendous crime that was committed and they would have imposed the death penalty.

My last comments are directed to the Writ lawyers, shortly after the trial and after their appointment, David Schulman contacted my office with a letter to retrieve my files in this case. I left my files right where they were for an entire year or longer and they never contacted me again until approximately one month before the Writ was filed. They came to my office, which I have since moved because a new person bought the building that I was working in and I moved to a different office. They only reviewed the files at that point in time and scanned them and told me I had made mistakes in the trial and wanted to know whether or not I had thought about the fact that Bart was gay or that he had an extra "Y" chromosome. I don't feel like (1) that is true as Bart denied it and, (2) I don't know what my thoughts are about Bart being gay and how that would have been effective as a mitigation tool. My personal feeling is Bart is A-sexual and sex was only a tool for him. I am not quite sure how that would fit into purposes of finding him not to be a future threat and/or less blameworthy for his crime. They suggested that there was a Dr. Harrison that was going to testify about certain things. I know Dr. Harrison as he was on my barbeque team. I know him personally and I know about his testimony. I would not have hired Dr. Harrison as my expert in this case, had I felt the need to have one. Why didn't they hire an investigator or a mitigation expert to show what I missed? If Bart has an extra "Y" chromosome, did they test him and could it be useful? The Writ lawyers had longer to prepare the Writ than I did the trial. What evidence have they produced indicating a need for an investigator and what mitigating evidence have they produced?

Ultimately, the two Writ lawyers after hiring mitigation experts (Dr. Harrison) and doing exhaustive investigations believed that Bart should have pleaded guilty to this extremely horrific crime and then agreed that he should not be executed because he has (1) delusional thinking, (2)

has multiply personalities, only created to further his narcissistic personality, (3) that he was gay or bi-sexual, and (4) finally, that because he's incapable of controlling this delusional thinking, his life should be spared. In other words, because he's mentally incapable of conforming his disturbed thinking the jury should find this to be something making him less blameworthy and it is certainly proof that he is not a future threat to society especially based on his past conduct. Realistically, I like my theory of the case better, even now.

Finally, I state under oath that I had a definite trial strategy and then carried it out. Although I personally felt that my closing argument at the punishment phase was not as good as I hoped it would be and for this, I apologize to both Kent and Bart. I do not feel that any of my trial strategies were unreasonable. I still feel, to this day, that they were the only options I had in pursuing this very horrific crime. The fact that six jurors believed, if they did, that Bart would not be a continuing threat, in spite of all the testimony that was presented, is an indication that we did pick a good jury and they were just overcome by the foreman's wishes, never to have Bart in general population and/or on the streets in his lifetime. Other than putting the foreman on the jury, I thought the jury selection went well, despite not having a second chair, and my overall performance in the case, was a specific and a continuing trial strategy, when in fact the evidence was very overwhelming and Bart Whitaker had nothing to offer as far as any evidence to make him any less blameworthy. The strategy was the only one I believed had a chance to work. Unfortunately, it did not.

Signed this 21st day of September, 2009.

RANDY MCDONALD

BEFORE ME the undersigned authority, this day personally appeared Randy McDonald and by oath stated that the facts herein stated are true and correct.

SWORN TO AND SUBSCIBED before me on this the 21st day of September, 2009.

NOTARY PUBLIC * STATE OF TEXAS

LISA MCDONALD
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
OCT. 1, 2010

FILED

2009 SEP 21 PM 12:18

CLERK DISTRICT COURT
FORT BEND CO., TX

EXHIBIT "F"

4 of 14

MCMI-II

Interpretive Report

Theodore Millon, PhD

ID Number 1234

Male

Age 17

White

Never Married

Outpatient Never Hospitalized

9/17/97

[2.0 / 1.0 / 1.0]

MCMI-II reports are normed on patients who were in the early phases of assessment or psychotherapy because of emotional discomforts or social difficulties. Respondents who do not fit this normative population or who have inappropriately taken the MCMI-II for nonclinical purposes may have distorted reports. To optimize clinical utility, the report highlights pathological characteristics and dynamics rather than strengths and positive attributes. This focus should be kept in mind by the referring clinician reading the report.

Based on theoretical inferences and probabilistic data from actuarial research, the MCMI-II report cannot be judged definitive. It must be viewed as only one facet of a comprehensive psychological assessment, and should be evaluated in conjunction with additional clinical data (e.g., current life circumstances, observed behavior, biographic history, interview responses, and information from other tests). To avoid its misconstrual or misuse, the report should be evaluated by mental health clinicians trained in recognizing the strengths and limitations of psychological test data. Given its limited data base and pathologic focus, the report should not be shown to patients or their relatives.

INTERPRETIVE CONSIDERATIONS

In addition to the preceding considerations, the interpretive narrative should be evaluated in light of the following demographic and situational factors. This 17 year old single white man currently seen professionally as an outpatient, reports his most recent problems as Antisocial Behavior and Marital or Family; difficulties appear to have taken the form of an Axis I disorder of an unspecified duration.

The response style of this patient showed no unusual test-taking attitude that would distort MCMI-II results. The Millon Clinical Multiaxial Inventory - II is designed for use with individuals at least 18 years old. Since this individual is less than 18 years old, the resulting narrative should be interpreted with caution.

Severity of Disturbance: On the basis of the test data it may be assumed that the patient is experiencing a severe mental disorder. Further professional observation and care are appropriate. The text of the following interpretive report should be evaluated with this level of severity in mind. The salience and constancy of the characteristics described may need to be modulated upward based on this level of severity.

AXIS II: PERSONALITY PATTERNS

The following pertains to those enduring and pervasive characterological traits that underlie this man's personal and interpersonal difficulties. Rather than focus on his more marked but essentially transitory symptoms, this section concentrates on his habitual, maladaptive methods of relating, behaving, thinking, and feeling.

Evidence of a moderate level of pathology exists in the overall personality structure of this man. He likely has a checkered history of disappointments in his personal and family relationships. Deficits in his social

attainments may be notable, as well as a tendency to precipitate self-defeating vicious circles. Earlier hopes may have resulted in frustrating setbacks, and efforts to achieve a consistent niche in life may have failed. Although he usually is able to function on a satisfactory ambulatory basis, he may experience periods of marked emotional, cognitive, or behavioral dysfunction.

This egocentric man has an inflated sense of self-importance combined with an intense mistrust of others. He exhibits provocative and abrasive behavior, an edgy defensiveness, an inclination to misinterpret the actions of others, and a tendency to project malicious motives onto presumed accusers or scapegoats. His arrogant pride in self-reliance, unsentimentality, and competitive values hides a deep insecurity about his self-worth and is employed to counteract past humiliation and rejection. Fearful of domination, he resists external influence and carefully watches to ensure that no one undermines his self-determination and autonomy. Deeply felt resentment is projected outward, precipitating frequent squabbles, antagonism, and personal and family difficulties. He views others as belligerent and antagonistic, thus justifying his defensive aggressiveness. His disputatious demeanor invariably provokes exasperation and animosity in relatives, friends, and coworkers.

His guiding principle is that of outwitting others, exerting power over them before they can exploit him. He believes that only alert vigilance and vigorous counteraction can obstruct the malice of others. Closeness to others, displays of weakness, and willingness to compromise are seen as fatal concessions to be avoided by acting self-assured, cool, and arrogant. He exhibits a willingness to court danger and risk harm and is generally fearless in the face of threats and punitive action. Criticism only reinforces his hostile and suspicious attitudes. Alcoholism or drug difficulties may be prominent. Failures and social irresponsibilities are typically justified by boastful arrogance and frank prevarications.

He may embellish trivial achievements despite the contradictions and occasional ridicule of others. A public posture of self-reliance, self-determination, and hard-boiled strength is displayed for fear that others might recognize his inner insecurity. He is characteristically touchy and jealous, and is inclined to brood and harbor grudges. Easily provoked, he may express sudden and unanticipated brutality. He may lose touch with reality at times, twisting and magnifying the incidental remarks of others into major insults and purposeful slanders. At other times, he may attempt to reconstruct reality to suit his unfulfilled grandiose aspirations. Increasingly, aggressive attitudes may become more a matter of fantasy than of reality, more delusional than acted out. Nevertheless, his desire to provoke fear and intimidate others is deeply felt and stems from a long-standing need to overcome his inner weaknesses and to vindicate real or imagined past injustices.

AXIS I: CLINICAL SYNDROMES

The features and dynamics of the following distinctive Axis I clinical syndromes are worthy of description and analysis. They may arise in response to external precipitants, but are likely to reflect and accentuate enduring and pervasive aspects of this man's basic personality makeup.

There is reason to believe that this man is experiencing the clinical symptoms of a delusional (paranoid) disorder (e.g., irrational jealousy, ideas of reference) and that this disorder is probably set within a broad

context of other problematic characteristics and personality pathologies. Given his dispositional background, he may exhibit periods of aggressive behaviors and uncontrollable rages. Even when these are moderated successfully by medication, an undertone of surliness and bitterness remains, inclining him to be easily inflamed and unpredictable in his responses to what he perceives as the provocations of others.

For some time, this man probably has been engaged in abusing drugs, legal or street substances or both. Irritable, negative, and hostile in mood, he employs drugs not only to help him unwind his tensions and undo his conflicts but also to serve as a statement of resentful independence from the constraints of social convention and expectation. In addition to freeing him from feelings of ambivalence toward himself and others, drugs liberate him from whatever remnants of guilt he may experience over discharging his less charitable impulses and fantasies. Such defiant and hostile acts are undergirded in part by self-destructive elements. For example, these are evident in the careless disregard he may express in regard to the consequences that drugs can create.

NOTEWORTHY RESPONSES

The following statements were answered by the patient in the direction noted in the parentheses. These items suggest specific problem areas that may deserve further inquiry on the part of the clinician.

Interpersonal Alienation

13. I have little interest in making friends. (True)
32. I protect myself from trouble by never letting people know much about me. (True)
150. I have almost no close ties with other people. (True)

Emotional Dyscontrol

26. I tend to burst out in tears or in anger for unknown reasons. (True)

Self-Destructive Potential

115. Sometimes I feel like I must do something to hurt myself or someone else. (True)

PARALLEL DSM-III-R MULTIAXIAL DIAGNOSES

Although the diagnostic criteria utilized in the MCMI-II differ somewhat from those in the DSM-III-R, there are sufficient parallels to recommend consideration of the following assignments. More definitive judgments should draw on biographic, observation, and interview data in addition to self-report inventories such as the MCMI-II.

Axis I: Clinical Syndrome

The major complaints and behaviors of the patient parallel the following Axis I diagnoses, listed in order of their clinical significance and salience.

297.10 Delusional (Paranoid) Disorder
305.90 Psychoactive Substance Abuse NOS

Axis II: Personality Disorders
A deeply ingrained and pervasive pattern of maladaptive functioning underlies the Axis I clinical syndromal picture. The following personality diagnoses represent the most salient features that characterize this patient.

301.00 Paranoid Personality Disorder
with prominent
Personality traits NOS (Sadistic Personality Disorder)
and Narcissistic Personality traits

Course: The major personality features described previously reflect long term or chronic traits that are likely to have persisted for several years prior to the present assessment.

The clinical syndromes described previously tend to be relatively transient, waxing and waning in their prominence and intensity depending on the presence of environmental stress.

Axis IV: Psychosocial Stressors Statements
In completing the MCMI-II, this individual identified the following factors that may be complicating or exacerbating their present emotional state. They are listed in order of importance as indicated by the client. This information should be viewed as a guide for further investigation by the clinician.

Authority Conflicts; Family Discord

PROGNOSTIC AND THERAPEUTIC IMPLICATIONS

It would be advisable to attend to and ameliorate this patient's current state of anxiety or hopelessness by the rapid implementation of supportive psychotherapeutic measures or targeted psychopharmacologic medications. Once the patient has been adequately stabilized, attention may be directed toward the long-term goals suggested in the following paragraphs.

This patient is unlikely to be a willing participant in therapy, most probably agreeing to therapy under the pressure of marital, vocational, or legal difficulties. He may be in trouble as a consequence of aggressive or abusive behavior on the job or as a result of incessant quarrels and brutality toward his spouse or children. Rarely does he experience guilt or accept blame for the turmoil he causes. To him, a problem always can be traced to another person's stupidity, laziness, or hostility. Even when he accepts some measure of responsibility, he may feel defiance and resentment toward the therapist for trying to point this out. He also may seek to challenge, test, bluff, and outwit the therapist.

He may seem to be spoiling for a fight, and appear to enjoy tangling with the therapist to prove his strength and test his powers. He evinces an omnipresent undertone of anger and resentment, a persistent

expectation that the therapist may be devious and hostile. Because these moods and expectancies endure, he may repeatedly distort the incidental remarks and actions of the therapist so that they appear to deprecate and vilify him. He may persist in misinterpreting what he sees and hears, magnifying minor slights into major insults and slanders. These actions demand that the therapist restrain impulses to react with disapproval and criticism. An important step in building rapport with this man is to see things from his viewpoint. Therefore, the therapist must convey a sense of trust and a willingness to develop a constructive treatment alliance. A balance of professional authority and tolerance is necessary to diminish the probability that this man will impulsively withdraw from treatment.

Among specific therapeutic techniques are drugs that may modulate both the threshold and intensity of reactivity. Such changes may minimize the frequency and depth of the patient's hostile feelings and thereby decrease some of the self-perpetuating consequences of his aggressive behavior. Less confrontive cognitive approaches may provide the patient with opportunities to vent his anger; once drained of venom, he may be led to explore his habitual feelings and attitudes, and be guided into less destructive perceptions and outlets than before. Exploratory and insight-oriented procedures are unlikely to prove beneficial unless a thorough reworking of the patient's aggressive strategies seems mandatory. Behavioral methods geared to increase restraint and control may be usefully pursued. As far as group methods are concerned, the patient may intrude and disrupt therapeutic functions. On the other hand, he may become a useful catalyst for group interaction and appear to gain more constructive social skills and attitudes.

OMITTED OR DOUBLE MARKED ITEMS

The subject did not omit or double mark any items.

End of Report

MILLON CLINICAL MULTIAXIAL INVENTORY - II

CONFIDENTIAL INFORMATION FOR PROFESSIONAL USE ONLY

ID NUMBER: 1234 Questionable Validity
PERSONALITY CODE: 6B 5 6A 8A ** 4 * 7 8B 1 2 + - " 3 ' ' // P ** - * //
SYNDROME CODE: - ** T * // PP ** - * //
DEMOGRAPHIC: 1234/ON/M/17/W/N/H11/P/AN/MA/----/--/01/----/

CATEGORY		SCORE RAW	SCORE BR	PROFILE OF BR SCORES (35 60 75 85 100)	DIAGNOSTIC SCALES
MODIFIER INDICES	X	474	85		DISCLOSURE
	Y	14	67		DESIRABILITY
	Z	7	52		DEBASEMENT
CLINICAL PERSONALITY PATTERN	1	23	66		SCHIZOID
	2	18	62		AVOIDANT
	3	13	0		DEPENDENT
	4	41	75		HISTRIONIC
	5	73	116		NARCISSISTIC
	6A	51	109		ANTISOCIAL
	6B	64	116		AGGRESSIVE/SADISTIC
	7	42	70		COMPULSIVE
	8A	43	103		PASSIVE-AGGRESSIVE
	8B	20	66		SELF-DEFEATING
SEVERE PERSONALITY PATHOLOGY	S	17	64		SCHIZOTYPAL
	C	31	67		BORDERLINE
	P	60	115		PARANOID
CLINICAL SYNDROME	A	5	37		ANXIETY DISORDER
	H	8	54		SOMATOFORM DISORDER
	N	28	56		BIPOLAR DISORDER
	D	11	29		DYSTHYMIC DISORDER
	B	16	50		ALCOHOL DEPENDENCE
	T	41	76		DRUG DEPENDENCE
SEVERE SYNDROME	SS	19	65		THOUGHT DISORDER
	CC	7	53		MAJOR DEPRESSION
	PP	30	69		DELUSIONAL DISORDER

STATE OF TEXAS:

COUNTY OF FORT BEND:

TO ANY PEACE OFFICER:

G R E E T I N G S:

YOU ARE HEREBY DIRECTED TO SERVE WITH SUBPOENA THE FOLLOWING PERSON: DR. O'ROURKE AND/OR CUSTODIAN OF RECORDS, 2825 WILCREST #520, HOUSTON, TEXAS, 77042; TO PRODUCE;

CERTIFIED COPIES OF ANY AND ALL PATIENT RECORDS, WRITINGS, NOTES, DIAGNOSIS CONCLUSIONS, INFORMATION, VISITATION SESSIONS, PERSONAL HISTORIES, FOR ANY AND/OR ALL OF THE FOLLOWING PERSONS: KEVIN WHITAKER; WHITE/MALE; DOB: 03-19-1984; TDL#: 18344452 AND PATRICIA WHITAKER; WHITE/FEMALE; DOB: 01-07-1952; TDL#: 06073819.

TO APPEAR AND TESTIFY AS A WITNESS BEFORE THE GRAND JURY OF THE 268TH DISTRICT COURT OF FORT BEND COUNTY, TEXAS ON THE 2ND FLOOR OF THE FORT BEND COUNTY COURTHOUSE, RICHMOND, TEXAS, ON **JANUARY 5, 2003 AT 9:00 A.M.** THIS SUBPOENA IS ISSUED PURSUANT TO ARTICLE 20.11 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, AS AMENDED.

YOU ARE NOT TO DISCLOSE THE EXISTENCE OF THIS DIRECTIVE. ANY SUCH DISCLOSURE COULD IMPEDE THE INVESTIGATION BEING CONDUCTED BY THE SUGAR LAND POLICE DEPARTMENT AND THEREBY INTERFERE WITH THE ENFORCEMENT OF THE LAW.

***YOU MAY COMPLY WITH THIS SUBPOENA BY PROVIDING THE AFORESAID MENTIONED INFORMATION/RECORDS TO DET. M. SLOT, SUGAR LAND POLICE DEPARTMENT, 1200 HWY. 6, SUGAR LAND, TEXAS, 77478; TELEPHONE NUBMER: 281-275-2543; FAX NUMBER: 281-275-2646.

WITNESS MY SIGNATURE THIS 29 DAY OF DECEMBER A.D., 2003.

THE HONORABLE BRADY G. ELLIOTT
JUDGE, 268TH DISTRICT COURT
FORT BEND COUNTY, TEXAS

ASSISTANT DISTRICT ATTORNEY
FORT BEND COUNTY, TEXAS

[X] RECEIVED THIS WRIT ON THE 30th DAY OF December, 2003 AND PERSONALLY SERVED THE NAMED WITNESS Kristina Schuster

[ ] RETURNED THE SAME UNSERVED BECAUSE _____

[ ] _____

PEACE OFFICER EXECUTING PROCESS

EXHIBIT "G"

27C

BROWN, NELSON, FRANK, GILES & ASSOCIATES
6565 West Loop South • Suite 600 • Houston, Texas 77401 • 713/592-8952 • Fax 713/592-9266
1543 Green Oak Place • Suite 101 • Kingwood, Texas 77339 • 281/852-3828
714 Main • Liberty, Texas 77575 • 409/336-3899 • Fax 409/336-4098
12926 Dairy Ashford • Sugar Land, Texas 77478 • 713/592-8952

December 10, 2005

Mr. Dan Cogdell
Attorney at Law
914 Preston, 2nd Floor
Houston, TX 77002

mailed
12-21-05
SM

Re: Thomas Bartlett Whitaker (DOB: 12/31/79)

Dear Mr. Cogdell:

Mr. Whitaker was seen for psychological evaluation on December 2, 2005 pursuant to your request. It is my understanding that he is presently charged with the criminal offense of capital murder and is awaiting trial. He is accused of masterminding and participating in the murder of his brother and mother and the wounding of his father. The evaluation consisted of a clinical interview together with the administration of a battery of psychological tests, including the Minnesota Multiphasic Personality Inventory-2, Sixteen Personality Factor Questionnaire, and the Mooney Problem Checklist.

Mr. Whitaker was seen for evaluation in an attorney's booth at the Fort Bend County Jail where he is presently incarcerated. Also present was Mr. Jimmy Ardoin, one of his attorneys, who remained throughout the interview. He was presented as a well groomed and well nourished, Caucasian male appropriately dressed in a standard jail uniform. He has a neatly trimmed beard and mustache. Throughout the contact with him he was pleasant, agreeable, and responsive to all evaluation requirements. Because of his high level of cooperation, it is believed that the present results accurately reflect his basic personality characteristics and current psychological functioning.

Mr. Whitaker reported that he was born in Houston and has lived in this area all of his life. He was raised by his natural parents who were still married when the incident in question occurred. He had no siblings other than the brother who was killed. His father, who was also shot during the incident, survived.

Mr. Whitaker graduated from high school in 1998, then attended Baylor University where he completed enough hours to graduate, but did not have the right types of courses to be awarded a degree. In this respect, he reported that he changed majors several times. He last attended in 2002. He reported later in the interview that, after this, he also took some courses at Sam Houston State University and perhaps completed 10 hours. His occupational history includes working as any laborer for his father's construction business and, more recently, as beverage manager at a local country club. He had been working at this

position about one year and three months when the alleged offense occurred. He denied ever being fired from any employment.

Mr. Whitaker was living in his own home at the time his family was attacked. Also living with him was a roommate who paid him rent.

Mr. Whitaker denied ever receiving professional mental health assistance himself, but did recall attending several sessions together with family members regarding his brother who suffers from ADD. He stated that he "never enjoyed it" and would never have sought counseling himself because "I had no issues." He denied ever receiving medication for a nervous or mental disorder. He described his general physical health as good and denied that he was under a physician's care for any medical condition. However, he noted that he was also shot in the left bicep during the incident in question, and that because of this he still has metal fragments in his arm as well as some restricted movement.

As far as his use of illegal chemicals, Mr. Whitaker reported that he has tried a number of them, but has never used them on a regular or frequent basis. He estimated that he has never used any street drug more than three or four times at the most. He has never injected any chemical and has not used illegally obtained prescription medication. His alcohol use was described as a social and occasional only.

Mr. Whitaker reported being arrested once in the past when he was 17 years old. He was convicted of misdemeanor theft after he and some friends stole computers from a school. He received a probated sentence which he successfully completed in two years together with community service. He denied any other arrests.

Mr. Whitaker described his early family life and development as more or less unremarkable and benign on the surface, but as producing considerable unhappiness and feelings of rejection because of the way his parents handled him, especially in comparison to his brother. Although he described them as good providers and as treating him reasonably well, he stated that they "decided I was an independent child" who did not need their attention or affection, with whom they needed to spend little time, and to whom they needed to offer little encouragement. However, he stated that his brother, who had special problems, would be praised for any minor accomplishment ("I usually made straight As, but they only complimented me occasionally. My brother or would make C and they would throw a party.") He went on to complain that "they seemed to deny me as a person... I finally got the picture and I moved on... I stopped seeing them as parents and more as jailers." At the same time to there was not open friction between him and his parents because "I never did anything that required their attention." He denied that he was ever molested, mistreated, or abused by anyone while growing up. He also denied any episodes of violence, mental illness, drug abuse, or police arrests in the family constellation. He stated that

his parents maintained a stable relationship with no separations, adding sarcastically "that would have offended the neighbors." When questioned about this, he stated that his mother was especially concerned about her image in the community, which he believed made her a hypocrite or a phony. He described his father as a "nebbish" who would do anything his mother wanted. He stated that he "never saw much to her" as he was growing up.

In school, Mr. Whitaker was an excellent student who eventually decided to attend Baylor University because he received an honors scholarship there. He denied any disciplinary difficulties, and specifically denied ever being expelled or suspended. In his mid-teens, however, he admitted stealing money and jewelry from neighborhood homes on several occasions, mainly as a "cheap thrill" more than anything else. He denied any problems with bed-wetting, cruelty to animals, or fire-setting. He was involved in some flights with peers, but no more than others. He has never maintained a collection of weapons.

Mr. Whitaker did not deny his guilt with regard to masterminding the attack upon his family resulting in the death of his brother and mother. He could not recall when he first started thinking of doing something like this, but does remember thinking about it "as a theoretical idea" while still in high school. He recalled these fantasies coming up when "I wanted them off my back." In this respect, he reported that they would bother him about coming home when he stayed out late or other minor parenting concerns to which he believed they were not entitled because they had been so uninvolved previously. These ideas continued to blossom throughout his time at Baylor University, an experienced he "hated" because of the "hypocrisy... everybody's fake there." The first couple of years he attended, he earned a 3.4 GPA, but this dropped the last two years because "I stop caring... I became totally numb." He then began to fantasize about earning a living as a drug dealer and living in Mexico, which led him to believe he no longer needed an education. He finally left school "because I got sick of it." During this time he talked about his fantasies of killing his family with a friend who then told police. However, no one believed he was serious and nothing came of it. The fantasies about becoming a drug dealer in Mexico gave him a certain degree of purpose and direction which he otherwise would not have had, and led to his taking the courses at Sam Houston State University because he thought that they might help him accomplish this.

The plan that led to be attack on his parents came together in a more concrete fashion after he met two employees working under him who "had no future... I could give them a future they would never have by themselves." He stated that he began to manipulate them by making their work difficult so they would desire even more a way out. Eventually he was able to impress them enough and they became dependent enough upon him to share his plans and become more specific about what he wanted them to do. He stated that he did not want to hire professionals or something similar because he felt he should be doing it himself. He admitted, however, that the actual incident was executed very poorly,

including the survival of his father. He then stated that "I wasn't as smart as I thought I was."

Roughly six months after the incident, Mr. Whitaker realized that the police were going to discover who committed the crime. He fled to Mexico and stayed there about one year and two months. The first three months he was essentially isolated on a ranch near Monterey during which he had some extremely difficult experiences he had never encountered before. These included intense feelings of guilt, violent nightmares, and a growing realization that "I had completely wasted my life." On December 28, he tried to shoot himself with a pistol, actually pulling the trigger several times, but the weapon did not fire because it was defective. He then began to believe that somehow his life might have purpose, and began to believe that there was "a possibility of God." He left the ranch and found work as a furniture builder's assistant in a small town. He no longer had interest in material things such as nice clothes, but instead enjoyed the simple life he was living at the time. He stated that he found a few friends whom he had no interest in manipulating or using. He was discovered and arrested when he attempted to obtain false identification papers (September 2005).

Mr. Whitaker stated that his father, in spite of what he has done, has continued to be supportive and encouraging. He believes that his father has become a "serious Christian" and consequently, has forgiven him. He stated that he also wants to find God because "I do want to feel cold... I don't want to be a sociopath... I don't know how to progress from where I am."

Estimates of intellectual ability place this individual in the superior range. He also demonstrates the expected level of cognitive flexibility given his/her intellectual capacity. Individuals obtaining these scores are usually able to profit from past experiences and can utilize a counseling process to make constructive behavioral and attitudinal changes.

When given an opportunity to endorse a variety of psychological difficulties, Mr. Whitaker revealed problems with self-esteem, family conflicts, emotional turmoil, and confusion about the direction he wants his life to take and the kind of person he wants to be. More specifically, he believes that he is not smart enough, does not do anything well, feels inferior, and feels that he is a failure. He is bothered by thoughts of suicide and is unhappy too much of the time. He feels misunderstood by his family and not trusted. He feels no one cares for him and that sometimes life is hardly worthwhile. He has a troubled or guilty conscience, and gives too much in to temptation. He also reported that he is sometimes dishonest, lies without meaning to and is too self-centered. He summarized his problems by stating "I don't feel my personality is consistent.... I guess I just don't feel very concrete any more."

The psychological test results reveal high levels of emotional disturbance and intensely felt psychological conflict. He is seriously depressed and is having

trouble controlling ideas and thoughts that he experiences as alien and disturbing. He is endorsing many items suggestive of serious psychopathology. He harbors intense feelings of inferiority and insecurity, and feels guilty about perceived failures. At the same time, he is suspicious and distrustful others and avoids emotional ties. In spite of his claims that he is adept at manipulating others, he is actually deficient in social skills and is quite limited in his ability to generate positive relationships. Although he is capable of relating to others at a superficial level,, he is uncomfortable with deeper feelings, keeping others at a safe distance in order to avoid exposing his vulnerability and insecurity. He views the world as a threatening and rejecting place, and responds by withdrawing or striking out in anger as a defense against being hurt. He has trouble accepting responsibility for his own behavior, and rationalizes excessively, blaming his difficulties on other people.

From a longer-term point of view, this young man has always been out of touch with his feelings and confused about what he wants. It is likely that his family members were always perplexed by his moodiness and unreliability. What he describes as excitement-seeking behavior has actually served as a diversion from depressed feelings and chronic insecurity. His protective mechanisms do not allow him to seek advice from others. Instead, he prefers to make his own decisions even though he does not have the wisdom or experience for these decisions to be effective.

In summary, this is a troubled and confused young man who struggles with deep-seated feelings of inferiority and inadequacy. He has never lived up to his potential because he decided at an early age that he must protect himself against any exposure to hurt and rejection by developing a façade of cynicism and pseudo-independence. He convinced himself that he could become a manipulator and could use his intelligence and superficial social skills to control others and circumvent the rules to his own needs. To protect himself in this fashion came at a high price, for he never developed the relationship with his family, especially his parents, that he actually desired, and instead pushed them away with increasing anger and disappointment that they were unable to see or to provide for him what he really needed at an emotional level. As he became more isolated and detached from the world, his plans and ideas became increasingly unreal, fantastic, and peculiar. His violent actions against his family are the culmination of this pathological process, an acting-out of rage against them that had been building for years, while at the same time also serving as a desperate, bizarre plea for the attention he desired but never received. These dynamics and the psychological reasons for this offense do not make it the typical murder-robbery that would qualify for a capital murder prosecution. In this case, the primary motivation was passion rather than profit.

Mitigating against further serious violations of the law for this young man include the absence of previous felony convictions, the absence of any arrests since becoming an adult, voluntary avoidance of street drugs, the remorse for his

actions, his religious searching, his rejection of anti-social attitudes, and the renewed efforts at establishing a meaningful relationship with his father.

I hope this information is a value to you in working with this interesting client. Please do not hesitate to contact me if there are any questions.

Sincerely,

Jerome B. Brown, Ph.D.
Clinical Psychologist

EXHIBIT "H"

Kit W. Harrison, Ph.D.
& Associates
Neuropsychology
Forensic Psychology

Clinical Psychology Center
510 Bering Drive, Suite 200
Houston, Texas 77057

(713) 961-1112 (713) 961-5202 FAX

March 30, 2009

Mr. David A. Schulman
P.O Box 783
Austin, Texas 78767

STRICTLY CONFIDENTIAL

Re: Thomas Bart Whitaker; Criminal Trial Cause No. 42,969; The State of Texas vs. Thomas Bartlett Whitaker; In the District Court of Fort Bend County, Texas 400th Judicial District; Summary of Findings of Forensic Psychological Examination.

Dear Mr. Schulman:

This is a brief summary of the findings arising out of my review of the documents provided, including my forensic evaluation of defendant as noted. Mr. Whitaker had asked for my opinion, if possible, as to why the murders occurred and this encapsulates my response to him and addresses each of the 17 mitigating circumstances I had addressed with counsel at our lunch meeting. Mr. Kent Whitaker and Thomas Whitaker executed releases authorizing this information to be forwarded to you, but I do not have such a release yet to forward the information to other co-counsel or to other entities. Please obtain additional authorization from the patient and Mr. Whitaker before re-releasing this information in that I have not reviewed all of these findings with either of them.

Thomas Whitaker is a 29 year old male who was evaluated January 9, 2009 while housed at the Texas Dept. of Criminal Justice Polunsky facility in Livingston, Texas. He received a clinical interview of approximately 4 hours, mental status examination, and a battery of neuropsychological testing consisting of the Wechsler Adult Intelligence Scale-Third Ed. (WAIS-III), Eye-Hand Dominance Test, Finger to Nose Test, Boston Dyspraxia Test, Speech Rating Scales, Reitan Aphasia Screening Test, Trails A & B, Motor Programming, Motor Inhibition, Stroop Color-Word Test, Rey's 15-Item Memory Test, Timed Sustained Attention Test (TSAT), Seashore Rhythm Test, Bender Gestalt, Validity Indicator Profile, Rorschach Test, Thematic Apperception Test (TAT), projective drawings, and the Millon Clinical Multiaxial Inventory 3rd Ed. (MCMI-III). Testing took approximately 3 hours to complete. The following is a summary of findings from the evaluation. His father, Mr. Kent Whitaker, was interviewed on November 14,

2008 for approximately 3 hours with a telephone .5 hour follow-up interview on February 23, 2009. His former fiancé was interviewed for two hours on February 11, 2009.

There were many remarkable findings relative to the forensic history and evaluation of this young man. Most prominent in the clinical picture was a tormented irrational self-concept and personal self-identity dating back to early childhood. Likely demonstrating early manifestations of social impairments most resembling several features suggestive of early Asperger's Disorder, Thomas was bright intellectually but absorbed in excessive reading (hyperlexia) and had very thin boundaries between fantasy and reality, a problem which exists to this day. He would assume the identities of fictional characters in elementary school, many of them dark misfits, a persona which rang resonant with his emerging social anxieties and adjustment problems. He had trouble with eye-to-eye gaze, hypersensitivity to tactile stimulation and was uncomfortable with reciprocal expressions and affection. Laughter was often inappropriate. His childhood prominently lacked an inner identity of an integrated, competent, and loved child. Thomas had the unusual and restricted range of interests which accompanies aspects of the autism spectrum, and was primarily subjectively out of social context, but also objectively out of context with family and peers. He was drawn to a rich inner fantasy world and became increasingly feminine in his interests, speech, and behavior when he was 6 or 7 years old he had a romantic interest in a male peer and one day kissed him in secret. In the meantime, Thomas perceived that he resided in an affluent and image-oriented family and community—he simply did not fit into an upscale suburban polo-shirt community, he said. His father would put a spray of dollar bills on his bedroom door so that if he talked like a boy that day he would get one dollar. There was intolerable pressure, both internally and externally, to be something he was not.

Thomas' younger brother, Kevin, was macho, athletic, seemed to strive to entire mainstream school life but academics and intellectualism were a struggle for him. Thomas resented his brother for many reasons, but his brother was a boy in all ways, and Thomas liked to read. He liked to shop, primp, and was very socially anxious, but was sarcastic, negativistic, and angry at the same time. Engaging in intense social comparison, Thomas realized he could act like his brother, act the way his parents wanted him to be, and that he could experience a dual life.

Another reason Kevin was not like him was because there had been an increasingly deepening fracture in the nuclear and extended family between the Whitaker side of the family (father) and the mother's side of the family, the Bartletts. Thomas was acutely aware of open conflict and acrimony of long duration between his father and his mother's parents, in all aspects of life. Dualism became a family trait as underlying resentments and polarization of family identity culminated in Thomas witnessing his parents investing more and more time and money in concealing family issues. As the first born and oldest offspring to that family feud, much of the psychological angst became infused and internalized in him. Even his birth name was a vain attempt to achieve continuity and unity between the two families, he believed. Thomas Bartlett Whitaker---even his name

was a lie, he concluded. He so hated that he was also a Bartlett inside and shared his mother's and brother's genetic curse, much more like a Whitaker (his father) in many ways, and so much unlike his brother and mother (Bartletts), that he lacked any ability to nullify the conflict, make peace with his inner self, or rationalize or intellectualize the problem away. Thomas became increasingly enthralled with the delusional idea that if you became someone else, acted like someone else, he could achieve inner fulfillment and self-acceptance. Disavowing his Bartlett genes, he began informing peers in high school that he was adopted. Increasingly out of touch with reality, paranoid, and delusional he began informing closer friends that he was in training for military intelligence operations and was in training for a unique government program which identified gifted children for training as a spy. He starting having ideas of reference that he would never be free to be himself in the Sugarland, Texas as a Bartlett or a Whitaker in an expanding culture of narcissism. He began hating his brother, mother, and to a lesser degree, his father. Father seemed oblivious to his deepening feelings of alienation, psychotic thinking, and oppositional behavior. Conformity to the family image was the only important value left in his family, he perceived. No one really understood him at that time in high school. He dated a few girls, including a love interest, Lynne Brace, in high school who personally observed Thomas' decline in functioning. Affectionate and romantic at first, Thomas attended to her needs while simultaneously experiencing grandiose and delusional thinking. She loved him and thought he could provide a future, both financially and emotionally. Thomas' mother did not like Lynne because she was not feminine enough, was not socialite material, and did not like to wear make up. She was not a prom queen.

After high school he became more reclusive, bizarre, and reckless. He started affiliating with unusually dark misfits, "computer nerds, and weird people." She evidenced an increasing relegation to the social fringes accompanied by frank lying and latent interests in homosexual relationships, she stated. She confronted him about cheating on her with both men and women. He had a certain charisma about him which attracted men and women, she said. Thomas noted that while taking methamphetamine he felt more competent and socially adept. Thomas' sexual performance significantly declined as he was increasingly involved with various male roommates in college and afterwards, culminating in erectile dysfunction. As Thomas became increasingly disorganized within, his parents provided more of the unearned trappings of wealth: A condominium on Lake Conroe, expensive cars, and a Rolex for "graduation" from Sam Houston State University, which was a also ruse, on the night of the killings.

One persona was superficially appropriate and the other dark, confused, and conflicted. Never realizing such could ever work for him, he experienced increasing inner turmoil and upheaval, self-loathing, and increasingly desperate attempts to appear normal. In the meantime he experienced increasing paranoia fearing the ridicule, hating the perceived rejection he encountered at every life's turn.

In college Thomas made "segues" to party in Dallas under an alter ego, "Sebastian Cole,"

and further assumed a dual lifestyle in response to faltering adult functioning and tormenting conflicts about identity, both personal and sexual. Cole was a fictional character he had read about as a child who was a con artist and could manipulate others easily. During this period of time he was deepening a problem with substance abuse, which exacerbated his delusional thinking, which consisted of the belief that if he was never born from his family, he would have a normal and happy life. He concluded if he had not been born, or could otherwise erase his genetic past, he could at least have a chance of happiness someday. The added benefit would be that if his family was eliminated he would also inherit a lot of money. The accumulative net result of this type of thinking amounts to "autistic cleansing" of two decades of dysfunctional intrapsychic, intrafamilial, and interfamilial acrimony.

He had many discussions with his roommate at Baylor University, Justin, a later co-conspirator, about eliminating his family for psychological and economic benefits. During this time a romantic issue emerged in the relationship with Justin which caused some panic and distress for Thomas around the time of the murders. There were later allegations that Thomas was possibly in a sexual liaison with a male roommate at Lake Conroe. The other man was the shooter, Chris Brashear. His fiancé confronted Thomas about this after she saw significant changes in his behavior and intimate relations with her.

There is ample evidence that insurmountable and intra-punitive personality dynamics became psychotically projected onto his family of origin. Thomas' finance described the home as compulsive, unloving, and lacking nurturance, and was instead focused on external trappings. She reported after Thomas had burglarized the school, Ms. Whitaker refused to grocery shop in the entire Sugarland region out of humiliation.

Additionally, with regard to problem-solving and executive functioning, Thomas demonstrates many problems, both social and psychological, associated with being affiliated with third-generation wealth.

Although Thomas had many of the benefits of a rather homogeneous suburban community during the formative years, the lack of many aspects of an urban environment with its relatively widely diverse cultural and socioeconomic demographics contributed to his perception of a ubiquitous culture of narcissism. Thus, he lacked outlets to alternative demographics which may have diffused many of his early social and psychosexual problems and provided a greater inner cohesion, reducing subjective panic.

The public school system had many opportunities to identify Thomas as an at-risk child and assemble a special educational program, or alternative services under Sec. 504 of the Texas Education Agency (TEA), to address his insidious social and defiant attitudes and behaviors. A psychological evaluation conducted by the school would have revealed many of his emerging issues with delusional content of thought and diminishing coping. Instead, the school system expelled Thomas absent an assessment of his needs,

potentially depriving him of his rights to a free and appropriate public education.

While attempting in vain to keep Thomas in Clements High School, the parents engaged the services of a psychologist who evaluated him and his needs. A psychological test of Thomas, performed by a retained psychologist on September 17, 1997, revealed "this man is experiencing the clinical symptoms of a delusional (paranoid) disorder." The report narrative discussed the benefits of medication which would "modulate the threshold and intensity of reactivity." Thomas never received any benefit from antipsychotic medications which are well known for their efficacy in managing such symptoms. The doctor testified at the time of trial that the test was designed for adults and Thomas was 17 years of age at the time, thus the validity was questionable. In my opinion, the test had typical accuracy for which the test is well-known and describes with uncanny detail, Thomas' state of mind at that time. Had the school performed appropriate testing they would have likely found the same details or they already knew of his problems and failed to address them with any number of appropriate eligibilities for services, such as "student with an emotional disturbance," or any other number of eligibilities. Instead, he got no diagnostic help or treatment. It is public policy to identify at-risk children as early in the educational process as possible.

Although there was much concern for Kevin and his history of attention-deficits, including a thorough treatment program through the Tarnow Center in Houston, Texas, the psychotic brother escaped scrutiny, perhaps because he got good grades in school. That Thomas attended a more strict religious educational program at Fort Bend Baptist Academy was like jumping from the pot into the fire for him psychosocially, encountering a tighter spectrum of oppressive and non-responsive culture there than he had experienced at Clements High School.

Thomas sustained two closed head injuries, one in 1999 with no loss of consciousness and the other in 1995 while playing sports with loss of consciousness. There is a poverty of information about what impact these mild brain injuries had on Thomas, although there is no significant evidence of organic impairment on present testing. He had peripheral nerve damage on the left arm due to an injury while working out in the prison. He was otherwise reported to be in good health.

Formal Diagnostic Impressions

AXIS I	Delusional Disorder, Mixed Type Mood Disorder NOS
AXIS II	Personality Disorder NOS With Paranoid, Narcissistic, and Antisocial Features

AXIS III	Peripheral Neuropathy (Traumatic) Serial Concussion-TBI
AXIS IV	Problems with Primary Support, Incarceration Medical and Psychiatric Oversight; R/O Educational Neglect
AXIS V	Global Assessment of Functioning (GAF) Current 40 Past Year 35 Offense 25

Thomas is in his 29th year of life demonstrating a psychotic disorder and has yet to obtain appropriate medical management. Treatment is immediately indicated with a combination of antipsychotic medication and mood elevators as recommended by his psychiatric physician. That these murders were motivated solely by greed is not supported whatsoever.

Individual and group psychotherapy would be the indicated treatment for psychological manifestations of the diagnosis in order to achieve integration of core self-identity and reversal of distorted reality and chronic thinking errors.

This information is of the type that a jury typically requires and relies upon while opining on punishment phase after a violent crime.

If you have any questions concerning this narrative please do not hesitate to ask. Thank you for allowing me the opportunity to participate in this interesting review.

Sincerely,

Kit W Harrison

Kit W. Harrison, Ph.D.

GROUP EXHIBIT "I"

STATE OF TEXAS:

COUNTY OF FORT BEND:

TO ANY PEACE OFFICER:

G R E E T I N G S:

YOU ARE HEREBY DIRECTED TO SERVE WITH SUBPOENA THE FOLLOWING PERSON: DR. O'ROURKE AND/OR CUSTODIAN OF RECORDS, 2825 WILCREST #520, HOUSTON, TEXAS, 77042; TO PRODUCE;

CERTIFIED COPIES OF ANY AND ALL PATIENT RECORDS, WRITINGS, NOTES, DIAGNOSIS CONCLUSIONS, INFORMATION, VISITATION SESSIONS, PERSONAL HISTORIES, FOR ANY AND/OR ALL OF THE FOLLOWING PERSONS: KEVIN WHITAKER; WHITE/MALE; DOB: 03-19-1984; TDL#: 18344452 AND PATRICIA WHITAKER; WHITE/FEMALE; DOB: 01-07-1952; TDL#: 06073819.

TO APPEAR AND TESTIFY AS A WITNESS BEFORE THE GRAND JURY OF THE 268TH DISTRICT COURT OF FORT BEND COUNTY, TEXAS ON THE 2ND FLOOR OF THE FORT BEND COUNTY COURTHOUSE, RICHMOND, TEXAS, ON **JANUARY 5, 2003 AT 9:00 A.M.** THIS SUBPOENA IS ISSUED PURSUANT TO ARTICLE 20.11 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, AS AMENDED.

YOU ARE NOT TO DISCLOSE THE EXISTENCE OF THIS DIRECTIVE. ANY SUCH DISCLOSURE COULD IMPEDE THE INVESTIGATION BEING CONDUCTED BY THE SUGAR LAND POLICE DEPARTMENT AND THEREBY INTERFERE WITH THE ENFORCEMENT OF THE LAW.

***YOU MAY COMPLY WITH THIS SUBPOENA BY PROVIDING THE AFORESAID MENTIONED INFORMATION/RECORDS TO DET. M. SLOT, SUGAR LAND POLICE DEPARTMENT, 1200 HWY. 6, SUGAR LAND, TEXAS, 77478; TELEPHONE NUBMER: 281-275-2543; FAX NUMBER: 281-275-2646.

WITNESS MY SIGNATURE THIS 29 DAY OF DECEMBER A.D., 2003.

THE HONORABLE BRADY G. ELLIOTT
JUDGE, 268TH DISTRICT COURT
FORT BEND COUNTY, TEXAS

ASSISTANT DISTRICT ATTORNEY
FORT BEND COUNTY, TEXAS

[X] RECEIVED THIS WRIT ON THE 30th DAY OF December, 2003 AND
[X] PERSONALLY SERVED THE NAMED WITNESS Kristina Schuster
[ ] RETURNED THE SAME UNSERVED BECAUSE _____.

[ ] _____

PEACE OFFICER EXECUTING PROCESS

THE STATE OF TEXAS IN THE DISTRICT COURT

V. FORT BEND COUNTY, TEXAS

_____ 268th JUDICIAL DISTRICT

AFFIDAVIT

Before me, the undersigned authority, personally appeared BRENDAN O'ROURKE, PHD, who being by me duly sworn, deposed as follows:

My name is BRENDAN O'ROURKE, PHD. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of records of BRENDAN O'ROURKE, PHD. Attached hereto are 118 pages of records from PATRICIA WHITAKER (48 pages) AND KEVEN WHITAKER (70 pages)

These said 118 pages of records are kept by BRENDAN O'ROURKE, PHD in the regular course of business, and it was the regular course of business of BRENDAN O'ROURKE, PHD _____ for an employee or representative of BRENDAN O'ROURKE, PHD _____, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

Brendan O'Rourke PhD
AFFIANT

SWORN TO SUBSCRIBED before me on the 5th day of JANUARY, ~~2003.~~ 2004

My Commission Expires:

MARSHALL SLOT
MY COMMISSION EXPIRES
November 4, 2007

NOTARY PUBLIC

12/21/06 2:10 pm
requesting details
(Jodi Hanks)

SUBPOENA

THE STATE OF TEXAS
VS
THOMAS BARTLETT WHIT.

Jab 12

CAUSE NO. 42,969

TO ANY PEACE OFFICER OF THE STATE OF THE TEXAS, OR ANY
YEARS OLD AND NOT A PARTICIPANT IN THE PROCEEDINGS - GI

You are hereby commanded to summon

DR. BRENDON O'ROURKE PH.D.
2825 WILCREST, STE. 520
HOUSTON, TX 77042

to be and personally appear February 12, 2007 at , before the Honorable 400TH District Court of Fort Bend County, Texas to be held within and for said County at the courthouse thereof, in Richmond, Texas, to testify and speak the truth on behalf of the State in the above styled and numbered cause, now pending in said Court, and to remain there from day to day, and from term to term, until discharged by said Court. The above named witness is further commanded to produce at said time and place above the following books, papers, documents or other tangible things:

PLEASE BRING ALL RECORDS RELATING TO THE DIAGNOSIS AND TREATMENT OF PATIENT, THOMAS BARTLETT WHITAKER, D.O.B. 12/31/79.

Herein Fail Not, and make due return, showing how you have executed the same.

Please contact JEFF STRANGE (281) 341-3781 of the District Attorney's Office, upon receipt of this subpoena.

NOTICE TO OUT OF COUNTY WITNESSES: "A DISOBEDIENCE OF THIS SUBPOENA IS PUNISHABLE BY A FINE NOT EXCEEDING FIVE HUNDRED DOLLARS TO BE COLLECTED AS FINES AND COST IN OTHER CRIMINAL CASES."

Witness my official signature at Richmond, on November 9, 2006.

DISTRICT CLERK GLORY HOPKINS

EXHIBIT "J"

Cause No. 42969

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

AFFIDAVIT OF JEFFREY THOMAS STRANGE

STATE OF TEXAS §
§
COUNTY OF FORT BEND §

BEFORE ME, The undersigned authority, on this day personally appeared Jeffrey Thomas Strange, who, after being by me duly sworn, deposed on his oath and stated as follows:

My name is Jeffrey Thomas Strange. I am over 18 years of age and am mentally capable of making this affidavit. I am an attorney licensed in the State of Texas to practice law since May 4, 1990. My bar number is 19355650. I have been board certified in Criminal Law since 2000 and have been employed as an Assistant District Attorney in Harris, Cameron and currently, Fort Bend Counties. I have been counsel in over 200 criminal jury trials.

I am one of the prosecutors, along with First Assistant District Attorney Fred Felcman, assigned to prosecute Thomas Bartlett (Bart) Whitaker. My involvement with the case began approximately January 2005 when I began assisting Sugar Land Police with their investigative efforts.

Obviously, the Court will have to make its own conclusions regarding defense counsel Randy McDonald's effectiveness. However, I would like to state that I have known Randy McDonald since 1990 when I started practicing law. I know him to also be board certified in criminal law. My impressions of Mr. McDonald are that he has always been a highly competent attorney and that his reputation in the local legal community is that he is a highly competent criminal attorney. Nothing about my experience with Mr. McDonald during the time we spent resolving the Whitaker case has changed my opinion of him.

Reading Mr. Cogdell's affidavit surprised me in several regards. It was my understanding that when Mr. Cogdell felt it necessary to withdraw as Bart Whitaker's attorney, Mr. McDonald was retained by the Whitaker family on his recommendation. I do not remember whether I learned this from a conversation with Mr. McDonald or Kent Whitaker but I do remember the conversation.

I was the prosecutor assigned to work with Mr. McDonald during the discovery process before jury selection. Mr. McDonald was provided either digital or hard copies of the following: the entire Sugar Land Police Department's offense report regarding the murders including all supplements, all photographs taken by law enforcement officers, all witness statements, recorded or written, all video taken by law enforcement agents, and copies of all lab reports. There were a number of third party consent calls conducted by Sugar Land Police between cooperating witness Adam Hipp and Thomas Bartlett Whitaker. Mr. McDonald was provided copies of these recordings. The state obtained an order to tap the cellular phones of Co-defendants Chris Brashear and Steven Champagne, Mr. McDonald was provided copies of all intercepted conversations. Mr. McDonald was provided copies of Thomas Bartlett Whitaker's counseling records with Lynn Ayers and Psychiatrist Dr. Brendan O'Rourke who performed the Million Multi-Axial Clinical Inventory Test on Mr. Whitaker in 1997 following his arrest for burglary of a building. If my memory also serves me correctly Mr. McDonald was also provided photocopies of Thomas Bartlett Whitaker's prior burglary case reports in which he was ultimately placed on deferred adjudication.

Due to the massive nature of the police investigation copies of a number of documents and records were kept in approximately 8 three ring binders. Many documents contained therein were irrelevant to the prosecution of the case; for example, the victim Kevin Whitaker's school records etc. Mr. McDonald was provided unlimited access to these materials and visited our office and spent time reading them on several occasions. I requested that Mr. McDonald paperclip any document he deemed helpful so I could provide him a copy. I remember Mr. McDonald had me copy some of the documents for him however I do not remember exactly what I copied and provided Mr. McDonald.

Several weeks before the trial of the case I went to the Sugar Land Police Department and checked out all of the physical evidence collected in the case as well as the evidence log sheets generated by S.L.P.D. Mr. McDonald, on a couple of occasions, met me in our conference room, wearing rubber gloves, to observe and inspect all physical evidence collected. Occasionally Mr. McDonald had relevant questions regarding the chain of custody or testing of evidence. I remember on a couple of occasions having to get back with Mr. McDonald after visiting with police or a lab tech to accurately answer a question he had. Mr. McDonald further met with the lead detectives, Marshall Slot and Billy Baugh and had the opportunity to ask questions to clear up any issues unresolved by the offense reports. I short, Mr. McDonald had duplicates or access to all of the information that Fred and I had available to us. In my presence Mr. McDonald was diligent in his discovery efforts. The questions he asked me indicated a full grasp of the evidence confronting Mr. Whitaker and at no time did I consider Mr. McDonald unprepared to represent Mr. Whitaker.

During a pre-trial conversation with witness Rudy Rios I was informed that while hiding in Mexico Bart Whitaker had assisted Mexican police when a small stream flooded, possibly saving a life. As this was a death penalty case this was deemed relevant mitigating evidence and thus was provided to Mr. McDonald immediately. Due to the

difficulty of corroborating this evidence and the obviously difficulty to produce any such witnesses for court I put this information before the jury during Mr. Rios' direct examination during the guilt/innocence stage of the trial. Though this information was later determined to be untrue, it was deemed appropriate to put before the jury because of the context of the case and the consequences, and the favorable working relationship we had developed with Mr. McDonald.

I would next like to address the allegations of prosecutorial misconduct alleged in the Petitioner's Application. I was not present during the conversation that Mr. Felcman, Mr. Cogdell, and Mr. Ardoin apparently had at a Best Buy store. I could not imagine any circumstance where Mr. Felcman would have committed the office to a position without discussing it with the elected District Attorney, John Healey and myself who was co-counsel at the time of the conversations. I participated in two formal meetings with Mr. Cogdell that included the District Attorney; Mr. Felcman was present for only one of the meetings I believe. At no time was anything represented to Mr. Cogdell in my presence. The meetings were simply an opportunity to hear Mr. Cogdell's position and answer any questions that he may have.

At no time was a plea offer of life imprisonment seriously discussed in my presence with Mr. Cogdell nor do I know of any such discussions. Mr. Cogdell's position simply was the death penalty was inappropriate because of the wishes of the Whitaker and Bartlett families. At no time was there any discussions of Bart Whitaker's mental health issues nor, more importantly, did Mr. Cogdell ever represent that Bart Whitaker would ever accept a life sentence on a capital murder charge. After meeting with Mr. Cogdell and speaking with Fred about his contacts with Dan we came to the conclusion that Mr. Cogdell was attempting to get us to take the death penalty "off the table" so he could then start negotiating for a period of years on a possible murder plea.

We also met with Kent Whitaker and Bo Bartlett on at least a couple of occasions before we ultimately decided to seek the death penalty. Mr. Bartlett clearly had no love lost for Bart Whitaker. He stated that he did not want us to seek the death penalty to avoid the pain it would put his family through and the embarrassment a trial would bring. Kent Whitaker spent a lot of time telling us how Bart had truly changed while in was in Mexico and incarcerated in the Fort Bend County Jail. As we were aware of Bart Whitaker's history of chameleon-like manipulation, and his controlling relationship with his father we were obviously skeptical.

From the time Bart Whitaker was arrested in Mexico we felt he posed a potential danger to his father, Kent Whitaker, and his co-defendants, Steven Champagne, and Chris Brashear. Additionally, we discussed the possibility that Bart Whitaker would attempt to have someone recently released from jail harm Fred or myself.

Fred Felcman never discussed obtaining a "proffer of evidence" in my presence until he was given the document by defense counsel. Fred repeatedly stated to Mr. Cogdell during our discussions that he would like to see some sign that Bart Whitaker had changed or showed some legitimate, genuine remorse. This was based on our

conversations with Kent Whitaker. During one conversation I remember Fred stating that if he (Bart Whitaker) felt so bad about his crime he would have confessed or words to that effect. I believe this is where the proffer of evidence came from. I remember when Fred told me about receiving the proffer of evidence that he was somewhat surprised as he did not expect it coming. I did not expect it either.

Reading the proffer it was clear that it had been prepared by Mr. Cogdell's office and did not reflect the words of Bart Whitaker. It appeared they drafted it to make us feel sorry for him. I understand that no competent attorney would have their client prepare a document that could be used as evidence in a death penalty case. The fact the document proffered no real information is evidence that defense counsel had no expectation that the "proffer" was dispositive of anything.

Dan Cogdell has always been honorable in my dealings with him and I know him to be a first-rate attorney. I believe he came into our negotiations believing Fred Felcman and myself were less sophisticated than the prosecutors he regularly works with in Harris County, where his practice is located. At no time did he ever suggest that his client would plead to Capital Murder in exchange for a life sentence. I believe the proffer of evidence was his attempt to "finesse" Fred's legitimate concerns about his client and possibility that he posed a future danger. We fully understood that Mr. Cogdell was just doing his job protecting and representing his client in a capital murder case where the death penalty was being seriously considered. The document had no evidentiary value nor did it influence our decision to seek or not seek the death penalty

After we announced our decision to seek the death penalty Mr. McDonald met with Mr. Felcman, Mr. Healey, and myself and told us that Bart Whitaker would plead guilty to Capital Murder in exchange for a life sentence. This was the first time that anyone told us that Bart Whitaker would plead to anything. We subsequently visited with Kent Whitaker and Bo Bartlett to again discuss the issue and consider their points of view but obviously did not change our minds.

The decision to seek the death penalty against Bart Whitaker was made by the District Attorney, John Healey, as the law requires. John invited and considered Fred and my positions. We also thoroughly discussed what we anticipated the evidence would show at trial. After a couple days of discussion John told us he wanted to sleep on it and informed us the next day that he thought is was appropriate to seek death. The proffer of evidence was never a serious topic of discussion, if it was mentioned at all. If anything, Mr. McDonald's straightforwardness bought his client some good will that made our decision to seek death more difficult.

There was nothing inappropriately considered in our decision to seek the death penalty against Bart Whitaker. The decision was thoughtfully made after a careful discussion of the facts of the case and appropriate equitable considerations. The wishes of the Bartlett and Whitaker families were discussed and thoughtfully considered. We thought we had a strong guilt/innocence case and that we could in good faith prove the three relevant special issues beyond a reasonable doubt.

Briefly addressing the Petitioner's allegations that Mr. McDonald was ineffective in failing to present a mitigation defense based upon Mr. Whitaker's alleged mental health issues. In short, as a matter of trial strategy, this is exactly what we wanted him to do. We had access to reports prepared by Dr. Brenden O'Rourke and Lynn Ayers that had been provided to us by the Sugar Land Police Department. Obviously both reports had not been prepared in anticipation of capital litigation and both reports bolstered our position that Bart Whitaker posed a future danger. Dr. O'Rourke performed the afore-mentioned Million Multi-Axial Clinical Inventory Test on Whitaker which we attempted to introduce in evidence before the jury as evidence of his future danger. As the record indicates Mr. McDonald was able to suppress its introduction.

Had Mr. McDonald attempted to introduce evidence of Bart Whitaker's mental condition we would of course, had our own expert evaluate Whitaker for use in our rebuttal case during the punishment phase. The submitted petition is rife with speculation about what the results of an evaluation would have been. It is also my belief that a litigant can find an expert witness to provide evidence under Rule 702 that will come up with any conclusion the litigant wants them to reach. However, there is no reason to conclude that subsequent appropriate evaluations would have revealed a different result that the conclusions reached by Ms. Ayers and Dr. O'Rourke.

In my professional opinion spending the juries time listening to experts discuss Whitaker's mental condition would have weakened the effect of one of the victims and the brother of another victim pleading for Whitaker's life. Paid expert witnesses as the Court is aware are a mixed bag. If the expert's testimony before the jury strained credibility it is likely that the person who paid for the testimony, Kent Whitaker, also would have lost credibility.

In this case, in this jurisdiction, Mr. McDonald's trial strategy was not unreasonable. Both Kent Whitaker and Bo Bartlett are likeable decent men whom the jury related to. They had logical, articulable reasons why Bart Whitaker should not be executed. As this is a very religion oriented community and Kent Whitaker's story of forgiveness and redemption made the jury's decision heartbreaking, most had tears in their eyes when they returned to the courtroom to deliver their verdict. Attempting to mitigate Bart Whitaker's conduct with retained, "pop psychology" would have lessened that effect.

I would also like to briefly address the claims that Mr. McDonald's trial strategy was inconsistent or somehow defective. As all parties stipulate, our guilt/innocence case was strong if not overwhelming. Mr. McDonald, in a pre-trial motion, had attempted to keep us from introducing evidence of two prior unsuccessful murder conspiracies in which Bart Whitaker had plotted to kill his family. As the plots were essential the same as the plan of the successful 2003 murders, Judge Vacek properly allowed to present such evidence before the jury.

Most of the evidence presented to the jury regarding the prior plots was through the testimony of Adam Hipp, Will Anthony, and Justin Peters. However, all three had participated in the plots and testified only under the promise of immunity from prosecution. Additionally, our main witness to Bart Whitaker's involvement in the successful murder plot was Steven Champagne who also testified under an agreed plea that included his cooperation as a condition. As all of these witnesses were accomplices, under Texas law their testimony needed to be corroborated with some evidence that directly linked Bart Whitaker's involvement in the murders.

Mr. McDonald's trial strategy was clearly to make a legal argument that the accomplice testimony was not sufficiently corroborated to sustain a conviction. Mr. McDonald basically had three choices. To contest our entire case, to plead guilty to the jury then let them decide punishment or to make the legal argument that he did.

Mr. McDonald's strategy allowed him to develop testimony without questioning the veracity of police officers and other witnesses the jury would relate to. Mr. McDonald also had the opportunity to develop the culpability of the accomplice witnesses to make the equity argument he ultimately made during the punishment phase. The State of Texas gave three witnesses immunity on potential charges of conspiracy to commit capital murder and a 15-year agreed sentence to a party to the offense who was guilty of capital murder. All of this was necessary to secure their cooperation in the prosecution of Bart Whitaker. In my professional opinion Mr. McDonald's strategy was reasonable and obvious under the circumstances. A reading of my punishment final argument clearly shows my efforts to preemptively deal with the issue before Randy had a chance to make his argument.

Respectfully submitted,

Jeff Strange

SWORN TO A SUBSCRIBED before me on this the 21st day of MAY 2009.

YOLIE L. GARCIA
Notary Public, State of Texas
Commission Expires 03-27-2011

Yolie L. Garcia
Notary public, State of Texas

EXHIBIT "J.1"

STATEMENT PROFFERED PURSUANT TO RULE 408 OF THE TEXAS RULES OF EVIDENCE AND IS EXPRESSLY EXCLUDED FROM ADMISSIBILTY OR REFERENCE AT ANY TRIAL, PUNISHMENT HEARING, APPEAL OR OTHER ADJUDICATIVE PROCESS

Mr. Fred Felchman
Fort Bend County District Attorney's Office
Travis Building, 2nd Floor
301 Jackson Street
Richmond, TX 77469

January 5, 2006

Dear Mr. Felchman:

I am writing you now to give you the full details of the events that led up to the incident on the night of December 10, 2003. I never felt loved by my parents while I was growing up. Consequently, an anger and hatred towards them that I cannot explain began to build inside of me. Whether those feelings were justified or not is an issue that I have had to deal with and confront ever since that night. I am in counseling now to try and understand "why" I caused this to happen.

The first time I ever attempted to act on these feelings was in 2001 while I was in school at Baylor University. I enlisted the help of two if my friends, Justin Peters and Adam Hipp, in an attempt to murder my father. I enlisted Adam to be the shooter and Justin to be the driver. Justin had stolen a car and was driving it to Houston when he decided not to go through with the plans. After this failed attempt I thought my feelings towards my parents would change. However, they only grew worse.

Eventually I moved to Conroe and began working at the Bentwater Country Club. It was at the country club that I met Chris Brashear and Steven Champagne. Both of

them worked under me at Bentwater. Chris and I started working at Bentwater about the same time. Steven on the other hand was someone that I hired to work for me at the country club. The three of us suffered from a general displeasure for life. Their displeasure helped to feed my feelings towards my parents.

I wanted them to help me but I needed to know that I could trust them. I would put them through little tests to see if they were up to the task. I would send them on raids to steal certain items from the country club and I would lead them on raids through the country club. Each time was a test to see if they were up to the task. I offered them something they could not attain on their own, freedom. The promise of money was all they needed to become part of the plot

Then in June of 2003 I began to discuss with them the possibility of killing my family and the money we could get from doing it. I started planning how we would accomplish the task. I took them on dry runs that involved planning getaway routes out of my parents' neighborhood and various practices on where our abort points would be if something went wrong along the way. These dry runs were usually two to three weeks apart. No one ever had any guns during any of the dry runs. The dry runs never involved going in the house. We would occasionally drive by the house but it was only to plan any necessary escape routes out of the neighborhood.

On December 10 we took one of Steven's mom's cars, a Honda Accord. Steven drove the Accord while Chris and I drove my Yukon. Late that afternoon we went to a parking garage in the Woodlands to steal license plates to put on the Accord. After changing the plates we then headed down Interstate 45 to Highway 59 out to Sugar Land. We arrived in Sugar Land at about 6:15 p.m. Steven went into a holding pattern, driving

around the neighborhood. Chris meanwhile stayed in the Yukon in front of the house where I parked it.

My family and I then went to eat dinner at Pappadeaux's. Steven followed and parked in the rear of the Harley Davidson dealership that was next door to the restaurant. Once we were inside the restaurant Steven called Chris to give the "all clear" command. Chris then gathered his black clothes, got out of the Yukon and entered the house using the spare key and disarming the alarm. I went to the restroom to call Steven who confirmed that Chris was in the house and that he had not aborted our plan.

Chris was going through the house to make it look as though someone had robbed the house. He then went up to my brother's gun safe and got a pistol that would eventually become the murder weapon. It was designed to look like Chris had taken a high priced pistol that was worth stealing and then used it when he was startled by the family coming home.

I stepped outside to call my cousin to wish her a happy birthday. After I was done placing that call I called Steven to let him know we would be leaving soon. When we got back from Pappadeaux's we parked the car on the driveway. We all started walking to the house. I went to the Yukon to get a video game that I brought for my brother. The idea was that I would come in last and struggle with the intruder who shot my family. For some reason my dad had stopped to look at something in the yard, this prevented Chris from getting a good shot on him as the angle was bad by the time he entered the house. I was walking up the sidewalk when the first two shots rang out. I then started to run. After I got inside Chris and I faked a struggle and he purposely shot me in the arm

as part of our plan. Afterwards, Chris ran out the back door and through the neighbors' yard where he was picked up by Steven while I made the 911 call.

I cannot begin to try to explain how sorry I am for what I have done. What I did to my family and to the community is impossible to rationally explain. Oversimplified, there is no rational explanation. I could attempt to try and explain the changes that I have experienced since the incident, but now is not the time. When that time comes, I will do so. It is my understanding that the purpose of this letter is simply to explain what my role was and how the incident transpired. I hope that you consider it in that light and do not read the absence of a detail of my sorrow, shame, remorse and regret as anything other than a deliberate avoidance of same because of the limitations of this letter. I am willing to discuss those at any time.

Sincerely,

Bart Whitaker

GROUP EXHIBIT "K"

Mon Jan 15th
1 - 2:30p
Here

Subj: **Randy McDonald**
Date: 1/4/2007 1:44:32 PM Central Standard Time
From: kentwhitakermx@yahoo.com
To: DrORourke@aol.com

Dear Dr. O,
Randy's office number is 713.521.2585. Let me know if you have any trouble, because I have his cell phone number somewhere and I will look for it.
Kent
ps Thanks for seeing me again today!

Jan 15th
@ 1pm
Here

Lisa - gave
date/time -
paid needed to
need file #
will check w/RMD +
call back -LE

L -
please call
Dan & set up
meeting.
Here is best
tel. #

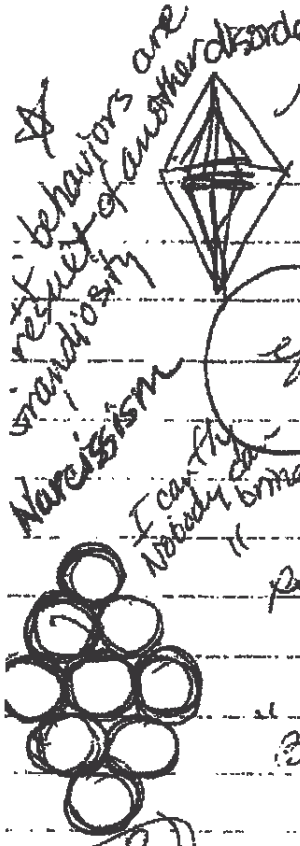
*DSM-IV Criteria for Antisocial Pers

pervasive pattern of disregard for and violation of the rights of others occurring since 15yo

3 or more:

1. failure to conform to social norms w/respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
2. deceitfulness as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
3. impulsivity or failure to plan ahead ~~and aggressiveness, as indicated by repeated physical fights or assaults~~
4. irritability and aggressiveness, as indicated by repeated physical fights or assaults
5. reckless disregard for safety or others
6. consistent irresponsibility, as indicated by repeated failure to sustain work behavior or honor financial obligations

7. lack of remorse as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another



reasons can't render opinion on test
stupidity, recklessness, grandiosity
conclusions
in a general setting

effect on Kent – if jury were to give Bart the death penalty

psychopath/sociopath" – ↓ in 40's (?)
tendency goes away

Bart's prior → tried so many X's then actually did it

difficult or impossible to predict future behav based on past behav.
[need to research this]
prison is a society – would he be dangerous

Standard Error of Measure for MCMI-III

Didn't do a future dangerous assessment

Psychopathy Checklist – 22 elements required
Doesn't meet

(20) Lots of instability — Charming (No)
(19) Impulsive — Juvenile criminal behavior
Same g.f. for so long

"equivocal data" – could go either way

Personality traits aren't stable

→ Not a forensic evaluation
only used for treatment planning

Daniel
7 Sins of Memory – Schacter

don't know what happened

"hindsight memory"
we all have a lot of errors in our thinking related to our bias

whatever your memory is, you're not going to remember in a way inconsistent with your values

- no markers" for personality disorders
- never expelled from school

I did it to help figure things out
If had been a forensic test wld

→ can be wrong upto 57% of time – computer-generated interpretations
Graham (90?)
MMPI-2

might be true now but doesn't mean true then

send $ to CCI

2/26/06 Phone consult c J. Ray Hays, PhD, JD

Questions to ask:

1. Should I meet c prosecutors?

2- How do I express that I am not an objective, expert witness?

3- What might I expect to be asked?
- he was in tx c me
- family brought him in

4. At Which points should I refuse to testify, disclose, etc.?
* don't speculate

5- What communication may I have c ~~Kadi~~ Bart's attorney?
Randy McDonald
~~is~~ treating professional - don't speculate

6. Is there "dual relatshp."?

7. Juvenile status?

8. Lawyer attend if meet c DA
c/ written permission of my client

9.

10. "on call" < let me know approx.
typically on have w/k to judge — need to make a living

his/her behavior then different reasons other - could I have predicted?

"I didn't do a dangerous assessment"

MCMI - if appropriate instrument

early a.m. late p.m.

D: tell Bart's atty Brad DA is trying to see me start

Other causes of long-standing character disturbance include Personali Change Due to a General Medical Condition, in which a medical conditic affects a patient's personality but does not qualify as a personality disord because it originates in physical disease and may not be pervasive (see Tabl 13.1). A number of Axis I conditions can distort the way a person behaves an relates to others. Such effects are especially likely in the mood disorders (se Chapter 16), the psychotic disorders (see Chapter 15), and cognitive disorder such as dementias (see Chapter 12).

PROBLEMS WITH DIAGNOSING PERSONALITY DISORDERS IN YOUNG PATIENTS

Although some authorities believe that personality disorders can be reliably diagnosed in adolescents, few make that claim for children. With the relationships among child disorders, adult disorders, and adult personality disorders still not well worked out, the study of childhood personality disorders is yet in its infancy. Several features of personality disorders limit their application to juveniles, especially young children:

- The DSM-IV criteria for personality disorders require a lifelong pattern of experiences and features. Children (especially younger children) simply haven't lived long enough to attain this standard.
- When personality disorder diagnoses are made in adolescents, they tend not to be stable.
- Changing diagnostic criteria promote uncertainty in the diagnostic process.
- In fact, as personality disorder diagnoses fall out of favor (consider the case of passive–aggressive personality disorder), even less stability in this diagnostic process can be assumed.
- Many teenagers and adults qualify for several personality disorders.
- According to DSM-IV criteria, the best-validated personality disorder, Antisocial Personality Disorder, cannot be diagnosed before the age of 18.

Consider the behavioral symptoms that constitute the attention-deficit and disruptive behavior disorders (see Chapter 11). Over the past several decades, it has been well documented that these behaviors often predict pervasive social

difficulties in later life. (These difficulties will not necessarily be severe ones, however; nor do they imply that individuals will continue to act out in an antisocial manner. In fact, fewer than half of teenagers who qualify for a diagnosis of Conduct Disorder will eventually be rediagnosed as having Antisocial Personality Disorder.) Nonetheless, it is uncommon for children with conduct problems to become adults who have no Axis I or Axis II pathology at all. It is also unusual to the point of rarity for adult personality disorders to develop from a background of normal childhood or adolescent behavior.

Considering all of these factors, we recommend avoiding specific personality disorder diagnoses for all children and for most adolescents. Rather, we prefer to use the generic criteria for personality disorders (Table 26.1), and to indicate on Axis II a level of uncertainty that avoids labeling young patients with pejorative diagnoses and biasing future clinicians' judgments about such patients.

Apart from the difficulty of making personality disorder diagnoses in young patients, these disorders offer opportunities in any patient for confusion with Axis I disorders. Consider the following:

- Histrionic Personality Disorder is found in up to half of patients with Somatization Disorder; many clinicians consider them to be nearly synonymous.
- Schizotypal Personality Disorder is often a precursor to Schizophrenia, Disorganized Type.
- Asperger's Disorder shares a number of features with Schizoid and Schizotypal Personality Disorders.
- It is often difficult to draw a line between Paranoid Personality Disorder and Delusional Disorder.
- For many patients, the line between Conduct Disorder and Antisocial Personality Disorder is crossed at the 18th birthday.
- Although they are described as different disorders, the similarities between Obsessive–Compulsive Personality Disorder and Obsessive–Compulsive Disorder are obvious.
- Social Phobia patients often have Avoidant Personality Disorder—should they therefore really be considered separately?

As if these issues weren't enough, note also that Cyclothymic Disorder used to be a personality disorder (in DSM-II); that Passive–Aggressive Personality Disorder was included in DSM-III and DSM-III-R, but has been remanded to Appendix B of DSM-IV to await further study; and that Borderline Personality Disorder, introduced in DSM-III, is so popular with some mental health professionals that other clinicians mistrust the diagnosis whenever they encounter it. Finally, many patients qualify for multiple Axis II diagnoses, while some experts in the field believe that there may ultimately turn out to be literally thousands of personality disorders!

Further Evaluation of Jim

The case of Jim (see p. 222) is that of a child who amply met the criteria for Conduct Disorder. Which, if any, Axis II diagnosis might be appropriate? Read-

EXHIBIT 'L'

UNITED STATES DISTRICT COURTS
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THOMAS BARTLETT WHITAKER,	§	
Petitioner,	§	
v.	§	**CASE NO. 4:10-MC-293**
	§	
RICK THALER, Director, Texas	§	
Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent.	§	

STATEMENT OF DR. BRENDAN O'ROURKE

My name is Brendan O'Rourke. I am a psychologist licensed to practice in the Texas with offices at 2825 Wilcrest, Houston, Texas 77042.

In 1997, I treated Thomas Bartlett Whitaker and administered the Millon Clinical Multi-axial Inventory II ("MCMI-II") test. In 2007, I testified at Thomas's trial upon being summoned by the State.

Before executing this affidavit, I reviewed the MCMI-II test results, my testimony and the handwritten notes and typed outline that I drafted before I testified. I also reviewed the affidavit of Thomas defense counsel, Randy McDonald, and the State's Proposed Findings of Fact and Conclusions of Law.

I have been asked by Thomas's current attorney to address the following issues in this statement: (i) the nature of my communication with Mr. McDonald before trial; and (ii) the accuracy of Proposed Findings numbered 32 and 40.

Proposed Finding 32 says Mr. McDonald spoke with me and indicates that Mr. McDonald "determined there was no evidence of retardation or psychological problems other than an indication that Applicant had an antisocial and narcissistic personality" based on our conversation. Proposed Finding 40 states that "Mr. McDonald determined that any testimony from a psychologist would be harmful to Applicant and allow the State to show that Applicant did not have a conscience, was narcissistic, and could not be remorseful."

I remember speaking with Mr. McDonald by telephone before my testimony. The transcript of my testimony mentions a single telephone conversation between myself and Mr. McDonald. As I recall, the conversation was brief. Mr. McDonald was concerned about the results of the Millon test. I do not recall reviewing the test results in detail with Mr. McDonald during this communication, but I believe that I cautioned Mr. McDonald that the test results for Thomas on the Millon test might be harmful.

However, I did not tell Mr. McDonald that "antisocial and narcissistic personality" were definite diagnoses in Thomas' case or that his psychological profile was confined to such traits. The diagnosis of personality disorders should not be made or else should be made with reservations in adolescents, which Thomas was when I examined him. My notes also show that I was prepared to testify that based on the information I had in 1997 a conclusion that Thomas suffered from an antisocial disorder or that he was a psychopath was *not* justified. I also noted that Thomas exhibited narcissistic traits, but I was not prepared to say he suffered from a narcissistic disorder based on my 1997 evaluation, and I would not have told Mr. McDonald otherwise.

The clinical personality pattern for Thomas on the MCMI-II showed elevated scores for narcissistic and anti-social traits. However, the MCMI-II indicated Thomas was having other psychological problems. Under the section entitled "Axis I: Clinical Syndromes" the interpretive report states that "there is reason to believe that this man is experiencing the clinical symptoms of a delusional (paranoid) disorder (e.g., irrational jealousy, ideas of reference)." The section regarding "prognostic and therapeutic implications" states that "it would be advisable to ameliorate this patient's current state of anxiety or hopelessness by the rapid implementation of supportive psychotherapeutic measures or targeted psycopharmacologic medications."

I also did not tell Mr. McDonald it would be of no use to retain a psychologist or present a defense based on a psychological evaluation, nor did I suggest to Mr. McDonald that there would be a consensus amongst psychologists that Thomas did "not have a conscience, was narcissistic, and could not be remorseful." My review of my notes shows that I bulleted the following reasons for withholding a diagnosis of an anti-social disorder or classification as a psychopath:

- No juvenile criminal acts. No markers for personality disorder.
- No setting fires or cruelty to animals
- No evidence of conduct disorder before 15 y/o
- Same girlfriend for two years with hopes of marrying someday
- Good grades and school performance
- No prior expulsions or suspensions.

Because of this social history, the inference made in proposed finding 40 that psychological testimony would invariably establish that Thomas did "not have a conscience, was narcissistic, and could not be remorseful" is not a reasonable one.

If called as a witness, I would testify to the foregoing in a court of law. I hereby swear, affirm and state that the foregoing is true and correct under penalty of perjury pursuant to Title 18 U.S.C. § 1746."

Brendan O'Rourke, PhD DATED: 4/21/11

DR. BRENDAN O'ROURKE

EXHIBIT 'M'

Diane M. Mosnik, Ph.D.
Clinical Neuropsychologist
Licensed in Texas (#3-1547) & Wisconsin (#2620-057)
TEL: 832.483.9732 EMAIL: 4dmosnik@gmail.com

Forensic Psychological / Neuropsychological Evaluation

June 20, 2011

RE: Review and evaluation of records and administration of a psychological examination for determination of psychiatric diagnoses at present and to form an opinion of his mental state and potential clinical diagnoses at and around the time of the offense.

NAME:	Mr. Thomas Bartlett Whitaker
CAUSE No.:	Criminal Trial Cause No. 42,969; *The State of Texas vs. Thomas Bartlett Whitaker;*
DATE of BIRTH:	12/31/1979
DATE of EXAM:	05/05-06/2011
DATES of REVIEW:	05/01/2011 – 06/20/2011
REFERRAL SOURCE:	Defense Atty. Mr. James Rytting

Evaluation Procedures: The following documents and records were reviewed as part of this assessment and evaluation:

1. Report from Dr. Kit W. Harrison dated March 30, 2009, and raw data and patient's file Bates numbered KH000039 – KH000115.
2. Report of Dr. Jerome B. Brown dated December 10, 2005.
3. 08-0708 Records from Dr. Brendan O'Rourke.
4. Kelsey-Seybold Clinic Records, numbered KH000266 – KH000484.
5. Emails from The Law Office of David A. Schulman, Bates numbered KH000156 – KH000167.
6. Fort Bend Baptist Academy School Records including grades and health record, Bates numbered KH000176 – KH000264.
7. Volumes 25-31 of reporter's record in Cause record 42,969, *The State of Texas vs. Thomas Bartlett Whitaker*.
8. 08-0220 Fort Bend Baptist Academy records.
9. 08-0208 Clements H.S., Fort Bend I.S.D.
10. 08-0208 Fort Bend I.S.D.
11. 09-0415 Habeas Corpus Application Exhibits.
12. 08-0131 Client Letter to Suzette Ermler.
13. 0000 Undated Suzette Ermler notes on family history.
14. Jails packets 1, 2, 3, and 4.

Psychological Evaluation. The following standardized tests were administered to Mr. Whitaker on Thursday & Friday, May 5-6, 2011:

1. Clinical Diagnostic Psychiatric Interview.

2. M-FAST clinical interview for feigned or exaggerated psychiatric symptoms.
3. Wechsler Adult Intelligence Scale-IV edition (selected subtests included information, comprehension, vocabulary, figure weights, arithmetic, symbol search & digit symbol coding).
4. Rey Auditory Verbal Learning Test form 1.
5. Rey-Osterreith Complex Figure Copy Test with immediate and delayed free recall and recognition memory.
6. Wisconsin Card Sorting Test.
7. Neuropsychological Assessment Battery NAB assessment of Attention.
8. The Awareness of Social Inference Test (TASIT) section 1.
9. Personality Assessment Inventory.

Introduction.
Mr. Thomas Bartlett Whitaker was referred for a forensic psychological evaluation by his current counsel, Mr. James Rytting, to determine the status of his mental health at the present time and, if possible, at the time of the offense in December of 2003. At the time of the evaluation, Mr. Whitaker was a 31 year old, right-handed, Caucasian male with a completed high school education and some 2-4 years worth of college credits although he did not meet the necessary requirements for obtaining any advanced degree. He is currently residing on Death Row in the Texas Department of Criminal Justice Polunsky Facility in Livingston, Texas subsequent to a conviction for the orchestration of the capital murder of his family, specifically his mother and younger brother, on December 10, 2003. Mr. Whitaker was interviewed and tested by this examiner in a small room in the Polunsky Facility in Livingston, Texas. The client's attorney was not present during the interview or assessment. Prison guards were located immediately outside of the testing room, but were not present inside the testing room. The client's wrist shackles were removed while ankle shackles remained in place so that he was able to participate fully in the testing procedures.

Prior to beginning the interview and assessment, Mr. Whitaker was advised of the procedures and the purpose of the evaluation and informed of his right to consent or refuse participation in the evaluation. He was informed that the evaluation was being conducted for the purposes of gathering information about his current mental health status and the status of his mental health at the time of the offense in order to determine whether or not he met criteria for a clinical diagnosis at the request of his current attorney, Mr. James Rytting, in order to assist with his defense. He was informed that he would not be provided with any therapy or treatment at any point during the assessment. He was informed that he could choose not to answer any questions or to terminate the evaluation at any time he so chose. Mr. Whitaker was informed that the evaluation would not be confidential and that it would be shared with his attorney, any applicable courts, and potentially other individuals involved in the legal proceedings. Mr. Whitaker agreed to participate in the clinical interview and testing procedures, and was able to state an understanding of the procedures to be completed. The in-person interview, including review of the client's history and prior records, and the administration of the testing procedures required 10 hours of direct contact with the client.

Relevant Background Information.
Mr. Thomas Whitaker is the oldest child, with one younger brother, born to Kent and Patricia Whitaker. He resided with his family in their home in the Sugarland area, the suburbs of Houston, Texas, until he went away to school after graduating from high school in 1998. He reportedly attended Highlands Elementary School from first to fifth grade, Sugarland Middle

School from sixth through eighth grade, Clements High School from ninth through eleventh grade and Fort Bend Baptist Academy for his senior year. The client reported that he was "the perfect student till high school," receiving straight A's with no disciplinary actions against him. He was reportedly sent away to attend the Baptist Academy because of his involvement in a series of thefts of computers from his high school. His mother worked as a part time teacher. Mr. Whitaker's biological father worked for his wife's family's construction business and was a member of a fundamentalist conservative Baptist Church. The client noted that while growing up they were raised and confirmed in the Methodist Church. During his senior year, he completed the SAT examinations and received a verbal score of 650 and a math score of 580, which fell at approximately the 96th percentile and between the 73-84th percentile, respectively. After graduating from high school, Mr. Whitaker attended Baylor University from 1998 – 2001 where he initially resided in the college's dormitory and then in an apartment that he rented with two other male associates he had met at college. In 2001, Mr. Whitaker reportedly transferred his credits to Sam Houston State University because, according to him, Baylor was "not the right place" for him. He stated that he purchased, with his family, a small condominium in Willis near Sam Houston where he reportedly lived while attending classes. He stated that he eventually took in a roommate because the "friend needed a place to stay." The client stated that he got a job working at a country club in the spring of 2003 and that he had been so busy over the summer that he had decided not to return to school in the fall, but to make up classes in the spring instead.

Substance Use History.

The client reported that he had his first drink of alcohol at approximately age 15-16, but noted that he didn't drink "much" compared to his friends and others with whom he was associating at the time. He stated that he didn't like to consume alcohol because he didn't like being out of control and "didn't like alcohol too much." However, he stated that when he drank, he typically drank on the weekends with friends and that he tended to drink whatever form of alcohol was available, whether it be vodka, whiskey, or tequila, although he stated that he preferred to drink Scotch, but only one glass. He stated that when he went out with friends he was often the "designated driver" and he wouldn't any consume alcohol. He stated that he did not drink alcohol and use illicit drugs together on the same night. The client reported a history of experimental use of illicit drugs including marijuana, cocaine, oxycontin, amphetamines, LSD, methamphetamine and MDMA (ecstasy). He reported that he never used heroine or injected drugs intravenously. He reported that the age at which he first used any form of illicit drug was at 17 years of age when he first used marijuana and cocaine. He stated that he used marijuana approximately 10 times in total and used cocaine approximately 50-60 times in total. He reported that he used LSD approximately three times and mushrooms one time during high school at approximately age 17. He stated that he used methamphetamine (what he referred to as "crack, meth, ice, glass, or crystal") beginning at age 18 for a total of approximately 20 times. He stated that his drug of "choice" was ecstasy which he began to use at 19 years of age and used "all the time that first two years, all weekends and events for two years—maybe about 75-100 times, it was quite a bit, by far the drug I used more than any other; I kind of lost myself on it. It was opening the door to the person I always wanted to be." He reported that he had always used drugs with friends when they were planning on doing something social and noted that he never used drugs when he was alone unless plans fell through for something that they had planned on doing.

Overall, the client's history of drug use was consistent with experimental drug use rather than a history of regular substance use. His drug use history does not meet criteria for diagnoses of

abuse or dependence for any specific drug nor does he meet criteria for diagnoses of abuse or dependence for alcohol.

Friendships and Social History.
Mr. Whitaker reported that his first "best friend" during childhood was a boy named Matt B. who moved away with his family when he was 8 years old. During the remainder of his childhood, he reported that he hung out with a group of five boys all about his same age from his neighborhood during the 1st to 5th grade when he attended the Highlands Elementary School. However, he reported that he felt he was "the odd one out in that group, believe it or not I was the 'good' boy." He stated that the group of boys did some "pretty bad stuff from time to time." He stated that he felt that their pranks were beyond the typical guy activities and were somewhat more "aggressive" than typical for boys that age. He stated that the group was known around the school for being "rowdy." For example, they would shoot golf balls, throw water balloons, and fireworks at cars, dry ice bombs to blow up mailboxes, toilet paper houses, and numerous other pranks, as well as teasing each other; however, he stated that they were not bullies to other kids. The client stated that he was the "skittish one" who absented himself from a lot of their hijinx." However, he stated that when they all entered middle school, he became ostracized from the group because he was more of a "nerd" and took "gifted and talented" classes. He stated that he "wasn't as cool" as they were in middle school, describing himself as a "ghost" in middle school, "mostly I tried to stay out of the way from them." He remained friends with one of the guys, named Matt C. (a different "Matt" than his boyhood friend), stating that "he was the only one who'd be seen with me but it cost him socially and I didn't want him to be someone he didn't want to be." The client reported that another male friend, named Lane, was his only friend during high school, apart from his girl friend, Lynn. He noted that Lane was one of his "true friends" and that they had remained in contact even in college at Sam Houston. He offered that "you could argue in my life I've only had four good, core friends. There's a wall there." Mr. Whitaker reported that he received a call one Saturday morning from his mother, informing him that his two friends had both died on the same night in unrelated events. Matt B. had reportedly been killed by a drunk driver and Lane had died from an accident where he "had slipped on ice going into his fraternity house, bled out on the sidewalk and froze before he was found." The client also noted that his other friend, Matt C., from middle school, had died the following summer in a car accident. After reporting this information to this interviewer, the client stated that when he had been previously asked by Dr. Harrison whether or not he'd ever lost touch with reality, he stated, "I think it was then [after I heard the news of their deaths] that I did." He further stated that when he heard the announcement, his girl friend, Lynn, had commented that he "went flat and never came back from that." "I think that was the catalyst, I went from being angry to numb," Mr. Whitaker said. He further commented that although he had previously already lost his religion, after their deaths he became increasingly angry. He said, "If God exists, I fucking hate Him. I didn't know where to put those feelings of anger on everyone."

The client reported that he never felt that he lacked the abilities or social skills to form friendships, but rather that he was "pushed out" of the group of friends in middle school for his beliefs as he was "an extremely religious and spiritual person" at that time. He stated that he was feeling that "the things [his] body was telling him he wanted were wrong", like "wanting to kiss a girl and smoke a cigarette." He stated that he believed those things to be a sin at that time. He stated that he felt that if he met a certain standard, school, clothing, etc..."I'd feel accepted by them and by my family. Perfection was what was required to get me there. It was a no-win situation for me so I withdrew." The client stated that he was never evaluated for or

informed that anyone thought he might have Asperger's syndrome. In contrast, he felt that he was able to blend into different social groups in high school and thereafter. As a result of feeling as though he didn't fit in or belong, he began to watch other people constantly in the hope of becoming like them and acting like them. This talent of watching people, he believed, helped him to be able to learn how to fit into any group. "I became good at analyzing people simply by paying attention, a lot of attention, and mimicking others; not consciously," he added, "just dying to please. I know I was looking for acceptance. I got to the point that I was known by a lot of people but not called on Saturday [to do things]. You know how you become part of a group, even if not fully accepted, it's better than none and what I'd had up to that point."

Dating History.
Mr. Whitaker stated that he has always had a preference for dating women and that he would not have any problem telling anyone he was homosexual if he was, but he wasn't. He stated that he thinks people may have presumed he was homosexual because of the way he dressed, stating that he had always been very fastidious in his manner of dress and personal hygiene, as well as "careful about class and brands" in order to win acceptance from his mother. He stated that he had experienced sexual dysfunction in the past but felt it had been attributable to his drug use, as "meth was a libido killer." In regards to dating, he was reportedly shy with women for a long time until 17 when he met his first "serious" girlfriend, a girl he described as being "exactly what my mother wanted me to date, totally vapid, no personality whatsoever." He then "fell in love hard" for Lynn B., whom he had always known but then started dating. She was described as the opposite of what his mother wanted him to date. She was a "kind-hearted, trustworthy, decent person." They dated throughout his time in college, from approximately age 17 to 24 when he left for Mexico. They became engaged to be married. Despite his professed love for his fiancé, he acknowledged cheating on her throughout their relationship. "I cheated on her quite a bit, girls at school, girls at work, I don't mean it to sound...whatever...but it was purely sexual relationships, precisely about the physicality of the relationship." Specifically, he reported that he had cheated on her approximately three times per year, but noted that "none of them were one-night stands, they were typically well developed sexual relationships" where they would have sex on a semi-regular schedule. He stated that he believed Lynn had not known about the infidelities, although perhaps "a couple of times expected I was." In his own defense, he stated, "I had another phone, I didn't make any of those rookie mistakes." He reported that he most often visited Lynn in Austin where she lived and kept his life in Waco separate. He further reported, "I've always done that, compartmentalized my life. I was always a slightly different person in each one of those groups. At the time, I thought I was fluid and thought I was good at doing that [fitting in]." "There was a massive difference between the person that I knew I was and the person I showed to everyone else. I was aware of it then. I was an angry, solipsistic [i.e., extreme egocentrism; that the self is the only existent thing] jerk."

Although the client personally denied a history of homosexuality to this examiner, his history does consistently support a poorly established identity and sense of self. Even the client described how he compartmentalized aspects of his identity and inner self in order to fit in with his surroundings and what he believed others in his life, i.e., his family, wanted him to be. Most notably, his long time girlfriend and then fiancé even stated in her affidavit that she had begun to be "suspicious that he might be bi-sexual or homosexual" and wondered if he was with her because she was an acceptable mate. Based on this history, it is certainly possible that the client was either not fully aware of or in denial of his own sexual identity, given the reported amount of inner turmoil he was dealing with.

Family Background.
In regards to his parents' disciplinary style, Mr. Whitaker reported that he was "switched" (i.e., hit with a switch) only one time and that his father had generally taken the stance that "if we talked to Jesus about it and repented for our sins, punishment was not considered, you needed to make amends and rehab." He also added, "I'm sure I was paddled as a child, I don't remember it." "In retrospect, punishment would have been great—let me know they cared enough to make the effort." Mr. Whitaker put forth the belief that his father's family was comprised of intellectuals while his mother's family was comprised of "blue bloods from Memorial." He stated that he believed his mother's family felt she had married down when she married his father. He remarked, "The dynamic had always been apparent to me—Whitaker versus Bartlett. I was 5 years old at my father's parents' home and I had already picked up on my family's dynamic. Dad always sucked up to the family [Bartletts]. I'm the first grandchild given the Bartlett name but looked like a Whitaker. Kevin was a Bartlett and was treated like a Bartlett." He further opined that he was never accepted by the Bartlett's and even though he was the only grandchild given a job at their construction company, he was given the "worst jobs." He stated that he was told that "whatever name was given to me, I wasn't that," reportedly implying to him that the company would not be his and that he didn't fit in there. When asked what it was like for him growing up in his household, he stated, "Because I was so observant, I knew a lot about that dynamic early on. Christmas was superficial; gifts are great, they [the Bartletts] got money, but there was no love in that family at all, but I'll admit to you [this examiner] that for a number of years wanting to be a Bartlett was always on my mind a lot." However, he also stated that wanting to live up to being called "Bartlett" didn't last as he realized the hypocrisy. He stated that he took on a pseudo-arrogance which helped to cover up how inadequate he felt. When this examiner asked 'how' inadequate he felt, he replied, "Totally. Living up to the Bartlett name and what my parents wanted me to be. Same pressure to conform to some ideal, some mold of ideal, then, if I can, I'll really be worthy."

In general, the client repeatedly stated that he felt he was living a double life, trying to be something he was not, with pressure from both sides of his family, his father and his mother, and from a religious background and religious ideals and a background of money with its own expectations. He stated that he didn't show his real self to anyone and compartmentalized his feelings. He reported that he repeatedly denied and buried his own wants and goals for his life for those of his family. He noted that on at least two occasions he had attempted broaching the subject of joining the army to his family, but was talked out of it each time by his family and his fiancé. He reported that he felt like he had no way out, that the two times he had tried to be himself and take his own road, he had "failed" and he felt like to couldn't get away from them [his family]. He stated, "I certainly had a number of delusions—just my place in the world, my nihilistic stance on what life was about. There was going to be one second there that my parents saw me, even if it was at the tip of a gun—but that's in and of itself a delusion." In describing himself, he noted that he was "one persona [that] was superficially appropriate and the other [was] dark, confused, and conflicted." He felt inner turmoil about wanting to live up to his parents' expectations and approval by society itself, but felt his "dark side" was more him, "conflicted, miserable, lonely." He stated that he had always felt lonely, even in a crowded room. Over time, he stated, "I felt like it took more and more effort for me to hold things together, the compartmentalization of my life, what I thought of myself depended on the day, and the stitches that were holding me together were fraying."

Criminal History.

Mr. Whitaker reported that he was first arrested at age 17 for stealing computers from a couple of schools over the period of one month. In discussing the arrest, he stated that he had been the one to initially steal the ring of school keys when he had discovered them unattended at his school one evening while working late on the school newspaper. He stated that he took the keys to The Home Depot and made a copy of the master key because he "thought it would come in handy." He stated that he used it [the copy of the master key] to gain access to copies of tests which he used to maintain his grade point average in school. Later, he stated, he "realized the power, control I had with it [the key]." He reported that he became friends with two older guys who were going to college and supposedly didn't have computers, so they got the idea to steal two of them from the school. The client stated, "I didn't take anything for me, it wasn't about me that time, it was for them. Then it snowballed from there. We took 10 computers from Clements and then hit two others schools and stole computers and televisions. We came in through the skylights and rappelled down, it was a grand adventure. We just put the stuff in a storage facility and never talked about selling it, then one of the guys tried to sell one to the son of a cop and he was arrested and ratted everyone else out. So, I confessed and told them where they could reclaim the computers. But the thing is I knew we were going to get caught. I made a decision, this is what I want, my parents are going to notice me. It wasn't the money, it was the act to me. It meant nothing to me fiscally. It was the anticipation of what mummy and daddy would say. One of the schools was where my mother taught and I had hoped she'd get fired over it, felt it would connect back to her someway or I figured she'd quit out of embarrassment. I had a lot of anticipation on that; I relished the look on my mother's face when they told her." In addition to the arrest for the stolen computers, he reported that he had cheated on tests in junior high and high school if he didn't think he would get an 'A' naturally. He also acknowledged underage drinking and experimental use of illicit drugs, but was never arrested or charged with any legal infractions relating to these behaviors. In addition, he reported that during the 5th grade he had burned money given to him by his father "for behaving in certain ways" which made him "extremely mad." He went on to say that when attempting to burn the money as a message to his father, he "inadvertently started the field on fire and then "I lied to the police and said I had no idea; but it wasn't intentional. My parents pretty much didn't care where I was most of the time." The client specifically denied having any recollection of ever "stealing money and jewelry from neighborhood homes on several occasions" as noted in a previous evaluation.

Despite the fact that the client engaged in a couple of isolated criminal offenses during his adolescent years, he never met diagnostic criteria for conduct disorder. Specifically, he did not exhibit a "repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules" were violated. He did not exhibit any aggression or cruelty toward people or animals, he did not engage in physical fights, and he did not bully others. In fact, when younger and he hung out with a group of male friends who were known to be pranksters, they did not engage in bullying others, but helped other kids who were being bullied by others. Moreover, he did not engage in the willful destruction of property, and never ran away from home or engaged in any serious violations of rules. By all reports, apart from the one arrest for the theft of computers, the client was a model citizen who was active in community service and achieved good grades throughout high school.

Medical and Psychiatric History.

In terms of his past medical and psychiatric history, the client denied a history of any major medical problems including heart disease, strokes or transient ischemic attacks, seizures, thyroid disease, history of infections such as hepatitis, meningitis or HIV, or diabetes. He did,

however, report that he had experienced "many concussions in [his] life; who knows how many, I was a rambunctious child." He described experiencing at least three isolated potential traumatic brain injuries. According to the client, he was playing street hockey at age 16 when he got hit "pretty hard" in the head in the region of his left temple and saw stars though he didn't pass out at the time; he stated that he vomited and passed out in the morning during his shower and suffered a headache over the next few days. He reported that he was seen by a neighbor who was a physician who checked his pupils and sent him home without sending him to the ER. A medical record (02/19/1996) documented the fact that he had suffered a mild concussion and sustained an injury to his left thumb during that incident; however, there was reportedly no evidence of any neurological deficit at that time. At the age of 19, he reported being involved in some form of illegal, "unsanctioned" karate tournament during which he "got put on the ground from a round-house kick to his orbital region," and also got hit in his right eye and was knocked unconscious for a brief period of time. He noted that he experienced vomiting and a headache afterwards, but did not go to the ER. In his own defense for apparently not going to a doctor to be evaluated, he stated, "At that point in my life, I didn't care; that pain sort of anchored me to this world. It was something real." He did not believe that he had experienced any change in his thinking abilities as a result of the injury. However, he said that since that injury, the eyelashes on his right eye grew back white. Finally, he reported that in 2004 at age 24 while in Mexico, he was attacked and beat-up by a group of 7-8 individuals and was knocked out for "a short period of time but I don't know how long" and "I was extremely disoriented for a period of time after that and was not entirely conscious." Following that episode, he reportedly had "walked around for some 20 minutes" trying to find his keys (which were in his pocket) and find his way home but he wasn't thinking clearly; he then slept the entire next day. Since that reported head injury, he has reportedly suffered from a "continual tic of the trigeminal nerve at the right temple." In addition to the reported head injuries described above, he reported a history of migraine headaches when he was younger, from age 14 to his current incarceration. He stated that he used to take Imitrex to manage the headache pain. Over the past 1 ½ years he has reportedly experienced hypertension for which he is prescribed enalapril maleate (10 mg). He also endorsed the experience of tinnitus which he feels may be the result of attending too many music concerts, raves and listening to loud music. The client did not endorse a history of any other medical problems, with the exception of describing the surgeries on his upper extremity relating to the gunshot wound he received during the offense. He continued to report pain and decreased range of motion in his shoulder and upper extremity. The client was taking no medications, apart from his antihypertensive and Prilosec for heartburn/gastric reflux, at the time of the present interview and assessment.

According to available medical records, the client participated in ten sessions of individual therapy with Dr. Brendan O'Rourke reportedly to deal with the aftermath of the arrest for stealing computers from schools as detailed above. He noted that the client had expressed remorse for his actions and had not engaged in the actions as part of a pattern of criminal misbehavior or lack of respect for others. According to the notes provided by Dr. O'Rourke, at the time he was seeing the client in therapy, he felt the client's "choice of friends and his lack of judgment brought him to a criminal act" but saw "no character disorder, no predictable, lasting pattern" that suggested he would continue to behave in that manner, i.e., criminally. He further noted that clinically, he found "no significant pathology." Dr. O'Rourke stated repeatedly that he had not make a diagnosis of antisocial personality disorder in regards to the client. Although the client reportedly endorsed some items on a psychological test suggestive of behaviors that can be consistent with a diagnosis of antisocial personality disorder if

observed in combination with the rest of the constellation of symptoms and circumstances that define the clinical personality disorder, he was not found to exhibit the full pattern of criteria for the diagnosis. Specifically, the client did not meet criteria for a diagnosis of conduct disorder prior to the age of 15 or at any other point in his adolescence. Moreover, he was 17 years of age at the time he was seeing Dr. O'Rourke in therapy, at which point a diagnosis of antisocial personality disorder could not have been made (as it needs to be made after the age of 18). Additionally, he completed psychological testing in 1997 that revealed that he was experiencing "the clinical symptoms of a delusional (paranoid) disorder."

Additional review of the client's medical records obtained, there was a record that he had completed psychological testing (01/03/2000) with an Alice M. Gates, EdD., at the request of his primary care physician, Dr. Hoyle, for an assessment of his mood and possible deficits in attention following results from his prior meetings with the client in December of 1999. Results of that evaluation indicated that he met criteria for a diagnosis of a Generalized Anxiety Disorder and also Attention-Deficit / Hyperactivity Disorder secondary to a Generalized Anxiety Disorder, inattentive type, and noted that he should be referred to his physician for medication management. Subsequently, his primary care physician wrote the client prescriptions for Adderall 10 mg and then 20 mg, as well as Zoloft for depression and anxiety. The client reported that he took the Adderall but never actually took the Zoloft medication. However, at this time, the client reported that he did not remember having his own prescription for Adderall, but instead thought that he had been using his brother's and his mother's prescriptions for the medication. The client denied ever having participated in any individual therapy for himself, but noted that he did participate in a session or two for his brother and family. The client also acknowledged that he has always had difficulty sleeping and had been previously prescribed Ambien for sleep.

Review of Records.
This examiner completed a review of the available records denoted above.

Results of testing completed on January 9, 2009, and the report generated by Dr. Kit Harrison dated March 30, 2009, were reviewed by this examiner. As part of his assessment, Dr. Harrison had the client complete an objective measure of personality and clinical mood symptoms known as the MCMI-III (01/09/2009). Results of that clinical profile indicated that the client met criteria for Axis I diagnoses of a Generalized Anxiety Disorder and Posttraumatic Stress Disorder, as well as demonstrating a depressive personality disorder, self-defeating personality disorder with schizotypal and paranoid features. The results of the clinical profile also indicated a tendency to magnify illness, an inclination to complain or be self-pitying, or feelings of extreme vulnerability associated with acute turmoil. On the basis of the test results, the client was noted to be at risk for becoming depressed and self-demeaning under even moderate levels of distress. He was noted to display disappointment in a chronically unhappy and pessimistic way. His clinical presentation was characterized by a pervasive apprehensiveness, intense and variable moods, prolonged periods of dejection and self-deprecation, and episodes of withdrawn isolation or unpredictable anger. He indicated a longstanding expectation that others will reject or disparage him, which can precipitate profound gloom, self-sabotaging behavior, and irrational negativism. The vacillation in his mood was exhibited between desires for affection, self-destructive acts, fear, and a general numbness of feeling. Despite his apparent longing for acceptance by others, he maintains a safe distance from close psychological involvements, and while retreating defensively, may become engaged in impulsive and self-defeating behaviors. Behind his front of restraint are

intense contrary feelings that occasionally surface as impulsive and angry outbursts toward those he feels have been unsupportive, critical, and disapproving. Although often disconsolate, aimlessly drifting in peripheral social roles, he often finds himself in troublesome situations, occasionally by behaving in an unpredictable, unstable, and edgy manner. Disappointments with others occur as he vacillates between being self-pitying, sullenly withdrawn, and explosively angry. Frequently, these behaviors are interspersed with genuine feelings of guilt and contrition that are mixed with feelings of being chronically misunderstood, unappreciated, and demeaned by others. He may provoke condemnation through persistent melancholy behavior and then accuse others of mistreating him. Having a low sense of self-worth, he may painfully contemplate his pitiful and futile state, but this tendency toward extreme introspection compounds his identity problem. The alienation he feels from others is paralleled by a feeling of self-alienation, which creates a constant undercurrent of fearfulness, sadness, and anger.

In summary, Dr. Harrison noted that the most prominent in the clinical picture was a tormented irrational self-concept and personal self-identity dating back to early childhood. He reported social anxieties and adjustment problems and raised the possibility of a diagnosis of Asperger's disorder. Dr. Harrison ultimately made the clinical diagnosis on Axis I of Delusional Disorder, mixed type, and Mood Disorder NOS, as well as an Axis II diagnosis of Personality Disorder NOS with paranoid, narcissistic, and antisocial features.

Results of the evaluation completed on December 2, 2005, by Dr. Jerome Brown in regards to the endorsement of psychological difficulties indicated problems with self-esteem, family conflicts, emotional turmoil, and confusion about the direction he wanted his life to take and the kind of person he wanted to be. He reportedly indicated that he believed he was not smart enough, did not do anything well, felt inferior, and felt he was a failure. He was bothered by thoughts of suicide and was unhappy much of the time. He felt he was misunderstood by his family and not trusted. He felt no one cared for him and that sometimes life was hardly worthwhile. He also indicated that he was dishonest, lied without meaning to and was too self-centered. The client reportedly stated, "I don't feel my personality is consistent…I guess I just don't feel very concrete any more." The psychological testing completed at the time revealed high levels of emotional disturbance and intensely felt psychological conflict. He was felt to be seriously depressed and to have trouble controlling ideas and thoughts that he experienced as alien and disturbing. He was suspicious and distrustful of others. Dr. Brown indicated that as the client became more isolated and detached from the world, his plans and ideas became increasingly unreal, fantastic, and peculiar. His violent actions against his family were felt to be the culmination of his pathological process, an acting out of rage against them that had been building for years, while at the same time fulfilling a bizarre and desperate plea for the attention he desired but never received.

Results of the MCMI-II completed on an outpatient basis on September 17, 1997, at age 17, revealed that the client was experiencing a severe mental disorder and indicated no unusual test-taking attitude that would render the evaluation invalid. The results indicated an individual with a checkered history of disappointments in his personal and family relationships, with notable deficits in his social attainments, as well as a tendency to self-defeating vicious cycles. He was described as being an egocentric man with an inflated sense of self-importance combined with an intense mistrust of others. He was noted to exhibit provocative and abrasive behavior, an edgy defensiveness, an inclination to misinterpret the actions of others, and a tendency to project malicious motives onto presumed accusers or scapegoats. His arrogant

pride in self-reliance, unsentimentality, and competitive values were felt to hide a deep insecurity about his self-worth and were employed to counteract past humiliation and rejection. Clinical syndromes evident at that time were noted to be a delusional (paranoid) disorder set within a broad context of other problematic characteristics and personality pathologies. He was also noted to exhibit periods of aggressive behaviors and uncontrollable rages. He was noted to be experiencing authority conflicts and family discord. Neither a diagnosis of conduct disorder or antisocial personality disorder was made at that time because the client did not meet criteria for the diagnosis to be made given the results of the psychological testing and his history together.

Current Clinical and Behavioral Observations.
Mr. Whitaker was accompanied to the room within the prison that was to be used for the assessment by three armed prison guards. He was shackled at the wrists and ankles and wearing standard issue prison coveralls. After being admitted to the examination room, his wrist shackles were removed, but his ankle shackles remained fastened. The door to the room was locked from the outside, where prison guards stood watch. The room was well lit from artificial lighting, barren of decoration, and contained two single chairs and a small table. This examiner and the client were seated at an angle opposite each other adjacent to the small table. A large window comprised one of the walls in the room so that the prison guards could fully observe the activity within the room. Two guards were present at this window and observed the testing procedures throughout the examination. Despite occasional distractions by the guards, the client was able to attend fairly well to the assessment procedures. The ambient temperature of the room was cold, which did contribute to some additional distraction during the assessment.

The client was awake, alert, and fully oriented to time and location. He accurately stated the current month, date and year. He was able to discuss some current events. He was also able to accurately report basic personal information, including his date of birth, age, and educational attainment, as well as information about his personal history.

He presented as a Caucasian man of medium stature, appearing approximately 5 feet 10 inches tall, and of medium build. He appeared fairly healthy in appearance and presented with intact hygiene. He appeared his stated age. He reported being right-handed and did not wear reading glasses or hearing aids. Vision and hearing appeared adequate to complete the testing procedures. His mood appeared dysphoric, as well as mildly anxious and somewhat guarded and wary, though he appeared to be trying to put forth a good face and seem fine with the situation. His affect appeared restricted in range, although this may have attributable to the nature of the situation. His facial expression was flat and there was a definite lack of affective responsiveness, although, again, this could have been, at least in part, engendered by the formal testing situation. Expressive gestures were limited and he appeared somewhat uncomfortable and exhibited little change in his body posture. His eye contact was good with no observed difficulty establishing or appropriately maintaining eye contact. However, his eyes often appeared downcast, though not averted from the examiner.

Spontaneous conversational speech was fluent, without word finding difficulty or the presence of phonemic or semantic paraphasias (incorrect substitutions of one or more sounds in a word; or the use of an incorrect but semantically related, similar word). However, he did have a tendency to be sesquipedalian, that is, given to using long or more intelligent sounding words. Unfortunately, he often erred in his use of such a word, placing a word in an inappropriate

context or giving it a different meaning. He even commented on this tendency, stating that he was working on building his vocabulary. Conversational speech was otherwise within normal limits in regards to rate, rhythm, prosody, volume, and clarity. Responses were logical and goal-directed without evidence of tangentiality, loosening of associations, derailment (slipping off one idea onto another), or loss of his train of thought. During the interview, the client demonstrated no episodes of thought blocking. There was no evidence of poverty of content of speech or poverty of speech, as his speech was meaningful and responsive.

The client was not observed to experience auditory, visual, or any other type of hallucination during any point of the interview or assessment and he did not endorse the experience of such at any point during the evaluation or at any point in his history. When asked if he had ever seen anything that he wasn't sure was really there, he described the experience of seeing a "visual aura" that he described as "sort of like a bright blue flash in the periphery" of his vision, similar to "an after-image from a bright light burned into the retina." He stated that he didn't really know how to describe it as it was a "curious thing." He noted that it was "always blue, though I don't know why." He noted that he experienced this phenomenon approximately one time per month, but less frequently than he used to. He believes it may be related to a lack of sleep. He noted that he pays attention when he gets them because he then experiences pain; notably he may be describing the experience of a visual aura associated with migraine type headaches. Following his description of the images, he stated, "I don't mean to imply that I'm having some sort of schizophrenic episode or something, I'm not seeing things, I can't identify them." He did not endorse experiencing any type of delusional belief or ideas of reference, such as being controlled by any outside force. He did not endorse or exhibit any indication of grandiose ideas or beliefs that he possessed any special powers or talents or capabilities.

The client was able to discuss the circumstances surrounding his arrest and conviction without reference to any delusional ideas or associated paranoia. He was fully aware and able to state that he was on death row for "capital murder" for the orchestration of the killing of his mother and younger brother and was able to convey the understanding that he was being punished for the crime he was found guilty of by a jury of his peers.

In regards to his motor functions, his gait was within normal limits and he ambulated unassisted. No abnormal motor movements were observed during the assessment period. On testing, he demonstrated good impulse control, but his performance was mildly perseverative and minimally inflexible. He was cooperative with all of the testing procedures and appeared motivated to perform to the best of his abilities. Insight into his own thought processes and his current legal situation appeared generally intact. He denied that he was experiencing any symptoms related to a mental illness or psychiatric disorder. He was in no way attempting to portray himself as insane, and did not exhibit or endorse any overt psychotic symptomatology. However, given that his presentation was flat, with limited facial expressiveness or expression of affect, and downcast eyes, he appeared depressed or dysthymic.

Results of Psychological Examination.
Cognitive and Personality / Mood Testing.
Results of prior intellectual testing completed by Dr. Harrison January 9, 2009, revealed an overall level of general intellectual functioning falling in the superior range, with equally well developed and consistent performances across tests of verbal and nonverbal abilities. Current testing revealed a similarly high fund of general knowledge which fell in the superior range for

his age group. However, his ability to provide definitions for vocabulary words fell in the above average range for his age and significantly below his prior superior performance. Possible explanations for this discrepancy include the use of the new version of the Wechsler Adult Intelligence Scale-4th edition compared to the previous administration of the 3rd version, as well as an apparent tendency by the client to use "big" words in his definitions and often using those words incorrectly, thus missing points on words he had previously defined correctly on prior testing. In addition, his performance on a test of the comprehension of social norms and customs fell currently in the average range compared to a previously above average performance on prior testing. Again, possible explanations for this discrepancy include the use of the new version of the Wechsler Adult Intelligence Scale-4th edition compared to the previous administration of the 3rd version, as well as the client's tendency to use "big" words in his explanations and getting side tracked on semi-related information but missing the point of the question and thus missing points on items. His performances on tests of auditory working memory for mentally completing arithmetic story problems fell in the above average range, while performances on tests of processing speed were significantly variable, with his performance on a test requiring incidental learning for the speeded transcription of symbols to digits being consistent with his performance on prior testing and falling within the above average range for his age, but his performance on a test requiring visual search for identified targets amidst foils falling in the average range and significantly below other performances. His performance on a test of novel problem-solving requiring the accurate sorting of cards when provided with only limited verbal feedback on response choices fell in the borderline impaired range and was notable for some difficulty shifting among alternate solution strategies, resulting in a mildly perseverative performance. However, he had no difficulty generating alternate sorting strategies or maintaining cognitive set once established. His performance across a variety of tasks measuring effortful concentration, working memory, and processing speed fell were variable and ranged from the average to above average range for his age, with the exception of an increased number of omission errors on a visual search task during which he adopted a very fast speed that appeared to negatively impact his accuracy and fell in the impaired range. He also demonstrated mild difficulty attending to changes in complex visual scenes (i.e., visual attention to details). In regard to his memory performance, his ability to acquire a 15-item list of semantically-unrelated words, given rehearsal, was average overall, though his initial recall following the first exposure fell in the superior range. He demonstrated a relatively flat learning curve with limited benefit over repetition trials. Immediate and delayed free recalls for the words fell in the average range compared to others his age; however, he appeared to demonstrate some mild interference from being exposed to a distractor list of words, resulting in a loss of retention of some of the words from the original recall list. Recognition memory for the words was intact. His ability to accurately copy a complex geometric design was above average for his age intact spatial organization and attention to details. Immediate and delayed incidental free recalls of the geometric design were also above average for his age, with solid retention of information over time. Recognition memory for the details of the complex design was intact. Results of The Awareness of Social Inference Test which required the client to be able to recognize basic emotions exhibited by other people in video vignettes that depicted a dynamic, realistic portrayal of emotion, incorporating nonverbal cues including facial movement, tone of voice, and gestures that accompany normal emotional displays. Analysis of the client's responses revealed an average ability to recognize the basic emotions shown by other people, including happiness, surprise, revolt, and neutral emotions; however, he demonstrated a low average ability to accurately identify the emotions of sadness and anger, and he demonstrated a mild to moderately impaired ability to accurately identify when a person was exhibiting the emotion of anxiety.

The patient completed an objective questionnaire evaluating a variety of aspects about health, mood, neurobehavioral functioning, and use of alcohol and illicit drugs (PAI). Validity indicators assessing his pattern of responses to test questions revealed that he attended appropriately to the content of test questions. However, there appeared to have been some idiosyncratic responses to particular items that could affect test results. Moreover, there were indications from validity measures that he tended to respond with some amount of defensiveness about particular personal shortcomings as well as a tendency to exaggerate certain problems. Validity indications of negative impression management revealed a pattern of endorsing items that tend to present an unfavorable impression or represent extremely bizarre and unlikely symptoms, which suggests that the overall profile may exaggerate complaints to some degree. It is also possible that these unusual endorsements were the result of confusion about what the question was asking or careless responding, which was a pattern noted in this client's responses. Clinical elevations in this range also often indicate a plea for help, or an extremely negative evaluation of oneself and one's life. Although the response pattern does not render the test results invalid, the interpretive hypotheses should be viewed with this caution in mind, i.e., that responses may over-represent the extent and degree of significant test findings in certain areas.

Despite the possibility of some exaggeration of certain problems, overall, the clinical profile indicated marked distress with a significant impact on functioning. The configuration of scales suggested a person with prominent depression and hostility. He appears to be experiencing an embittered pessimism, with many of the negative circumstances occurring in his life attributed to the shortcomings of others, and he sees little hope that he can change these circumstances. His heightened sensitivity in social interactions has led to significant withdrawal and probably serves as a formidable obstacle to the development of close relationships. Although he appears to harbor considerable anger and resentment, this anger appears as much directed at himself as it is directed at others. However, he reported that his temper is within the normal range and well-controlled without apparent difficulty.

He reported a significantly elevated level of depressive symptomatology, characterized by the affective, cognitive and physiological symptoms of depression, including being plagued by thoughts of worthlessness, hopelessness, and personal failure, as well as feelings of sadness, a loss of interest in normal activities, and a loss of pleasure in things that were previously enjoyed. In addition, he reported experiencing a disturbed sleep pattern that has been present throughout his life, as well as a decreased level of energy, decreased libido, loss of appetite, and psychomotor slowing. With respect to suicidal ideation, the patient reported experiencing intense and recurrent suicidal ideation. Moreover, he endorsed the desire to take action to end his life if certain circumstances occurred, but would not elaborate on whether or not he had an active plan or current intent to hurt or kill himself. Concerns about suicidality and increased risk for suicide are heightened by the presence of a number of features, such as situational stressors, a lack of social support, and social isolation.

The client described experiencing a level of suspiciousness and mistrust in his relations with others that is unusual even in clinical samples. Such a pattern is often associated with prominent hostility and paranoia of potentially delusional proportions. He is likely to be a hypervigilant individual who often questions and mistrusts the motives of those around him. He is extremely sensitive in his interactions with others and likely harbors strong feelings of resentment as a result of perceived slights and insults. He appears to be quick to feel that he

is being treated inequitably and often holds grudges against others, even if the perceived slight was unintentional. Consistent with the constellation of hypervigilance, suspiciousness, and resentment, he is probably seen by others as being hostile.

In addition, he endorsed experiencing a discomforting level of anxiety and tension, and appears worried to the point that he may be having difficulty concentrating. He appears to feel a great deal of tension and to have difficulty relaxing. He also endorsed the experience of overt physical signs of anxiety including trembling hands, irregular or accelerated heart rate, and shortness of breath and/or fatigue. He is likely to be a fairly rigid individual who follows his personal guidelines for conduct in an inflexible and unyielding manner. He ruminates about matters to the degree that he may experience difficulty making decisions and perceiving the larger significance of decisions that are made. Changes in routine, unexpected events, and contradictory information are likely to generate untoward distress for him. He may fear his own impulses and doubt his ability to control them. In addition, the client described the experience of a traumatic even in his past that continues to distress him and produce recurrent episodes of anxiety.

In addition to the above noted psychological symptoms, the client described a history of experimental illicit drug use and a number of antisocial character features. He has a history of antisocial behavior and manifested a conduct disorder during adolescence. In addition to his past criminal behavior, his behavior is also likely to be reckless and impulsive; he can be expected to entertain risks that are potentially dangerous to himself and to those around him. Active psychotic symptoms, such as hallucinations or delusions, are not a prominent part of his clinical picture.

A number of aspects of the client's responses suggested noteworthy peculiarities in his thinking and experience. He is likely a socially isolated individual with few interpersonal relationships that could be described as close and warm, both now and in the past. He may have limited social skills and his social isolation may help to decrease a sense of discomfort he feels in interpersonal relationships. The patient reported that he is uncertain and indecisive about many major life issues and has little sense of direction or purpose in his life, both now and in the past. Although he may view himself as active, outgoing, ambitious, and self-confident, others may perceive him as impatient and somewhat demanding.

The patient's self-concept seems to involve a generally negative self-evaluation that can vary from states of harsh self-criticism and self-doubt to periods of relative self-confidence and intact self-esteem, and will likely depend on current circumstances. During stressful times, he is prone to be more self-critical and pessimistic, dwelling on past failures and lost opportunities with considerable uncertainty and indecision about his future. Given this self-doubt, he likely blames himself for setbacks and sees any prospects for future success as dependent on the actions of others. His interpersonal style is best characterized as remote and self-centered. He is not likely to be very interested or invested in social relationships, and he may seek to take more from relationships than he gives. As a result, his relationships are likely to be pragmatic and viewed in terms of their benefit to him rather than as a source of enjoyment in themselves. He appears to be skeptical of close relationships, preferring to engage in relationships that he can control or perhaps exploit. He will likely avoid commitment in close relationships if possible. He believes that he has little or no social support to help him through difficult times in his life. He sees others as rejecting and uncaring and believes that there is hardly anyone in his environment to whom he can turn for help and this appears to be a

longstanding belief. Of note, the client appears to have a substantial interest in making changes in his life and he appears motivated for potential treatment. He acknowledges important problems and expressed a perception of a need for help in dealing with his problems, as well as a positive attitude toward his responsibility in treatment.

Although the client demonstrated a mild tendency to endorse certain problem areas, his responses were deemed valid for clinical interpretation and were not indicative of an overly exaggerated or malingered profile. There was no indication of overt malingering on cognitive or psychological tests. On formal assessment of his tendency to malinger psychiatric symptoms, his responses fell in the normal range and were not consistent with symptom feigning. His profile is more readily seen in the context of someone who has a very negative self-concept and an inclination to complain. He also has a tendency to misinterpret the actions of others and misconstrue their actions and feelings towards him.

Given these findings, the following are the possible differential DSM-IV diagnoses:
Axis I: Major Depressive Disorder, Bipolar II Disorder, Posttraumatic Stress Disorder, Generalized Anxiety Disorder
Axis II: Deferred

SUMMARY of Current Test Results and Diagnostic Impression.
In summary, Mr. Whitaker's overall level of general intellectual functioning was estimated to fall between the above average to superior range, based on current and prior testing results. His performances on cognitive testing revealed mild variability across tests assessing attention, effortful working memory, concentration, and processing speed, with performances variably falling in the moderately impaired to the above average range depending on the test. In addition, he exhibited mild difficulty with executive functioning characterized by deficits in novel problem solving with impaired mental set shifting and perseveration (i.e., repetitive responding). In regards to learning and memory, he demonstrated a relatively flat learning curve and subtle interference on a verbal list-learning task, with otherwise intact memory encoding and consolidation, and intact recognition memory for both verbal and visual information. Results of testing of his ability to accurately recognize basic emotions exhibited by others in video vignettes revealed deficits in his ability to accurately identify the emotions of sadness, anger, and anxiety.

Results of the clinical interview, in combination with the results of the objective assessment of his personality character and mood symptoms, as well as the cognitive findings revealing variability in attentional processing and deficits in executive functions as well as a flat learning curve, indicate the presence of significant symptoms of depression, including the affective, cognitive and physiological symptoms associated with a depressive episode, as well as symptoms indicative of anxiety, including primarily the cognitive and affective symptoms associated with anxiety. Overall, these results are consistent with a clinical diagnosis of an anxious depression. He would meet clinical diagnostic criteria for Major Depressive Disorder, likely recurrent given past information, with mixed mood of anxiety. He could also meet criteria for a diagnosis of Dysthymic Disorder as his depressed mood appears to be chronic in nature with episodes of worsening mood. In addition, he also meets criteria for a separate diagnosis of Generalized Anxiety Disorder, although depression appears to be the over-riding emotion currently. Although his current circumstances of incarceration on death row are very likely contributing factors to his currently depressed mood and suicidal ideation, his symptoms, by history, are more longstanding in nature rather than an acute presentation relating solely to his

current circumstances. As part of his psychological presentation, he is hypervigilant, resentful, paranoid, suspicious, and feels persecuted by those around him. He exhibits a poorly established identity and sense of self, with poorly delineated goals or life purpose and, from all reports, appears to have exhibited this lack of identity consistently throughout his life. Given this constellation of symptoms, he is at risk for suicide and it would not be unexpected for him to take some action to harm himself or attempt to end his life if certain circumstances present themselves to him, e.g., that his execution date approaches and other legal attempts to support him fail.

Given his consistent presentation over time of heightened suspiciousness, resentment, chronic beliefs that others are against him, misconstruing the intentions of others, his social detachment, history of a lack of close friends, indifference and emotional detachment, and constricted range of affect indicate the presence of features of paranoid personality disorder or schizotypal personality disorder.

In the past, the client appears to have met criteria for a diagnosis of Acute Stress Disorder relating to the tragic loss of his friends and the events surrounding the shooting of his family and himself. As a result, he would currently meet criteria for a diagnosis of Posttraumatic Stress Disorder.

Based on his presentation and symptom endorsement at this time, in combination with the client's history, he does not meet criteria for a diagnosis of Asperger's Disorder, Schizophrenia, or Schizoaffective Disorder. However, it cannot be determined at this time whether or not the patient held beliefs that could have been severe enough to meet criteria for a diagnosis of Delusional Disorder at or around the time of the offense. There is some indication from prior testing that his beliefs may have been significant enough to meet criteria for a diagnosis of delusional disorder (paranoid) in the past.

For clarification, despite the client's involvement in isolated acts of a criminal nature during adolescence, he did not ever meet criteria for and was never given a diagnosis of conduct disorder in adolescence. Moreover, he does not meet criteria for and has never been given a diagnosis of antisocial personality disorder. Technically, he meets only one of the criteria (needs three or more criteria plus history of conduct disorder), a history of deceitfulness given a history of lying, use of aliases and conning others. Specifically, he has not exhibited a "pervasive pattern of disregard for and violation of the rights of others occurring since the age of 15 years" as required to make the diagnosis. He has not failed to conform to social norms with respect to lawful behaviors as he did not engage in "repeatedly performing acts that are grounds for arrest." He does not have a history of aggressiveness, a history of engaging in physical fights, or exhibition of reckless disregard for safety of self or others. Isolated juvenile acts and pranks do not make a diagnosis of antisocial personality disorder or conduct disorder.

It is well known and accepted medically that clinical diagnoses of depression and anxiety, as well as symptoms of delusional thought patterns and even deficits in executive functioning attributable to concussions, can be treated successfully pharmacologically and/or with psychotherapeutic treatments. Although a number of mental health and medical professionals recommended pharmacological evaluation and treatment early on in late adolescence and early adulthood, the client never followed through with treatment and, according to his perception of his family and his upbringing, he was not and would not have been supported in his pursuit of mental health treatment. Instead, it was suggested that he pursue religious

methods of healing, which instead compounded his own personal identity issues and level of internal stress and turmoil as these recommendations did not fit with his own beliefs. One can only imagine that if he had received the treatment he needed and been able to divert his inner turmoil and anger, circumstances may have changed dramatically and not led to the ultimate act of killing his family.

OVERALL GENERAL IMPRESSION.

It is the opinion of this examiner that Mr. Whitaker is currently suffering from a Depressive Disorder with accompanying Generalized Anxiety Disorder, in addition to significant identity issues and lack of a sense of self, feelings of resentment, persecution, and suspiciousness and mistrust of others. Overall, these results are very consistent with the findings from prior psychological evaluations dating back to 1997.

Given the findings from the current and prior psychological test data, revealing the client's personality structure comprised of features of suspiciousness and mistrust of others as well as a tendency to misperceive the motives or intentions of others as being negative judgments against him, it appears that the client's mood, characterized by episodes of recurrent depression and generalized anxiety, in combination with ruminative, obsessive, and perseverative thought patterns, contributed to his decision to do away with his family, who had been the sole focus of his inner turmoil and the target of his buried anger. His history of at least two mild head injuries / concussions may have contributed to the development of mild executive dysfunction observed on current testing. This impairment of problem solving indicated a pattern of perseverative, or repetitive, responding and difficulty shifting mental set and could certainly have contributed to his apparent difficulty in generating alternate possible solutions to dealing with his perceived lack of support and attention from his family. As he reported to this examiner, he "tried twice" to follow the goals he wanted to pursue in his life (e.g., joining the service) but "failed." He appeared unable to generate any way to separate himself or to establish a personal identity separate from his family of origin by any alternative method other than killing his family.

As can be seen from the data, there is fundamental agreement between the data from this evaluation and that from prior evaluations in the findings of anxiety disorders, signs of depression, consistent and pervasive identity issues with lack of a sense of self, inner turmoil and distress compounded by suspiciousness, resentment, and a negative misperception of others treatment of him. The constellation of these clinical symptoms has serious psychological consequences, even potentially to delusional proportions, as indicated in early assessments of the client when he was embroiled in the height of his anger and feelings of repression.

The results of this psychological evaluation, as well as the results of prior psychological evaluations, revealed data to support the presence of significant mental health conditions, disorders that could have been treated successfully pharmacologically, including depression and anxiety, present throughout the client's life beginning in late adolescence. The fact that this relevant data was not appropriately recognized and utilized during the client's trial, or even as mitigating circumstances during the punishment phase, was clearly a disservice to and improper representation of the client. It appeared as though the client's prior attorney felt he could come to his own conclusions about the presence or absence of any mental health diagnoses the client may or may not have, despite his lack of any professional training in the mental health or medical fields.

The literature is replete with discussions of misattributions by the lay public in regards to what certain psychiatric diagnoses represent and what symptoms comprise various mental health diagnoses. The fact that individuals in the lay public may inappropriately believe that an individual who engages in any criminal act carries a diagnosis of antisocial personality disorder or believe that if someone is motivated by money they are narcissistic, highlights the importance of the need for a proper evaluation to be completed by a trained professional in the mental health field to determine whether or not a mental health condition could have been a contributing factor in any criminal act.

DIAGNOSES:
Axis I Major Depressive Disorder, recurrent, with mixed mood of anxiety
comorbid Generalized Anxiety Disorder, Posttraumatic Stress Disorder
Axis II deferred, rule out paranoid or schizotypal personality disorder
Axis III history of three mild traumatic brain injuries/ concussions, peripheral neuropathy-traumatic secondary to gunshot wound, hypertension
Axis IV lack of social support, incarceration on death row with potentially impending execution date
Axis V GAF= 45 current

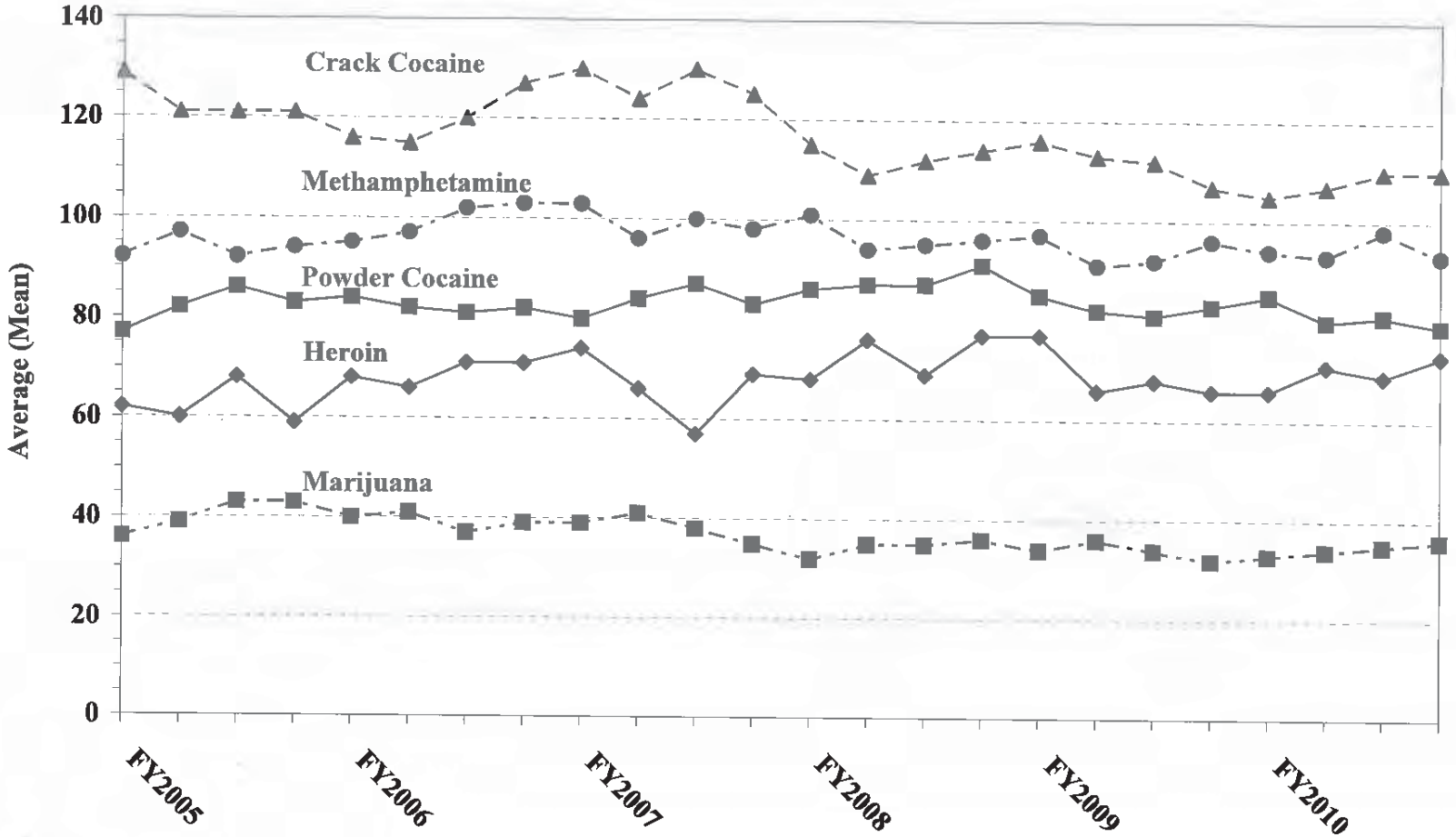
Thank you for the referral of this forensic psychological evaluation.

Diane M. Mosnik, Ph.D.
Licensed, Clinical Neuropsychologist

Figure I

AVERAGE SENTENCE LENGTH FOR EACH DRUG TYPE[1]

Fiscal Years 2005 - 2010



[1] Only cases sentenced under USSG §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession) are depicted in this figure. Figure includes only cases with a primary sentencing guideline of USSG §2D1.1. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2005 - 2010 Datafiles, USSCFY05 - USSCFY10.

EXHIBIT "M.1"

UNITED STATES DISTRICT COURTS
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THOMAS BARTLETT WHITAKER,	§	
Petitioner,	§	
v.	§	**CASE NO. 4:10-MC-293**
	§	
RICK THALER, Director, Texas	§	
Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent.	§	

STATEMENT OF DR. KIT HARRISON

My name is Kit Harrison. The following is, to the best of my knowledge, true and correct:

David Schulman retained me to evaluate Thomas Whitaker in post-conviction proceedings in the District Court of Fort Bend County, Texas, 400th Judicial District. On January 9, 2009, I conducted a clinical interview at the Texas Department of Criminal Justice's Polunsky facility in Livingston, Texas, and administered a battery of psychological tests. On March 30, 2009, I completed a brief summary of my findings ("Harrison 2009"). Mr. Schulman submitted this summary to the District Court as part of Thomas' application for a writ of habeas corpus.

Thomas' current attorney, Mr. James G. Rytting, of Hilder & Associates, P.C., requested that I review the psychological evaluations of Thomas by Dr. Brendan O'Rourke ("O'Rourke 1997") and Dr. Jerome Brown ("Brown 2005"). Mr. Rytting also asked me to review and comment upon the "Findings of Fact and Conclusions of Law," which, I understand, the State proposed and the Texas courts adopted in Thomas' state habeas proceedings.

Finding of fact # 32 states that,

> Based on his credible affidavit, Mr. McDonald spoke with Applicant's psychologist, Dr O'Rourke [McDonald Aff at 4]. Mr. McDonald determined there was no evidence of retardation or psychological problems other than an indication that Applicant had an antisocial and narcissistic personality [McDonald Aff at 4]

This implies that Dr. O'Rourke was Thomas' psychotherapist at the time of trial, and that Dr. O'Rourke informed Mr. McDonald that Thomas suffered from antisocial and narcissistic personality disorders, but stated that he did not exhibit any other psychological syndromes. The finding implies that Mr. McDonald investigated relevant, available information about Thomas. The Finding is inaccurate.

Dr. O'Rourke performed diagnostic psychological testing on Thomas in 1997 when he was 17 years old while he was a psychotherapy patient. That was the last time Dr. O'Rourke saw Thomas. At the time of trial, she was no longer his treating psychologist.

In 1997, Dr. O'Rourke administered a single psychological test, the MCMI-II. The 1997 MCMI-II report is a computer generated document that cannot be used alone to make a definitive diagnosis.

Dr. O'Rourke's affidavit dated April 21, 2011, correctly explains that findings that Thomas exhibited anti-social and narcissistic traits at age 17 could not be extrapolated into adulthood, and states that Mr. McDonald only spoke with her briefly about her report. She also correctly states that the MCMI-II indicated that "there is reason to believe that this man is experiencing the clinical symptoms of a delusional (paranoid) disorder (e.g., irrational jealousy, ideas of reference)." The finding that "it would be advisable to ameliorate this patient's current state of anxiety or hopelessness by the rapid implementation of supportive psychotherapeutic measures or targeted psycopharmacologic medications" is consistent with the findings I made in 2009.

Finding of fact # 33 states that

> Based on his credible affidavit, Mr. McDonald observed that Applicant had a tendency for anti-social behavior, a lack of empathy for the feelings of others, and was, in Mr. McDonald's opinion, narcissistic [McDonald Aff at 4].

Antisocial personality disorder, narcissistic personality disorder, and sociopathy or psychopathy, (the latter two of which are synonymous) which Mr. McDonald says he "observed," must be diagnosed after a careful history and examination. Each disorder is defined by multiple factors or traits, which a clinician must inquire into, test for, and record. Without a proper investigation, these complex psychological categories cannot be "observed," certainly not by laypersons with no training. Mr. McDonald has no known psychological training, did not follow any recognizable protocols, nor leave any records. Since Dr. O'Rourke was in the role of a psychotherapist, she could not have performed a lengthy evaluation without committing an ethical rule violation associated with being in a dual relationship with Thomas. Thus, Dr. O'Rourke could obtain only limited information within the role of a "helper," (i.e. therapist) to Mr. Whitaker. While it was not inappropriate for O'Rourke to administer a diagnostic psychological test to assist with treatment planning, performing a diagnostic evaluation would have constituted an abandonment of her role as a therapist, her chief assignment. Mr.McDonald appears to have known that Dr. O'Rourke was limited to a treatment, not an evaluation, role.

The second sentence again suggests that Dr. O'Rourke informed Mr. McDonald "that there was no evidence of retardation or psychological problems other than an indication that Applicant had an antisocial and narcissistic personality." However, Dr. O'Rourke's 1997 report (results of the MCMI-II) indicates that an Axis I diagnosis of delusional disorder marked by paranoid features should be considered. Dr. O'Rourke also states, in her 2011 affidavit, that she did not say what Mr. McDonald attributes to her.

My March 30, 2009 summary of findings and Dr. Brown's 2005 report are inconsistent with Mr. McDonald's statement that Thomas did not have an Axis I mental illness. Dr. Brown's and my evaluation of Thomas are also inconsistent with Mr. McDonald's statement that Thomas suffered from narcissistic and anti-social disorders to the exclusion of all other diagnoses.

Based on my January 9, 2009 clinical interview, the most prominent feature in Thomas' clinical picture "was a tormented irrational self concept and personal self-identity dating back to early childhood." (Harrison 2009). I found "early manifestations of social impairments most resembling several features suggestive of early Asperger's Disorder," including "thin boundaries between fantasy and reality, a problem which exists to this day." *Id.* In adolescence, "Thomas became increasingly enthralled with the delusional idea that if you became someone else, acted like someone else, he could achieve inner fulfillment and self-acceptance." *Id.* As a young adult, near the time of the offense, I found that Thomas was

> [i]ncreasingly out of touch with reality, paranoid, and delusional he began informing closer friends that he was in training for military intelligence operations and was in training for a unique government program which identified gifted children for training as a spy. He was starting to have ideas of reference that he would never be free to be himself in the Sugarland, Texas as a Bartlett or a Whitaker in an expanding culture of narcissism.

Id.

This clinical picture has been consistent over time. Dr. Brown described a similar constellation of psychological symptoms and problems (Brown 2005). According to Dr. Brown, the test results from a battery of psychological tests "reveal[ed] high levels of emotional disturbance and intensely felt psychological conflict." *Id.* Thomas was "seriously depressed and is having trouble controlling ideas and thoughts that he experiences as alien and disturbing." *Id.* At the time, Thomas was "endorsing many items suggestive of serious psychopathology." *Id.* Among the symptoms that Dr. Brown discovered were "intense feelings of inferiority and insecurity," suspicion and distrust of others, and avoidance of emotional ties. *Id.*

Dr. Brown determined that Thomas' self reported "adeptness at manipulating others" was false bravado, since Thomas was "actually deficient in social skills and is quite limited in his ability to generate positive relationships." *Id.* Fear and insecurity pervaded his thinking, as opposed to confidence, which characterizes narcissism. *Id.* Finally, Dr. Brown rejects the State's theory that Thomas killed his family for money. Instead, Dr. Brown found, and I agree, that "in this case, the primary motivation was passion rather than profit." *Id.*

Furthermore, if Mr. McDonald honestly felt the characteristics he attributes to Thomas – lack of empathy, narcissism, and antisocial traits – were patent or observable, his decision to have Thomas testify before the jury does not make sense. Thomas' affect is sometimes blunted and his emotional responses muted.

Factfinding # 34 and 35 are misleading and inaccurate. They are treated together because they are also redundant:

> (34) Based on his credible affidavit, Mr. McDonald believed that Applicant's psychological qualities-tendency for anti-social behavior, lack of empathy for the feelings of others, and narcissism-would assist the jury in finding Applicant to be a continuing threat to society rather than mitigate against the imposition of the death penalty [McDonald Aff at 4]
>
> (35) Mr. McDonald reasonably determined that indications Applicant was antisocial and narcissistic would support a finding of future dangerousness and that psychological testimony would not mitigate against the death penalty

Both of the psychologists who examined Thomas before trial (Dr. O'Rourke and Dr. Brown) concluded that the diagnoses of anti-social disorder and narcissistic disorder could not be made in Thomas' case, or else did not arrive at that diagnoses despite administering a "battery of psychological tests." (Brown 2005). According to his affidavit, Mr. McDonald did not consult other health professionals or resources, such as textbooks, or academic literature. So it seems that Mr. McDonald feared that the jury would arrive at the same lay-opinion about Thomas that he had, based on evidence similar to that which he, Mr. McDonald, had reviewed, and with the use of similar lay-persons' powers of observation.

What the jury likely needed to hear, therefore, was the testimony of a psychologist who could explain why a diagnosis of narcissism and anti-social disorder was not warranted, and who could also explain that Thomas suffered from other significant psychological problems that influenced his conduct at the time of the offense. They likely needed to know that even if Thomas demonstrated features of narcissism and anti-social disorder, his increasingly irrational thinking and delusions were resulting from clinical disorders on Axis I, not from personality disturbances on Axis II. The entire basis for multi-axial diagnosis is to bifurcate the differences between clinical syndromes and personality disorders in the first place.

The assertion in Finding #35 that psychological testimony would not mitigate against the death penalty depends, it seems to me, on the false assumption that psychologists would all agree that Thomas was narcissistic and antisocial. The psychologists who have examined Thomas, including myself, discovered mitigating evidence contradicting the State's theory that Mr. Thomas was a remorseless, venal sociopath. A testifying psychologist could explicate for the jury the strong differences between Axis I and Axis II disorders.

Finding # 36

> Based on his credible affidavit, Mr. McDonald, who **is** well-acquainted with Dr. Jerome Brown, determined that Dr Brown would not provide favorable testimony on Applicant's behalf [McDonald Aff at 4]

There is not much to say about this except that if Mr. McDonald, for one reason or another did not want to retain Dr. Brown or me, he could easily have found a different psychologist.

Finding # 37 betrays very basic misunderstandings of psychology and the evidence. It states that,

> (37) Applicant does not state in his affidavit that he is homosexual or that he has repressed that tendency, and he does not explain how his repressed homosexuality is mitigating to his case [App-Ex 5].

As I explained in my March 30, 2009, summary, Thomas was conflicted about his sexuality and gender/sexual identity. From an early age, he expressed preference displayed mannerisms typically associated with children raised as females, and persisted even though his parents, particularly his father, took what he thought were corrective steps to prevent Thomas from acting femininely. Thomas' fundamentalist religious upbringing and schooling was alienating and oppressive because it reinforced traditional gender roles and condemned deviations from them in the harshest terms. The *conflict* – not Thomas' sexual preference taken in isolation – caused by Thomas' receptivity to "feminine … interests, speech and behavior" (Harrison 2009, at 2) with the image he knew his parents' desired, and with the institutions that were essential to the family's identity and social well being, contributed directly to Thomas' psychological turmoil.

Finding # 40 states that

> (40) Based on his credible affidavit, Mr. McDonald determined that any testimony from a psychologist would be harmful to Applicant and allow the State to show that Applicant did not have a conscience, was narcissistic, and could not be remorseful [McDonald Aff at 4]

According to Dr. O'Rourke's recent affidavit, Mr. McDonald did not consult with Dr. O'Rourke in a meaningful fashion, and I do not believe he consulted with Dr. Brown at all. Mr. McDonald, to my knowledge, does not have an education or training in psychology. In my view, Mr. McDonald did not and could not make a reasonable determination on his own "that any testimony from a psychologist would be harmful" without first having in-depth consultations with a mental health professional.

Finding #42 states that,

> (42) The news article attached to Applicant's application as Exhibit 7 quotes the presiding juror as saying, "I was praying he would show repentance and give me a reason not to pass that judgment on him." This quote corroborates trial counsel's belief that Applicant needed to convince the jury that this was a one-time event for him, that he had changed, had forgiven his father for whatever transgressions he thought his father had committed against him, and that he was remorseful [McDonald Aff at 8]

The relevance of the juror's remark to Mr. McDonald's decision whether or not to retain a psychologist is dubious. Coming after the fact, it obviously cannot be used to explain or justify Mr. McDonald's decision. If anything, the juror's prayer (namely, that Thomas would show repentance) highlights the serious mistake of having Thomas testify without having a way to explain to the jury why Thomas affective responses are, at times, somewhat blunted. That Thomas may have had fundamental difficulties with empathy and reciprocal communication, the gold standard of many Axis I conditions arising out of the formative years, could have been explained in a germane way to the jury by a number of testifying psychologists available in the Houston area.

As for the need to show the jury that the offense was "a one-time event," and that Thomas "had changed" and "forgiven his father," it is difficult to imagine why a reasonable attorney representing a client with Thomas' psychological and behavioral traits would think he could achieve these goals *without* the assistance of a psychologist or psychiatrist. It is equally perplexing that a Court would think that Finding 42 supports the conclusion that Mr. McDonald made reasonable decisions about whether to retain a psychologist. Mr. McDonald could have retained a non-testifying consulting psychologist to assist in the theory of the defense without compelling an evaluation of the client. Similarly, Mr. McDonald could have retained a testifying expert to address mental illness and Axis I issues in Thomas without the psychologist ever having evaluated Thomas. Mr. McDonald could solicit psychological testimony via hypothetical information from an expert about key issues noted in Thomas which could have had mitigation value.

Finding #43 states that,

> (43) Based on his credible affidavit, Mr. McDonald knows Dr. Kit Harrison personally and knows about his testimony. [McDonald Aff at 3] Mr. McDonald would not have hired Dr. Harrison as an expert in this case, if he had felt an expert was needed. *Id*

I have testified in numerous cases, civil and criminal. I cannot tell from this finding what testimony Mr. McDonald may be referring to, other than perhaps social and charitable affiliations shared with Mr. McDonald. Furthermore, as I noted earlier, Mr. McDonald could have chosen from any number of reputable forensic psychologists and psychiatrists, and he need not have confined his search to the Houston area or to Texas.

Finding #44 states that

> Mr. McDonald believes it is appropriate to retain a psychological expert when, unlike Applicant, the defendant is mentally retarded or suffers some psychological problem that makes the defendant less blameworthy [McDonald Aff at 4]

On its face, this seems to be a piece of biographical information about Mr. McDonald. The inference suggested, which is that Thomas does not "suffer some psychological problem that

makes the defendant less blameworthy," is, I am afraid, based on the mistaken "observations" of an unqualified witness.

Finding #45 states that

> Based on his credible affidavit, Mr. McDonald found no mitigating evidence and made a deliberate determination not to pursue the mitigation issue [McDonald Aff at 4].

Dr. Brown's 2005 report and my findings in 2009 show there was considerable evidence that Mr. Whitaker suffered from a mental illness that affected his thinking and conduct leading to the crime. It is my opinion that Mr. McDonald did not find mitigating evidence because he did not have Thomas evaluated by a qualified psychologist or psychiatrist.

Finding #46 states that,

> In his application for writ of habeas corpus, Applicant does not present the types of mitigating evidence uncovered by the applicants in *Rompilla v Beard*, 545 U S 374 (2005), *Wiggins v Smith*, 539 U S 510 (2003), or *Williams v Taylor*, 529 U S 362 (2000), such as, severe physical or sexual abuse while a child, being left alone for lengthy periods of time and being forced to eat paint chips, garbage, or to beg for food, being beaten, molested, or raped, living on the street, living in a home with urine, feces, dirty dishes, and trash, living with intoxicated parents, borderline mental retardation, education only to the sixth grade, violent beatings and fights between his mother and father, alcoholism m his family or drug abuse

This finding betrays a fundamental misunderstanding. It is true that the type of mitigating evidence listed in finding 46 is not present in Thomas' case. However, poverty and abuse are not the only causes of mental illness and psychological turmoil. Furthermore, the evidence recited in Finding 46 can often be effectively presented without the assistance of a psychological expert. In contrast, the mitigating evidence in Thomas' case had to be developed and presented through a mental health expert. Having a mental illness associated with developmental problems arising from childhood almost certainly would have interested some, if not all, jurors. The biological and genetic aspects of antisocial behavior could have been explained to the jury by a psychologist. Additionally, to the degree narcissism arises out of dysfunctional families and impairment caused by the parent-child relationship, would have found an audience within the jury, in this psychologist's opinion. Parental neglect of emerging symptoms of personality and Axis I disorders is an area of mitigation not explored.

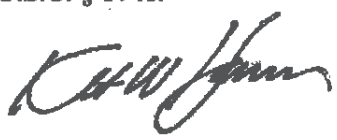
Finding # 47 states that,

> Based on the record, and the Court's own personal recollection, Applicant was raised by loving parents in an upper middle class home in Sugarland, Texas, was intelligent, attended Baylor University, and was given every opportunity to succeed.

For the most part, this finding is understandable, albeit superficial. I have little doubt that the State succeeded in leaving jurors with the same impression about Thomas' upbringing and advantages. In my view, that made it imperative to provide an explanation of how individuals in Thomas' circumstances can and do develop significant psychological syndromes that adversely affect their emotions and judgments. Inter-familial and intrafamilial difficulties noted in my report would have cast Mr. Whitaker in a much more sympathetic light.

Much like Finding # 46, Finding # 47 indicates serious misconceptions about mental illnesses and psychological problems, about their etiology and whom they may affect. Given the record, including the nature of the offense, it is difficult to understand why these facts would be cited as a justification for neglecting psychiatric or psychological assistance and defenses.

If called as a witness, I would testify to the foregoing in a court of law. I hereby swear, affirm and state that the foregoing is true and correct under penalty of perjury pursuant to Title 18 U.S.C. § 1746.



Dr. Kit Harrison

DATED: September 26, 2011

EXHIBIT 'N'

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THOMAS BARTLETT WHITAKER,	'	
	'	
PETITIONER,	'	
V.	'	**CASE NO. 4:10-MC-293**
	'	
RICK THALER, DIRECTOR,	'	
TEXAS DEPARTMENT OF	'	
CRIMINAL JUSTICE,	'	
INSTITUTIONAL DIVISION,	'	
	'	
RESPONDENT.	'	

STATEMENT OF KENT WHITAKER

My name is Kent Whitaker. I am the father of Thomas Whitaker. To the best of my knowledge the following is true and correct.

In 2006, I retained Randy McDonald to represent my son. I did so because of Mr. McDonald's reputation and because Dan Cogdell recommended him. The retainer was $180,000.00. Mr. McDonald understood that I would raise additional funds for experts and for co-counsel if needed.

Aware of the evidence against my son, I realized that we did not have any hope for an acquittal. Mr. Cogdell told me so before he withdrew. Mr. Cogdell had tried to arrange a proffer, through which, as I understood it at the time, the Fort Bend District Attorney's Office would not seek the death penalty in exchange for an account by my son of his role in the deaths of my wife Tricia and youngest child, Kevin. Before I hired Mr. McDonald I met with the Assistant District Attorney, Fred Felcman, and begged him, literally on my knees, not to seek the death penalty.

At the time Mr. McDonald took the case, he understood that it was an indefensible case, and that his job was to convince the jury at the punishment phase to sentence Thomas to life in prison. Mr. McDonald told me this himself from the day he took the $180,000.00 retainer.

However, I have read the affidavit that Mr. McDonald submitted supporting the State's Answer to the application for a writ of habeas corpus prepared by the state habeas counsel, David Schulman. This Affidavit shows that Mr. McDonald prepared for guilt-innocence by reviewing the State's file. I know Mr. McDonald did not hire an investigator to interview

witnesses, and he never spoke to me about interviews that he conducted or tried to arrange with witnesses for the State.

I have not seen an itemization of the work that Mr. McDonald put into the Thomas case; however, McDonald's affidavit suggests that he did not put any of the $180,000.00 retainer towards defending my son against the death penalty, or if he did, it was a nominal amount, consisting in, I suppose, the attorney time it took to talk to Thomas, Bo Bartlett (Thomas's maternal uncle) and me, and maybe the attorney time it took to look at the records that the State subpoenaed from Dr. Brendan O'Rourke.

I have read the State's "proposed findings of fact and conclusions of law." Finding numbered **thirty-one (31)** says that I "informed Mr McDonald that Applicant had every opportunity in the world" and that I thought Thomas had done it just to see if he could." I may have made a comment like this, however, it was only as one of many possibilities. I did not seriously believe that this had a high probability of explaining his actions, but not being legally trained I did not know what might be useful to Mr. McDonald in preparing a defense. Since I believed that Mr. McDonald needed every possible thought to create a strong defense in the penalty phase I mentioned it. Mr. McDonald did not make any comment at the time, tell me that I could anticipate the State asking me questions like this, or go over how to respond.

I have to say, I don't understand what this has to do with Mr. McDonald's decisions about whether or not to hire a psychologist. I do feel as if I am being blamed for what Mr. McDonald did not do. I can say categorically that I did NOT try to persuade Mr. McDonald that retaining a psychologist would be a waste. The exact opposite is true.

I pressed Mr. McDonald to have Thomas tested by a psychologist. It was clear to me that there was something wrong with Thomas, and I wanted to know what it was; and so did Thomas. Both Thomas and I on numerous occasions asked Mr. McDonald about retaining a psychiatrist. Thomas told me that he did not understand why the shootings had happened and he wanted to find out what had happened in his mind and would welcome a psychiatrist's testing. I had spoken with Dr. O'Rourke and she had told me that Thomas needed to have a battery of tests. I was willing to fund the testing.

Mr. McDonald told me that if we tested Thomas, the state would have access to it. The specific words he used were that "It would be committing legal suicide." He said that we would be have to hire experts to counter the State's experts and "the jury would be forced to choose between their experts and our experts", and that would create problems for him. Again, "Legal Suicide" was the description. Mr. McDonald did not explain that we could use a consulting expert. I thought that once tested, the results would be available to the State whether we wanted them to be or not. Furthermore, I had already paid for Dan Cogdell to retain Dr. Brown. As I recall the fee was $2,500 to have Dr. Brown interview my son. Thomas could not be bonded out, so that interview had to take place at the Fort Bend County Jail, which means that State could find out about it. I'm afraid Mr. McDonald's reasons for not retaining a psychologist are either fabrications or proof that he did not talk to Dr. Brown or Mr. Cogdell about the testing that had already been done.

Mr. McDonald did not tell me why he objected to Dr. Brown, or discuss Dr. Brown's December 10, 2005, report with me. I was not made aware, until after the trial, that Dr. Brown had tested Thomas or provided Mr. Cogdell with this report. Not knowing of the report, I certainly had no knowledge of what might have been in it. Mr. McDonald's affidavit indicates he fired Dr. Brown.

Mr. McDonald's statement that he instructed Dr. Brown not to interview Thomas leaves the impression that he did not know Dr. Brown had already interviewed and tested Thomas. It seems Mr. McDonald did not speak with Dr. Brown long enough to find out what he had already done, get Mr. Cogdell's file, or talk to Mr. Cogdell about Dr. Brown's findings.

Finding number **thirty-nine (39)** appears to blame me, again, for Mr. McDonald's decisions, and does so in a less than forthright way. I realized that investigating a defense against the murder charges was hopeless; I knew that my son was guilty. However, this finding makes it seem as if I thought investigating in a mitigation defense was a waste of time. I was not informed by Mr. McDonald that there was such a thing as a mitigation expert. If I had been I would have raised funds for Mr. McDonald to hire one, or else I would have asked Mr. McDonald to put a portion of the $180,000.00 I had agreed to pay him towards retaining a mitigation expert.

From my perspective, finding fifty-four **(54)** and **fifty-five (55)** blame me, yet another time, for Mr. McDonald's failures. Finding fifty four suggests that I told Mr. McDonald that I thought my son had changed and that he expected me to say this. Finding fifty five says that Mr. McDonald judged from statements picked up by the press that I would ask the jury to spare Thomas's life.

As you might expect, I had my antenna up very high evaluating my son's reactions since his return, and I saw behavior that did lead me to believe that he had changed. I never told Randy that I knew for a fact that Thomas was a changed person. I couldn't possibly know that. What I repeatedly told Randy and others was that I had noticed that Thomas seemed more contrite and open and caring for others' feelings and that I thought those changes were real, but that I could not see into the heart. From the beginning, I have said I don't know if he had changed. For all I knew he might still be trying to deceive us. I felt that Thomas had terribly deceived me and many others in the past. I told this to Mr. McDonald several times, and I expressed this horrible fear to the press. Randy knew that I would not lie to the jury.

I cannot for the life of me understand how a Court could find that an attorney who relied on statements reported by the papers to figure out what his witness would say at trial was effective. This seems to me to be the height of irresponsibility. Of course, I did ask the jury to spare my son's life. This was obvious. I told McDonald that I got down on my knees to Fred Felcman and asked him not to seek the death penalty.

The dreadful feeling I live with is that I was unable to give the jury a reason to spare my sons life. All I could do was beg, and I couldn't get on my knees like I did in front of Mr. Felcman. I needed so badly to have a report like Dr. Brown's or Dr. Harrison's so that the jury would have a more concrete reason for deciding against the death penalty, but I was relying on

Randy's evaluation and judgement that such a report would be dangerous for our defense. Now that I know more about how the legal system works I refuse to believe that a lawyer can be excused from failing to investigate possible mental illness or other mental problems in a Capital Murder case, especially when it looks like his client was suffering from them - and then limiting his defense to calling a family member to ask the jury to spare the client's life. That does not take a law degree.

Finding number **fifty-six (56)** may the worst. Thomas' state habeas attorney accused Mr. McDonald of not preparing me. In response Mr. McDonald says that he was surprised by my testimony. My layman's understanding is that you should prepare your witnesses so you are not surprised. I have to keep coming back to this point: What kind of judge would read this finding and think it shows that the attorney was doing his job?

Finding number fifty-six is plain wrong, and it continues to blame me. I vehemently disagree with it. I was never "O.K." with the district attorney's decision to seek the death penalty; what I said was that when I tried to view the situation from the position of a neutral citizen I could understand how a District Attorney locked in a contested primary race and prosecuting a high profile murder case involving a son charged with planning the murder of his family could choose to consider pursuing the death penalty. That did not mean that I believed this was the right course. I fought that with all my heart. I have been deeply damaged emotionally and financially by my efforts to fight their decision, which I did for a year and a half leading up to the trial. I spoke privately and publicly on many occasions expressing my disappointment with the district attorney's decision.

I told Randy and everyone else – I actually said this in my testimony – that my greatest concern was that my son would ask God and me for forgiveness, and be saved for eternal life in heaven. The first time I saw him after his arrest he took responsibility for everything that had happened and asked for my forgiveness, which I gave him. I believed it, but I also knew that it was possible he might still be trying to lie to me. I certainly did not know if he had asked God for His forgiveness, which as a Christian, I believe is necessary for acceptance into heaven. I was praying for the jury to give him life in prison so that (if he had not asked God for forgiveness) he would have more time to reach that decision before his death. The most important thing in the world to me is that my son join his Mom, brother, and me in heaven. I did not want the State to kill him before he made that choice; I told him God was in charge and allows things to happen that we cannot understand. This is the statement I gave to the press.

If this finding is an honest one, which I sincerely doubt, it means the courts that adopted it think that I left the jury with the impression that I was indifferent to whether my son was put to death – that I was O.K. with it, and with the impression that I thought my son was capable of killing again. Well, I hired Mr. McDonald so that he jury would not be left with these impressions. This finding shows he failed miserably. It shows he put on a punishment phase defense, through me but without the preparation I needed to succeed, that sent my son to death. This is unspeakably horrible. I should not have to bear being blamed for this especially when counsel admits that he purposefully did not prepare me.

I understand that Mr. McDonald's excuse for not preparing me is that he wanted me to appear spontaneous or unrehearsed. I cannot understand how this passes for a "strategic" decision. Mr. McDonald knew I had been living with this terrible tragedy for years, and that I had made a decision to speak about it publicly. Mr. McDonald knew that I had spoken publicly on many occasions. I was worn out by the ordeal, and I needed the assistance of counsel to prepare me for my testimony.

Finding **fifty-seven** (57) also faults me for not telling Mr. McDonald what questions he should have asked me. One that is obvious from the psychological reports that Dr. Brown and Dr. Harrison prepared is whether I was aware Thomas needed medication. Another is whether I knew that he suffered from mental illness. Another would be to ask if I had tried to get my child psychiatric treatment, or mistakenly thought that a more rigorous religious education was the answer. Apparently, another is whether I truly was OK with the district attorney's decision to seek the death penalty.

I have to keep coming back to the point that I needed help and guidance to effectively argue against giving my son the death penalty. I hired Mr. McDonald to think up the right questions to ask. I also needed to be prepared for cross-examination, not just for what Mr. McDonald would ask on direct. I was pushed into the fire of an experienced District Attorney without any insight from Mr. McDonald about what I might face. Randy was supposed to be the coach, but he sent me in without letting me know what the play was or preparing me for what the other side was going to run at me.

I cannot see how anyone could think that that the hope that the jury would feel I was being spontaneous was worth the risk of putting me on the stand unprepared. Randy did not go over the damaging records of Lynn Ayer with me. He did not prepare me to face questions about whether I felt betrayed and manipulated by his son. He did not warn me to expect cross examination regarding the privileges and efforts my wife and I had made to provide for Thomas, and failed to prepare me for question regarding whether I knew about the negative things Ayers and Dr. O'Rourke's reported. I had no answer to Mr. Felcman's questions about whether I knew Thomas was narcissistic and manipulative or why he was. But I needed to be able to say that Thomas hadn't been given the medication and counseling I now know he needed. Randy, in my view, needed to be able to say that Mr. Felcman was misrepresenting the evidence we have about Thomas' mental health and personality, and I needed the security of knowing he could make this argument.

The last finding that directly talks about me is finding **ninety-five (95)**, which says that "Kent Whitaker, the State's first witness, brought the proffer before the jury during direct examination." I am afraid that this is irresponsible. Finding ninety-five makes it sound if I am the one who allowed the proffer into evidence, against Mr. McDonald's will. However, I was called as the State's first witness. I was subpoenaed, I should add; I did not voluntarily testify for the State. On the stand, I had to answer questions that the State asked me. The State introduced the proffer, not I. Randy's job was to object. I could not.

If called as a witness, I would testify to the foregoing in a court of law. I hereby swear, affirm and state that the foregoing is true and correct under penalty of perjury pursuant to Title 18 U.S.C. § 1746."

/S/ DATED: June 28, 2011

KENT WHITAKER

EXHIBIT "O"

State	Year of Crime	Name of Defendant	Age of Defedant	Relationship of Victim	Death Sought? (Y/N)	Defendant's Sentence? (Death or Less Than Death)
Texas	1998	Michael Yowell	28	Father, mother and grandmother	Y	Death
Texas	1975	Markham Duff- Smith		Adoptive mother	Y	Death
Texas	2003	Tracy Beatty	42	Mother	Y	Death
Texas	1999	Carlton Akee Turner	19	Adoptive father and mother	Y	Death
Texas	1977	Mary Lou Anderson		Father and mother	Y	Death, immediately reduced to 50 year sentence for testimony at accomplice's trial
Texas	2003	Andrew Wamsley	19	Father and mother	Y	Less than death - found him not a FD
Texas	1992	Kristi Koslow	17	Step-mother	Y	Less than death - found her not a FD
Texas	2004	Justin Smith	25	Father and mother	N	Less than death
Texas	1982	Cynthia Campbell Ray	26	Father and mother	Unclear	Less than death
Texas	2005	Brandon Woodruff	18	Father and mother	N	Less than death
Texas	1992	Jennifer Yesconis	21	Father and step-mother	Unclear	Less than death
Texas	1992	Courtney Dunkin	15	Step-grandmother/Legal guardian	N	Less than death
Texas	1999	Stephanie Barron	17	Father and mother	N	Less than death
Texas	1992	Krissi Lynn Caldwell	17	Mother killed, father seriously wounded	Unclear	Less than death
Texas	2008	Erin Caffey	16	Mother and two brothers	N	Less than death
Texas	2000	David Hisey	53	Father and mother	N	Less than death
Texas	2004	Lohstroh	10	Father	N	Less than death
Texas	1999	Sylvester Hobbs III	20	Step-father	Unclear	Less than death
Texas	1995	Lance Butterfield	18	Father	N	Less than death
Texas	1993	James Michael Roy	22	Father	N	Less than death
Texas	2010	John Shank	20	Mother	Unclear	NGRI
Texas	2009	Nelson (female)	12	Father	N	Less than death
Florida	2004	Blaine Ross	21	Father and mother	Y	Death - conviction overturned in 2010
Illinois	2005	Eric Hanson	29	Father, mother, sister and brother-in-law	Y	Death (commuted to life)
California	1990	Deondre Arthur Staten	24	Father and mother	Y	Death
California	1989	Joseph Lyle Menendez	21	Father and mother	Y	Less than death
California	1989	Erik Menendez	18	Father and mother	Y	Less than death
California	1992	Dana Ewell	21	Father, mother, and sister	Y	Less than death
California	1983	Jim Gordon	38	Mother	Unclear	Less than death
California	1986	Timothy Roman	23	Mother	N	Less than death
California	2008	Ernest Scherer III	29	Father and mother	N	Less than death
California	1985	Neil Woodman	42	Father and mother	N	Less than death
California	1985	Stewart Woodman	41	Father and mother	N	Less than death

California	1981	Michael Wayne Hunter	23	Father and step-mother	Y at trial, unclear at retrial	Death, sentenced to LWOP after retrial
California	1999	Jose Najera	19	Father and mother	Unclear	Less than death
California	1987	Torran Meier	16	Mother	N	Less than death
California	1976	Barry Braeseke	20	Mother, Father, and Grandfather	Unclear	Unclear but conviction was overturned b/c of *Miranda* issues, less than death at retrial
California	1983	Michael Miller	20	Mother	Unclear	Less than death
California	1975	Marlene Olive	16	Adoptive father and mother	N	Less than death
New Jersey	1991	Matthew Heikkila	20	Adoptive mother and father	Y	Less than death
Oregon	1997	Patrick Niiranen	37	Adoptive parents	N	Less than death
Missouri	1991	Emory Futo	26	Father, mother and 2 brothers	Unclear	Less than death
Connecticut	1987	Patrick Campbell	20	Adoptive father and mother	N	Less than death
Nebraska	1993	Brett Reider	15	Mother	N	Less than death
Louisiana	1996	Clay Logan	18	Mother	N	Less Than Death
Mississippi	1997	Luke Woodham	17	Mother	N	Less than death
Oregon	1998	Kip Kinkel	15	Father and mother (and several other people)	N	Less than death
New Jersey	2000	Dr. I. Kathleen Hagen	56	Father and mother	N	NGRI
Idaho	2003	Sarah Johnson	16	Father and mother	N	Less than death
New York	2004	Christopher Porco	21	Father	N	Less than death
Ohio	2007	Daniel Petric	16	Mother	N	Less than death
Nevada	2009	Timothy Chester	18	Father and mother	Y	Less than death
Rhode Island	2008	James Soares	24	Father and mother	N	Less than death
New Hampshire	1997	Robert Dingman	17	Father and mother	N	Less than death
New Hampshire	1997	Jeffrey Dingman	14	Father and mother	N	Less than death
Pennsylvania	1995	Jeffrey Howorth	16	Father and mother	Unclear	NGRI
Pennsylvania	1995	Bryan Freeman	17	Father, mother and brother	N	Less than death
Pennsylvania	1997	Matthew Zimmerman	24	Father and mother	Unclear	Less than death
Pennsylvania	1995	David Freeman	15	Father, mother and brother	N	Less than death
Ohio	1993	Billie Joe Powell	16	Father	N	Less than death
Washington	2008	Bryan Kim	18	Father and mother	Unclear	Less than death
Washington	1991	Israel Marquez	17	Step-father	Unclear	Less than death
Florida	2004	Christopher Sutton	25	Adoptive mother	Unclear	Less than death
Florida	2008	Darryl Kenney	22	Father	Unclear	Less than death
New York	2000	Connie Leung	17	Father and mother	N	Less than death
New York	2010	Matthew Taranto	28	Father	N	Unclear
New York	2010	Jesse Green	31	Father, mother injured	N	Unclear
New York	1990	Roy Rowe	17	Step-father	Unclear	Less than death
New York	1986	Cheryl Pierson	16	Father	N	Less than death
Minnesota	2005	Matthew Niedere	17	Adoptive father and mother	N	Less than death

Arizona	2009	Kevin Black	50	Step-Father	Unclear	Less than death
Arizona	2008	Hughstan Schlicker	15	Father	N	Less than death
Arizona	2008	Christian Romero Nicholas Waggoner	8	Father	N	Less than death
Maryland	2008	Browning	15	Father, mother and 2 brothers	N	Less than death
Illinois	1976	Patricia Columbo	19	Father, mother and brother	Unclear	Less than death
Illinois	1993	Eric Robles	17	Father and mother	N	Less than death
Illinois	1984	Pamela Knuckles	17	Mother	N	Less than death
Illinois	1984	Bart Knuckles	19	Mother	Unclear	Less than death
Alaska	1976	Vincent Eben		Father and mother	N	Less than death
Louisiana	1997	Ronald Adams	Adult	Father and mother	N	Less than death
Louisiana	2007	Connor Wood	15	Father and mother	N	Less than death
Virginia	1990	Jessica Wiseman	14	Father and mother	N	Less than death
Virginia	1999	Gary Thorton	31	Father and mother	N	Less than death
Virginia	1993	Camellia Lou Fries	13	Mother	N	Less than death
Virginia	1993	Stephanie Dawn Fries	12	Mother	N	Less than death
Virginia	1985	Elizabeth Haysom	21	Father and mother	N	Less than death
Massachussetts	1997	Simon Piper		Mother	N	Less than death
Massachussetts		Mark Martone	16	Father	Unclear	Less than death
Minnesota	2003	Jason MacLennan	17	Father	N	Less than death
Indiana	1980	Allen Turner	19	Father and mother	Unclear	NGRI
Missouri	1990	Stacey Lannert	18	Father	Unclear	Less than death
Mississippi	1994	Stephen McGilberry	16	Mother, step-father, step-sister, and	Y	Death, reduced to LWOP after *Roper*
Georgia	2008	Anthony Terrell	17	Mother, 2 sisters	N	Less than death
Colorado	2007	Tess Damm	15	mother	N	Less than death
Colorado	2008	Jeremiah Raymond Berry	20	Father	N	Less than death
Colorado	2003	Thomas Martinez	38	Father	N	Less than death
Colorado	1998	Nathan Ybanez	17	Mother	Unclear	Less than death
Colorado	1992	Jacob Ind	15	Mother and step-father	N	Less than death
Colorado	2004	Michael Fitzgerald	16	Father	N	Less than death
Colorado	2004	Staci Lynn Davis	13	Mother	N	Less than death
Colorado	1999	John Engel	14	Mother and grandmother	N	Less than death
Colorado	1994	Jenna Smythe	19	Mother and young girl	Unclear	Less than death
Colorado	1988	Charles Limbrick	15	Mother	Unclear	Less than death
Colorado	1987	Richard Mijares	17	Mother	Unclear	Less than death
Colorado	1986	Herman Douglas French	14	Mother	Unclear	Less than death
Colorado	1986	Larry Long Jr.	18	Mother, Father, brother	N	Less than death
West Virginia	1994	William Bradford	43	Father	N	Less than death

Maine	2009	Perley Goodrich Jr.	45	Father, injured mother	N	Less than death
Maine	2009	Ross Morrill	22	Adoptive father	N	Not criminally responsible
New Mexico	2004	Cody Posey	14	Father, step-mother and step-sister	N	Less than death
Tennessee	1997	Nathan Callahan	15	Mother and sister	N	Less than death
Tennessee	2009	Misty Evans	25	Father	N	Less than death
California	2008	Son Lam Nguyen	30	Mother	Unclear	Less than death
Illinois	2010	James Larry	32	Mother, wife, son, two nieces	N	Less than death

EXHIBIT "P"

Affidavit of Silvia Edith Salazar Toscano

I, Suzana Trevino, declare under the penalty of perjury that I understand the Spanish language and the English language, and that, to the best of my knowledge and belief, the following statements in the English language have the same meanings as the statements in the Spanish language in the Affidavit of Silvia Edith Salazar Toscano, signed and notarized on July 31, 2011.

I, Silvia Edith Salazar Toscano, state that the following is true and correct to the best of my knowledge:

1. My name is Silvia Edith Salazar Toscano. I am over the age of 18 years and otherwise competent to give this affidavit.

2. I am a Mexican National; my permanent residence is in Cerralvo, Nuevo León, Mexico. At the present time I am staying with my cousins in McAllen, Texas.

3. I am married to Homero Salinas, Jr. and we have three sons. My husband and I manage Muebleria Salmusa, one of two furniture stores owned by my father-in-law, Homero Salinas Villarreal in Cerralvo.

4. Thomas Whitaker who is currently on Texas's death row in Livingston, I know as "Rury".

5. When Rury came to my father-in-law's furniture stores asking for work, we had already knew he was the son of Mr. Jelo Ríos, because Mr. Ríos had made it known to everyone that Rury was the son he had with an American woman.

6. Rury worked very hard and he earned the confidence of my father-in-law.

7. Rury worked Monday through Saturday and Sunday if needed, always willing to do so. He never said no.

8. Rury began by cleaning the furniture. He then delivered the furniture, and we trusted him so much that we could leave him alone at the furniture store with the responsibility of taking payments. He also worked in our homes. He painted and did carpentry work.

9. Homero is very distrustful, and for him to have trusted Rury as he did, it was special. Homero trusted Rury more than any of the other workers in his furniture stores.

10. We very much loved Rury; he would stay the night in our homes.

11. Rury never behaved badly.

12. Rury had a courtship with Sindy, the daughter of Homero. He took her to mass where Sindy played the guitar. Rury would say that it gave him a beautiful peace when he went to mass.

13. We trusted Rury completely and he was part of the family. Rury was included in all of our family's Christmas traditions. He was a good man, humble and honest.

14. Rury looked after my children when I went on errands. My children, who at that time were seven and four years old, loved Rury very much. He built a swing set for my children. Rury played soccer with my oldest and played games with my youngest.

15. When Rury gathered with us as a family we watched movies, played board games, sang karaoke, and we danced. We had a good time together. Rury was very nice to me and my children, and he was part of our family.

16. Rury's living conditions at Mr. Jelo's ranch were very lowly, he had nothing and it saddened me very much because Rury was very compassionate and noble.

17. Mr. Jelo had given Rury an old beat up truck which would leave him stranded every where. He would use it when he would go to Mr. Jelo's ranch to feed and give water to the horses whenever Mr. Jelo ordered it.

18. Rury attended a small school where he studied Spanish. He learned Spanish quickly. Within a year he spoke it well.

19. When Rury was leaving I asked him why. He told me he had been offered a job in Monterrey, Nuevo Leon and he would return within two years. I told him not to leave, but Rury said he had to go work. Rury said goodbye to everyone and he left.

20. My oldest still asks for him and continues to wait for his return.

21. Though Mr. Jelo did us wrong by telling us Rury was his son, I did not feel that Rury lied to me, because he was very sincere in everything he did. He had beautiful manners.

22. If Rury returned today I would live with him again. He had never disrespected us. He was never angry. Nothing ever went missing. He was very responsible. He was hard-working. He helped a lot with the children and around the house.

23. We shared everything as a family and I have beautiful memories of Rury. We loved him very much. There is something about him that wins you over.

24. When I learned Rury had been arrested and imprisoned, to me it seemed impossible that it was him. He is a different person than how he was described. Rury was different with us, and as the saying goes: a man is known by the company he keeps.

25. No one from Rury's defense team ever spoke with me and I was never asked to testify at Rury's trial. Had I been asked, I would have willingly talked about what I have stated in this affidavit. I also would have willingly testified to these facts at Rury's trial.

I have read this affidavit. I affirm that it is true and correct to the best of my knowledge, and so I state under the pains and penalties of perjury under the laws of the United States.

(Signature) _____
Silvia Edith Salazar Toscano

July 31, 2011
Date

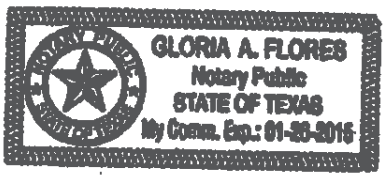
I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT

_____
Suzana Trevino

Signed and sworn before me this 8 day of 8, 2011.

_____
Notary Public, State of Texas

My commission expires: 01-26-2015



Declaración Jurada de Silvia Edith Salazar Toscano

Yo, Silvia Edith Salazar Toscano, declaro bajo protesta de decir la verdad lo siguiente es cierto en mi leal saber y entender:

1. Mi nombre es Silvia Edith Salazar Toscano. Soy mayor de 18 años y tengo la capacidad legal para rendir esta declaración.

2. Soy de nacionalidad Mexicana, y me residencia permanente es en Cerralvo, Nuevo León, México. Actualmente me estoy hospedando con mis primas hermanas en McAllen, Texas.

3. Estoy casada con Homero Salinas, Jr. y tenemos tres hijos. Mi esposo y yo manejamos Mueblería Salmusa, una de las dos mueblerías en Cerralvo de mi suegro, Homero Salinas Villareal.

4. Conozco a "Rury," quien actualmente se encuentra condenado a pena de muerte en Livingston, Texas bajo el nombre Thomas Whitaker.

5. Cuando llego Rury pidiendo trabajo en las mueblerías de mi suegro, ya sabíamos que Rury era hijo de Sr. Jelo Ríos, porque el Sr. Jelo nos dejo saber que Rury era su hijo con una estadunidense.

6. Rury tenía muchas ganas de trabajar y se gano la confianza a mi suegro.

7. Rury trabajaba de lunes a sábado y domingo si era necesario, el estaba dispuesto hacerlo. Nunca decía que no.

8. Rury empezó limpiando muebles. Después entregaba los muebles y teníamos tanta confianza en el que lo dejábamos solo en la mueblería con la responsabilidad de recibir los abonos. El también trabajaba en nuestras casas. El pintaba y hacia carpintería.

9. Siendo Don Homero bien desconfiado, para que le diera su confianza a Rury, era algo especial. Don Homero confiaba más en Rury que en los otros trabajadores de las mueblerías.

10. Queríamos mucho a Rury, hasta se quedaba a veces en nuestras casas.

11. Rury nunca se portaba mal, jamás lo hiso.

12. Rury tuvo un noviazgo con Sindy, la hija de Don Homero. La llevaba a misa donde Sindy tocaba la guitara. Rury decía que le daba una paz muy bonita en misa.

13. Confiábamos completamente en Rury que siempre andaba con nosotros como familia. Inclusive Rury paso una típica Navidad con nosotros. Era muy buen muchacho, humilde y honesto.

S.E.S.T.

14. Rury cuidaba a mis hijos cuando tenía que salir a los mandados. Mis niños, que tenían en aquel entonces siete y cuatro años, querían mucho a Rury. El armo unos columpios para mis hijos. Rury jugaba futbol con el grande y hacia detallitos con el chiquito.

15. Cuando nos juntábamos como familia con Rury veíamos películas, jugábamos juegos de mesa, cantábamos karaoke, y bailábamos. Nos pasábamos muy buen tiempo todos juntos. Rury era muy lindo conmigo y con mis hijos, fue parte de la familia.

16. Rury vivía demasiado humilde en el rancho del Sr. Jelo, no tenía nada y me daba mucha lástima porque Rury es un buen ser humano y muy noble.

17. El Sr. Jelo le dio a Rury una troca muy carcacha que hasta lo dejaba dondequiera. Lo usaba cuando se iba al rancho de Sr. Jelo para darles comida y agua a los caballos cuando el Sr. Jelo lo mandaba.

18. Rury fue a una escuela pequeña donde estudio español. Aprendió el español muy rápido. Dentro de un año ya lo hablaba bien.

19. Cuando se fue Rury le pregunte por que se iba. Me dijo que le ofrecieron un trabajo en Monterrey, Nuevo León y que regresaba dentro de dos años. Le dije que no se fuera, pero Rury dijo que tenía que ir a trabajar. Rury se despido de todos y se fue.

20. Todavía pregunta por el mi grandecito y sigue esperándole.

21. Siendo que Sr. Jelo nos hacia mal diciéndonos que Rury era su hijo, yo no sentí que Rury me miento, porque él era muy sincero en todo lo que hacía. Tenía bonitas maneras.

22. Si Rury regresara hoy yo conviviría con el otra vez. Nunca nos falto al respecto. Nunca se enojaba. Nunca nos faltaba nada. El era bien responsable. Era muy trabajador. Nos ayudaba mucho con los niños y en la casa.

23. Compartíamos como familia y tengo bonitas memorias de Rury. Lo queremos mucho. El tiene algo que te gana su forma de ser.

24. Cuando supe que Rury fue arrestado y lo encarcelado, para mí eso no era posible por como era el. El es otra persona de cómo lo describieron. Rury era diferente con nosotros, y como dice el dicho: dime con quién andas, y te diré quién eres.

25. Nunca nadie de la defensa de Rury hablaron conmigo y nunca me preguntaron a testificar acerca el juicio de Rury. Si me hubieran preguntado, yo hubiera estado dispuesta de lo que he indicado en esta declaración jurada. También hubiera estado dispuesta testificar de estos hechos en el juicio de Rury.

S.E.S.T

Yo ha leído esta declaración. Yo manifiesto que es cierto lo contenido en ella en mi leal saber y entender, conociendo las penas de los Estados Unidos en las que concurren los que declaran falsamente.

Silvia E. Salazar T.
Silvia Edith Salazar Toscano

31-7-11
Fecha

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT

Signed and sworn before me this 31st day of July, 2011.

Notary Public, State of Texas

Suzana Maree Trevino
Notary Public
STATE OF TEXAS
My Comm. Exp.:08-14-2012

My commission expires: 8-14-2012

EXHIBIT "Q"

Affidavit of Ubaldo Salinas Muñoz

I, Suzana Trevino, declare under the penalty of perjury that I understand the Spanish language and the English language, and that, to the best of my knowledge and belief, the following statements in the English language have the same meanings as the statements in the Spanish language in the Affidavit of Ubaldo Salinas Muñoz, signed and notarized on July 31, 2011.

I, Ubaldo Salinas Muñoz, state that the following is true and correct to the best of my knowledge:

1. My name is Ubaldo Salinas Muñoz. I am over the age of 18 years and otherwise competent to give this affidavit.

2. I am a Mexican National; my permanent residence is in Cerralvo, Nuevo León, Mexico. At the present time I am currently in McAllen, Texas to pick up my sister-in-law Silvia Salazar Toscano.

3. I am the son of Homer Salinas Villareal and Maria Muñoz de Salinas. My parents are the owners of Saymusa Mueblerías in Cerralvo, Nuevo León, Mexico.

4. I met "Rury," who is currently on Texas's death row in Livingston, Texas under the name Thomas Whitaker, when Mr. Rogelio "Jelo" Ríos introduced Rury as the son he had after a fling with a woman in the United States.

5. Rury took guitar lessons from my sister Sindylu Salinas Muñoz, and began a courtship with her. He would take her out. They would go to the discos and clubs in Monterrey, Nuevo León, Mexico.

6. Because I did not know him, I did not trust Rury when I first met him. He began to gain my trust because he was very helpful towards my family. If my mother needed an errand done, he would do it. If we needed help in the furniture stores, he would help us. He was always willing to do it.

7. Cerralvo is a town which is not very large, and everyone knew Rury as the son of Jelo.

8. Jelo is not a good person. He dealt with drug traffickers, but Rury worked for Jelo on his ranch. Rury was always muddy and dirty when he visited Sindy.

9. When trouble started with the drug traffickers in Cerralvo, Rury began distancing himself from Jelo and the ranch.

10. Rury started spending more time with us and working in my parent's furniture stores.

11. Rury did not only work in the furniture stores, he also did other jobs, mixing cement and painting. My family has property and my dad would make us cut weeds with a hoe. Rury did not know how to use the hoe and he would make giant holes.

12. Rury was hard-working. He arrived sharp at 15 to Nine in the mornings. Rury was very responsible and he gained the trust of the entire family.

13. My dad is very suspicious and no worker has earned the confidence my dad had for Rury. Rury took my nieces and nephews to school. My dad allowed Rury to drive his work trucks. Normally, only my dad, my brothers I had those duties.

14. We had enough confidence in Rury to leave him in charge of the furniture store. It was never a problem for him to do it.

15. Rury never lost our trust even after his courtship with my sister Sindy ended. When we had family parties he was there.

16. My dad being a macho suddenly would get angry and yell. Rury was so calm it made us feel happy rather than annoyed and he always made us laugh.

17. Rury liked to learn a word in Spanish every day. Rury had three dictionaries in his truck and he studied Spanish a lot. Within five months he completely understood Spanish. However he spoke with an accent. He made us laugh so much when he joked with us in Spanish.

18. When I learned of what he was accused of in the United States. It did not anger me, but it made me sad because he had never lied to us. He was a very different person than how he was described.

19. I feel that he began to punish himself while in Mexico. By the way he lived on Jelo's ranch. Otherwise how could he live in such deplorable conditions. The ranch is in the mountains far from town. He lived in the stables without a roof, he slept on a cot, he had no lights or water for the year he lived on Jelo's ranch. And he helped build the roofs for the stables.

20. Rury could have lost himself in Mexico. He could have easily gotten into trouble. But Rury took a different path in Mexico. Rury was upstanding and he never demonstrated anything different from the time he arrived until he left.

21. Rury is a friend. He never disrespected me. In this life I have only two friends, and Rury is one of them. If I needed him, I knew Rury would be there in 10 minutes.

22. Rury is not that person reported in the news.

23. Once when Rury and I drank tequila, Rury became very sad and began to speak more in English than in Spanish, and I could not understand him. He began to tell me something that I could not comprehend, it could have been about the problems he had in the United States.

24. Rury started crying and I opened up to him and asked what kind of problems could he have that could not be solved. Rury remained distant. I embraced him with all my might to encourage him. Let me support you, I am here for you because we are friends.

25. I believe that is when Rury felt the warmth of the family. He began being part of the family. He ate his meals with us. It was unusual that he did not eat dinner with us.

26. Rury is a good person. He changed a lot while with us. We began to spend more time with each other. Not as a worker in the furniture store, but as a great friend.

27. At the beginning Rury spent time with my sister. But eventually more time with me. I would take him with me to Monterrey and we would go out as couples with my girlfriend and her friends.

28. Rury always liked to pay, but he did not make very much money working for us, he made 800 pesos (around 80 U.S. dollars) per week.

29. We went to casual places. Rury never used drugs and didn't smoke. We drank beer and a few times we drank tequila.

30. Rury had a dream of opening a bar with small tables where on could drink a beer while reading a book. Rury very much liked to read in English and in Spanish. He had many books where he lived.

31. Rury could have had a better life and earn much more, but he decided to work with us and stay in Cerralvo.

32. Rury was once beaten very badly when he was walking with one of Jelo's daughters. Some men began to harass her. Rury defended her and they began to hit him leaving him beaten and bruised.

33. Sindy once became sick with a virus. Every morning Rury came by with an orange juice. We did not give Sindy too much attention, she is the only girl and she was spoiled. But Rury was worried about her.

34. One of Jelo's daughters has Down syndrome. Rury would take her to a special school each morning and he picked her up to take her home.

35. Rury had some money saved with my dad. When I was married, Rury gave me his money as a gift. Rury told me he was giving me the traditional gold coins.

36. Rury set his life right and he did it in Cerralvo. Rury was a different person than how he was described.

37. No one from Rury's defense team ever spoke with me and I was never asked to testify at Rury's trial. Had I been asked, I would have willingly talked about what I have stated in this affidavit. I also would have willingly testified to these facts at Rury's trial.

I have read this affidavit. I affirm that it is true and correct to the best of my knowledge, and so I state under the pains and penalties of perjury under the laws of the United States.

(Signature) _____
Ubaldo Salinas Muñoz

July 31, 2011
Date

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT

_____
Suzana Trevino

Signed and sworn before me this 8 day of 8, 2011.

_____
Notary Public, State of Texas

GLORIA A. FLORES
Notary Public
STATE OF TEXAS
My Comm. Exp.: 01-26-2015

My commission expires: 01-26-2015

Declaración Jurada de Ubaldo Salinas Muñoz

Yo, Ubaldo Salinas Muñoz, declaro bajo protesta de decir la verdad lo siguiente es cierto en mi leal saber y entender:

1. Mi nombre es Ubaldo Salinas Muñoz. Soy mayor de 18 anos y tengo la capacidad legal para rendir esta declaración.

2. Soy de nacionalidad Mexicana, y me residencia permanente es en Cerralvo, Nuevo León, México. Actualmente estoy en McAllen, Texas para levantar a mi cuñada Silvia Salazar Toscano.

3. Soy el hijo de Homero Salinas Villareal y María Muñoz de Salinas. Mis papas son dueños de las Mueblerías Saymusa en Cerralvo, Nuevo León, México.

4. Conocí a "Rury," quien actualmente se encuentra condenado a pena de muerte en Livingston, Texas bajo el nombre Thomas Whitaker, cuando el Sr. Rogelio Ríos "Jelo" nos presento a Rury como su hijo que tuvo en una aventura con una mujer en los Estados Unidos.

5. Rury tomaba lecciones de guitara con mi hermana Sindylu Salinas Muñoz y comenzó un noviazgo con ella. La invitaba a salir. Iban a Monterrey, Nuevo León, México a los discos y a los antros.

6. Cuando conocí a Rury no le tenía mucha confianza porque no lo conocía. Pero empezó a ganarse mi confianza porque era muy acomedido con mi familia. Si mi mama necesitaba un mandado él lo hacía. Si necesitábamos ayuda en las mueblerías el no ayudaba. El siempre estaba dispuestos hacerlo.

7. Cerralvo es un pueblo que no es muy grande, y la gente comenzó a conocer a Rury como hijo de Jelo.

8. Jelo no es una buena persona. El se ocupaba con los narco traficantes. Pero Rury trabajaba por Jelo en tareas de labor en su rancho. Siempre estaba enlodado y bien sucio cuando llegaba a visitar a Sindy.

9. Cuando comenzaron los problemas en Cerralvo con los traficantes, Rury se alejo de Jelo y del rancho.

10. Rury comenzó a juntarse más con nosotros y comenzó a trabajar en las mueblerías de mis papas.

11. No nomas trabajaba en la mueblería, Rury también era obrero, batia mezcla, y pintaba. Mi familia tiene una quinta y mi papa nos ponía a trabajar cortando yerba con azadones. Rury no sabía cómo usar el azadón y hacia unos posos grandísimos.

USM

12. Rury era muy trabajador. Llegaba en punto de 15 para las nueve de la mañana. Rury era bien responsable y comenzó a ganar la confianza de toda la familia.

13. Mi papa es muy desconfiado y ningún trabajador ha tenido la confianza de mi papa como Rury. Rury llevaba a mis sobrinos a la escuela. Mi Papa le permitía a Rury el uso de las camionetas de trabajo. Normalmente nada mas mi papa, mis hermanos, y yo hacíamos de esas obligaciones.

14. Le teníamos confianza a Rury para encárgale la mueblería. No se le complicaba hacerlo.

15. Cuando termino su noviazgo con mi hermana Sindy nunca le perdimos la confianza a Rury. Si teníamos una fiesta familiar el estaba allí.

16. Mi papa siendo un machista de repente se enojaba y gritaba. Rury era muy calmado que nos hacía sentir contentos en lugar de enojarnos y nos hacía reír tanto.

17. Rury al principio le gustaba que todos los días le enseñara una palabra en español. Rury tenía tres diccionarios en su troca y estudiaba mucho el español. Entendía completamente el español dentro de cinco meses. Pero si lo hablaba con acento. Y nos hacia reír bastante cuando jugaba con la idioma español.

18. Cuando me entere de lo que le acusaban a Rury en los Estados Unidos. No me dio coraje, mi dio tristeza porque a nosotros no nos engaño. El era una persona muy diferente de cómo le describían.

19. Yo siento que el mismo comenzó a castigarse en México. Por la manera que él vivía en el rancho de Jelo. No puede ser que estuviera viviendo en esas condiciones deplorables. El rancho está en la sierra muy alejado del pueblo. Vivió en las caballerizas sin techo, dormía en un catre, no tenia luz ni agua por el año que vivió en el rancho de Jelo. Y fue el que ayudo a techar las caballerizas.

20. Rury se podría haber perdido en México. Podría fácilmente hacer algo mal. Pero Rury tomo un curso diferente en México. Rury era recto y nunca jamás nos demostró diferente desde que llego hasta que se fue.

21. Rury es un amigo. Nunca me falto al respeto. En esta vida solo tengo dos amigos y Rury es uno de ellos. Si lo ocupaba, yo se que Rury en diez minutos estaba allí.

22. El no era esa persona que reportaron en los entrevistas.

JSM.

23. Una vez cuando Rury y yo tomamos tequila, Rury se puso bien triste y comenzó hablar más en ingles que en español y no le entendía. El comenzó a decirme algo que yo no entendí y podría ser los problemas que tuvo en los Estados Unidos.

24. Rury empezó a llorar y yo me abrí con él y le pregunte que problemas podía tener que no podría solucionar. Rury todavía se distanciaba. Yo lo abrase con muchas fuerzas para animarlo. Dejame apoyarte, yo estoy contigo porque somos amigos.

25. Pienso que eso fue cuando Rury sintió el calor de la familia. El comenzó entregarse a la familia. Comía y cenaba con nosotros, era raro que no cenara con nosotros.

26. Rury es una buena persona. El cambio mucho con nosotros. Empezamos a convivir más. No como trabajador de la mueblería, si no como un gran amigo.

27. Al principio Rury se juntaba más con mi hermana. Y después más conmigo. Me lo llevaba a Monterrey y nos juntábamos en parejas con mi novia y amigas de ella.

28. Rury siempre le gustaba pagar, pero no hacia tanto dinero trabajando con nosotros, hacia 800 pesos por semana.

29. Salíamos a lugares tranquilos. Rury jamás usaba droga y tampoco fumaba. Tomábamos cerveza y pocas veces tomábamos tequila.

30. Rury tenía un sueno de abrí un bar con mesas chiquita para tomar cervezas y poder leer un libro. Rury le gustaba leer mucho en ingles y en español. El tenía muchos libros donde vivía.

31. Rury podía tener mejor vida y ganar mucha más, pero decidió trabajar con nosotros y quedase en Cerralvo.

32. Una vez lo golpearon a Rury muy feo cuando estaba encaminando una hija de Jelo. Unos hombres comenzaron a molestarla. El la defendió y lo empezaron a golpear dejándolo todo molido y todo morado.

33. Una vez se enfermo Sindy con un virus. Todas las mañanas llegaba Rury con un jugo de naranja. Nosotros no la poníamos mucha atención a Sindy, era la única mujer y era muy chiflada. Pero Rury se preocupaba por ella.

34. Jelo tiene una hija con síndrome de Down. Cada mañana Rury la llevaba a una escuela especial y la levantaba para llevarla a su casa.

USM

35. Rury tenía un dinero guardado con mi papa. Cuando me case Rury me regalo ese dinero. Rury me dijo que me regalo las arras.

36. Rury enderezo su vida y lo hiso en Cerralvo. Rury demostró haber cambiado de cómo lo describieron.

37. Nunca nadie de la defensa de Rury hablaron conmigo y nunca me preguntaron a testificar acerca el juicio de Rury. Si me hubieran preguntado, yo hubiera estado dispuesto de lo que he indicado en esta declaración jurada. También hubiera estado dispuesto testificar de estos hechos en el juicio de Rury.

Yo ha leído esta declaración. Yo manifiesto que es cierto lo contenido en ella en mi leal saber y entender, conociendo las penas de los Estados Unidos en las que concurren los que declaran falsamente.

Ubaldo Salinas Muñoz — Ubaldo Salinas Muñoz

31-07-11 — Fecha

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT

Signed and sworn before me this 31st day of July, 2011.

Notary Public, State of Texas

My commission expires: 8-14-2012

Suzana Maree Trevino
Notary Public
STATE OF TEXAS
My Comm. Exp.:08-14-2012

EXHIBIT "R"

Texas Department of Criminal Justice

Brad Livingston
Executive Director

September 2, 2011

Jeff Newberry
Texas Defender Service
510 S. Congress Ste 304
Austin, Texas 78704

RE: Open Records Request concerning Offender Thomas Whitaker TDCJ#999522. DOB 12/31/1979.

This letter is in response to your request for information relating to the above referenced offender. The Texas Department of Criminal Justice / Executive Services forwarded your request to other departments within the Agency. I am responding on behalf of the Office of the Administrative Monitor for Use of Force. After a diligent search, to current date, No Use of Force Report was found involving any offender under this name. Retention for use of force documentation is seven years; therefore, prior to December 2003, any records not involved in identified current litigation would have been destroyed in accordance with the destruction schedule.

If this office may be of further assistance, please contact us.

Brittney McGowen
The Office of the Administrative Monitor for Use of Force

cc: file

EXHIBIT "S"

STATE OF TEXAS)
)
COUNTY OF POLK)

Affidavit of [redacted]

1. My name is [redacted] I am over the age of eighteen years and am otherwise competent to give this affidavit.

2. I have been a correctional officer at the Polunsky Unit for [redacted] I have been assigned to death row the entire time that I have been at Polunsky.

3. I am sometimes assigned to work on the pod in which Thomas Whitaker is currently incarcerated and have been able to observe him at those times. I have had more opportunity to observe him during the times in which he has been on other pods.

4. I have never had any problems at all with Thomas Whitaker's behavior and have always found him to be a pleasant person. He follows all orders that he is given.

5. I have never known anyone at the Polunsky Unit to have any problems with Thomas Whitaker.

6. Mr. Whitaker is a positive influence on those around him. He encourages the inmates around him to better themselves.

I declare under penalty of perjury that the foregoing is true and correct. Executed this

13 day of Sept, 2011.

[redacted]

Signed and sworn before me this 13th day of September, 2011.

Notary Public, State of Texas

JEFFREY ROBERT NEWBERRY
Notary Public, State of Texas
Commission Expires 04-04-2015

EXHIBIT "T"

STATE OF TEXAS)
)
COUNTY OF POLK)

Affidavit of [redacted]

1. My name is [redacted] I am over the age of eighteen years and am otherwise competent to give this affidavit.

2. I have been a correctional officer at the Polunsky Unit since [redacted] I have been assigned to death row the entire time that I have been at Polunsky.

3. I work on the same pod every day. Thomas Whitaker has been incarcerated in that pod during most of his time as an inmate at the Polunsky Unit. I have had at least as much contact with Mr. Whitaker as any of the other correctional officers.

4. Thomas Whitaker's behavior is good. His behavior is significantly better than the average inmate on death row. I have never had any problems at all with Mr. Whitaker. He is totally cooperative.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of September, 2011.

[redacted]

Signed and sworn before me this 9th day of September, 2011.

Notary Public, State of Texas

JEFFREY ROBERT NEWBERRY
Notary Public, State of Texas
Commission Expires 04-04-2015

EXHIBIT "U"

TDCJ DISCIPLINARY REPORT AND HEARING RECORD

CASE#: 20080261633 TDCJNO: 00999522 NAME: WHITAKER,THOMAS BARTLETT EA:
UNIT: TL HSNG: 12CC2 42 JOB: DR SEG LEVEL I IQ: 000
CLASS: CUST: D1 PRIMARY LANGUAGE: ENGLISH MHMR RESTRICTIONS: NO
GRADE: MI / JS OFF.DATE: 05/26/08 06:12 PM LOCATION: TL 12 BUILDING
TYPE: ID

OFFENSE DESCRIPTION

ON THE DATE AND TIME LISTED ABOVE, AND AT 12 CC 42 CELL, OFFENDER: WHITAKER, THOMAS BARTLETT, TDCJ-ID NO. 00999522, WAS ORDERED BY CO SKINNER TO REMOVE ALL CARDBOARD FROM CELL DOOR WINDOW AND SAID OFFENDER FAILED TO OBEY THE ORDER.

CHARGING OFFICER: SKINNER, C COV SHIFT/CARD: 2 2

OFFENDER NOTIFICATION

TIME & DATE NOTIFIED: 5-29-08 22:05pm BY:(PRINT) D Nelle IF APPLICABLE INTERPRETER,
YOU WILL APPEAR BEFORE A HEARING OFFICER 24 HOURS OR MORE AFTER RECEIPT OF THIS NOTICE. YOU HAVE THE RIGHT TO SUBMIT A WRITTEN STATEMENT AND MAKE A VERBAL STATEMENT. DO YOU WANT TO ATTEND THE HEARING? YES NO IF NO, HOW DO YOU PLEAD? GUILTY NOT GUILTY
OFFENDER NOTIFICATION SIGNATURE: X [signature] DATE: 5-29-08
BY SIGNING BELOW, YOU GIVE UP YOUR RIGHT TO 24-HOUR NOTICE AND AUTHORIZE THE HEARING OFFICER TO PROCEED WITH THE HEARING.
OFFENDER WAIVER SIGNATURE: X [signature] DATE: 5-29-08

HEARING INFORMATION

HEARING DATE: 6-4-08 TIME: 0445 INTERPRETER SIGNATURE:
EXPLAIN BELOW IF HEARING WAS NOT HELD WITHIN SEVEN DAYS, EXCLUDING WEEKENDS AND HOLIDAYS, AFTER THE OFFENSE DATE:

OFFENDER STATEMENT: I did not hear her.

OFFENSE CODES:	24.0			
OFFENDER PLEA: (G, NG, NONE)	NG			
FINDINGS: (G, NG, DS)	G			

PUNISHMENT

LOSS OF PRIV(DAYS)		REPRIMAND	
*RECREATION(DAYS)		EXTRA DUTY(HOURS)	
*COMMISSARY(DAYS)	10	CONT.VISIT SUSP THRU	/ /
*PROPERTY(DAYS)		CELL RESTR(DAYS)	10
* (DAYS)			

OFFENDER SIGNATURE FOR RECEIPT OF FINAL REPORT: Offender in Restraints
Lt. [illegible]
HEARING OFFICER (PRINT) WARDEN
(FORM I-47MI)CONTACT A STAFF MEMBER IF YOU DO NOT UNDERSTAND THIS FORM
(REV. 03-02) COMUNIQUESE CON UN MIEMBRO DEL PERSONAL SI NO ENTIENDE ESTA FORMA

TDCJ DISCIPLINARY REPORT AND HEARING RECORD

CASE: 20090212808 TDCJNO: 00999522 NAME: WHITAKER,THOMAS BARTLETT EA:
UNIT: TL HSNG: 71 JOB: DR SEG LEVEL I IQ: 000
CLASS: CUST: B1 PRIMARY LANGUAGE: ENGLISH RESTRICTIONS: NONE
GRADE: MI / JS OFF.DATE: 03/29/09 03:20 PM LOCATION: TL DEATH ROW HOUSING
TYPE: ID

OFFENSE DESCRIPTION

ON THE DATE AND TIME LISTED ABOVE, AND AT 12 BUILDING A POD 71 CELL, OFFENDER: WHITAKER,THOMAS BARTLETT, TDCJ-ID NO. 00999522, DID POSSESS CONTRABAND, NAMELY, 11 BOTTLES OF PAINT, WHICH IS AN ITEM THAT IS NOT ALLOWED OR ASSIGNED TO AN OFFENDER, AND NOT BOUGHT BY THE OFFENDER FOR HIS USE FROM THE COMMISSARY.

CHARGING OFFICER: NETTLES, C COIV SHIFT/CARD: 1 2

OFFENDER NOTIFICATION

TIME & DATE NOTIFIED: 0830/4-15-09 BY:(PRINT) SGT. DIXON IF APPLICABLE INTERPRETER,
YOU WILL APPEAR BEFORE A HEARING OFFICER 24 HOURS OR MORE AFTER RECEIPT OF THIS NOTICE. YOU HAVE THE RIGHT TO SUBMIT A WRITTEN STATEMENT AND MAKE A VERBAL STATEMENT. DO YOU WANT TO ATTEND THE HEARING? (YES) NO IF NO, HOW DO YOU PLEAD? GUILTY NOT GUILTY
OFFENDER NOTIFICATION SIGNATURE: [signature] DATE: 4.15.09
BY SIGNING BELOW, YOU GIVE UP YOUR RIGHT TO 24-HOUR NOTICE AND AUTHORIZE THE HEARING OFFICER TO PROCEED WITH THE HEARING.
OFFENDER WAIVER SIGNATURE: _____ DATE: _____

HEARING INFORMATION

HEARING DATE: 4-17-09 TIME: 2080 INTERPRETER SIGNATURE: _____
EXPLAIN BELOW IF HEARING WAS NOT HELD WITHIN SEVEN DAYS, EXCLUDING WEEKENDS AND HOLIDAYS, FROM THE OFFENSE DATE: Reschd by Staff
OFFENDER STATEMENT: The paint was for Art purpose

OFFENSE CODES:	16.0			
OFFENDER PLEA: (G, NG, NONE)	G			
FINDINGS: (G, NG, DS)	G			

PUNISHMENT

LOSS OF PRIV(DAYS)		REPRIMAND	
*RECREATION(DAYS)		EXTRA DUTY(HOURS)	
*COMMISSARY(DAYS)	5	CONT.VISIT SUSP THRU	/ /
*PROPERTY(DAYS)		CELL RESTR(DAYS)	
* (DAYS)			

OFFENDER SIGNATURE FOR RECEIPT OF FINAL REPORT: Offender in restraints
Tom Bolly Lt.
HEARING OFFICER (PRINT) WARDEN
(FORM I-47MI)CONTACT A STAFF MEMBER IF YOU DO NOT UNDERSTAND THIS FORM
(REV: 08-02) COMUNIQUESE CON UN MIEMBRO DEL PERSONAL SI NO ENTIENDE ESTA FORMA

TDCJ DISCIPLINARY REPORT AND HEARING RECORD

[redacted] TDCJNO: 00999522 NAME: WHITAKER,THOMAS BARTLETT

[redacted] DOB: DR SEG LEVEL I ID: GOD

CLASS: CODE: DI PRIMARY LANGUAGE: ENGLISH RESTRICTIONS: NONE

RACE: MA / OS OFF.DATE: 03/15/10 02:45 PM LOCATION: TL DEATH ROW HOUSING

TYPE: ID

OFFENSE DESCRIPTION

ON THE DATE AND TIME LISTED ABOVE, AND AT 12AD53, OFFENDER: WHITAKER,THOMAS BARTLETT, TDCJ-ID NO. 00999522, POSSESSED AN UNAUTHORIZED DRUG, NAMELY, THE PRESCRIPTION DRUGS NORTRIPTYLINE, BENADRYL, TYLENOL THREE AND DARVOCET

HEARING OFFICER: MANN, C JR CGIII SHIFT/CARD: 1 H

OFFENDER NOTIFICATION IF APPLICABLE INTERPRETER,

TIME & DATE NOTIFIED: 3-18-10 1800 BY:(PRINT) [illegible]

YOU WILL APPEAR BEFORE A HEARING OFFICER 24 HOURS OR MORE AFTER RECEIPT OF THIS NOTICE. DO YOU WANT TO ATTEND THE HEARING? YES NO IF NO, HOW DO YOU PLEAD? GUILTY NOT GUILTY

OFFENDER NOTIFICATION SIGNATURE: [illegible] DATE: 3-18-10

BY SIGNING BELOW, YOU GIVE UP YOUR RIGHT TO 24 HOUR NOTICE AND AUTHORIZE THE HEARING OFFICER TO PROCEED WITH THE HEARING.

OFFENDER WAIVER SIGNATURE: X DATE: 3-18-10

HEARING INFORMATION

HEARING DATE: 3/24/10 TIME: 11:13am TAPE# 137 SIDE# C START# 240 END# 442

COUNSEL SUBSTITUTE AT HEARING: C/S TAPE# SIDE# START# END#

EXPLAIN BELOW BY NUMBER: (1)IF COUNSEL SUBSTITUTE WAS NOT PRESENT DURING PART OF HEARING, (2)IF ACCUSED OFFENDER WAS CONFINED IN PRE-HEARING DETENTION MORE THAN 72 HOURS PRIOR TO HEARING, (3) IF ACCUSED WAS EXCLUDED FROM ANY PART OF THE EVIDENCE STAGE, (4) IF ANY WITNESSES OR (5) DOCUMENTATION WAS EXCLUDED FROM HEARING (6) IF OFFENDER WAS DENIED CONFRONTATION AND/OR CROSS-EXAMINATION OF A WITNESS AT THE HEARING (7) IF HEARING WAS NOT HELD WITHIN SEVEN DAYS, EXCLUDING WEEK ENDS AND HOLIDAYS, FROM THE OFFENSE DATE AND (8) IF INTERPRETER USED: (EXPLAIN IN DETAIL): 1) counsel substitute officer 4) Statement offender Vasquez statement due to security risk.

OFFENSE CODES:	12.D				
OFFENDER PLEA: (G) (NG) NONE	N/A				
FINDINGS: (G) (NG) (DISM)					
REDUCED TO: (PRIOR TO DOCKET)	(DOCKET)	(HEARING)	BY:(INITIAL)		

IF GUILTY, EVIDENCE PRESENTED, CONSIDERED, AND REASON(S) FOR DETERMINATION OF GUILT: A)ADMISSION OF GUILT B)OFFICER'S REPORT, C)WITNESS TESTIMONY D)OTHER. EXPLAIN IN DETAIL: D) officer testimony

PUNISHMENT

LOSS OF PRIV(DAYS)	REPRIMAND	SOLITARY(DAYS)	
*RECREATION(DAYS)	EXTRA DUTY(HOURS)	REMAIN LINE 3	
*COMMISSARY(DAYS) 30	CONT.VISIT SUSP THRU / /	REDUC.CLASS FROM TO	
*PROPERTY(DAYS)	CELL RESTR(DAYS) 15	GOOD TIME LOST(DAYS)	
(DAYS)	SPECIAL CELL RESTR(DAYS)	DAMAGES/FORFEIT.$	

SPECIFIC FACTUAL REASON(S) FOR PARTICULAR PUNISHMENT IMPOSED: [illegible] offense

CREDIT FOR PRE-HEARING DETENTION TIME? YES(DAYS) NO (NA)

TO BE PLACED IN PRE-HEARING DETENTION: n/a HEARING LENGTH 13.4 (MINUTES)

OFFENDER SIGNATURE FOR RECEIPT OF FINAL REPORT: X Offender in restraints REFUSED

HEARING OFFICER (PRINT): WARDEN STATE CLASS COMMITTEE MEMBER

FORM I-47A(A) CONTACT COUNSEL SUBSTITUTE IF YOU DO NOT UNDERSTAND THIS FORM.
REV. 08-01 COMUNIQUESE CON SU CONSEJERO SUSTITUTO SI NO ENTIENDE ESTA FORMA

TDCJ DISCIPLINARY REPORT AND HEARING RECORD

CASE: 20110288876 TDCJNO: 00999522 NAME: WHITAKER,THOMAS BARTLETT EA:
UNIT: TL HSNG: [redacted] JOB: DR SEG LEVEL: IQ: 000
CLSS: CUST: DI PRIMARY LANGUAGE: ENGLISH MHMR RESTRICTIONS: NONE
GRDE: MA / JS OFF.DATE: 06/08/11 02:00 PM LOCATION: TL DEATH ROW HOUSING
TYPE: ID

OFFENSE DESCRIPTION

ON THE DATE AND TIME LISTED ABOVE, AND AT 12 BLDG INTELLIGENCE OFFICE, OFFENDER: WHITAKER,THOMAS BARTLETT, TDCJ-ID NO. 00999522, DID POSSESS CONTRABAND, NAMELY A COMMISSARY NOTIFICATION APPROVED BY UNIT COMMISSARY & INSTRUCTIONS TO HIS FATHER TO REMOVE DEPARTMENTAL MARKINGS & DUPLICATE (X 20) AND MAIL BACK INTO UNIT USING FALSE "LEGAL" ADDRESS (RETURN ADDRESS) SO THAT UNIT MAILROOM STAFF WILL NOT INSPECT & CATCH THE FALSIFIED STATE DOCUMENTS AND FALSE LEGAL WORK CONTAINING

CHARGING OFFICER: SHEFFIELD, H. COIII SHIFT/CARD: 1 H

OFFENDER NOTIFICATION IF APPLICABLE INTERPRETER

TIME/DATE NOTIFIED: 6/13/11 1200hrs BY:(PRINT) M Jones [redacted]

YOU WILL APPEAR BEFORE HEARING OFFICER 24 HOURS OR MORE AFTER RECEIPT OF THIS NOTICE. DO YOU WANT TO ATTEND THE HEARING? YES (NO) IF NO, HOW DO YOU PLEAD? GUILTY NOT GUILTY

OFFENDER NOTIFICATION SIGNATURE: [signature] DATE: 6/13/11

BY SIGNING BELOW, YOU GIVE UP YOUR RIGHT TO 24 HOUR NOTICE AND AUTHORIZE THE HEARING OFFICER TO PROCEED WITH THE HEARING.

OFFENDER WAIVER SIGNATURE: [signature] DATE: 6/13/11

HEARING INFORMATION

HEARING DATE: 6/23/11 TIME: 09:00 UNIT: TL FOLDER: 1A FILE: 191 DSFILE: 2446/17

COUNSEL SUBSTITUTE AT HEARING: Medley FOLDER: FILE: DSFILE:

EXPLAIN BELOW BY NUMBER: (1)IF COUNSEL SUBSTITUTE WAS NOT PRESENT DURING PART HEARING,(2)IF ACCUSED OFFENDER WAS CONFINED IN PRE-HEARING DETENTION MORE THAN 72 HOURS PRIOR TO HEARING, (3) IF ACCUSED WAS EXCLUDED FROM ANY PART OF THE EVIDENCE STAGE, (4) IF ANY WITNESSES OR (5) DOCUMENTATION WAS EXCLUDED FROM HEARING (6) IF OFFENDER WAS DENIED CONFRONTATION AND/OR CROSS-EXAMINATION OF A WITNESS AT THE HEARING (7)IF HEARING WAS NOT HELD WITHIN SEVEN DAYS, EXCLUDING WEEK ENDS AND HOLIDAYS, FROM THE OFFENSE DATE AND, (8) IF INTERPRETER USED:
(SIGNATURE) [signature] Offender chose to not to attend - H/Evans.

OFFENDER STATEMENT: Refused + filed a grievance.

OFFENSE CODES:	15.0	30.0		
OFFENDER PLEA: (G, NG) NONE	NG	NC		
FINDINGS: (G, NG, DS)	G	DS		

REDUCED TO MINOR(PRIOR TO DOCKET)__ (DOCKET)__ (HEARING)__ BY:(INITIAL)__

IF GUILTY, EVIDENCE PRESENTED, CONSIDERED, AND REASON(S) FOR DETERMINATION OF GUILT: A)ADMISSION OF GUILT, B)OFFICER'S REPORT, C)WITNESS TESTIMONY, D)OTHER.
EXPLAIN IN DETAIL: Charges were not refuted.

PUNISHMENT

LOSS OF PRIV(DAYS)____	REPRIMAND.....____	SOLITARY(DAYS).....____
*RECREATION(DAYS)____	EXTRA DUTY(HOURS).....____	REMAIN LINE 3.....____
*COMMISSARY(DAYS) 30	CONT.VISIT SUSP.THRU__/__/__	REDUC.CLASS FROM __ TO __
*PROPERTY(DAYS)..____	CELL RESTR(DAYS).....10	GOOD TIME LOST(DAYS).____
*_____(DAYS)..____	SPECIAL CELL RESTR(DAYS).____	DAMAGES/FORFEIT.$____.__

SPECIFIC FACTUAL REASON(S) FOR PARTICULAR PUNISHMENT IMPOSED: Due to the Nature of the Offense.

CREDIT FOR PRE-HEARING DETENTION TIME? YES(DAYS)____ NO / NA
DATE PLACED IN PRE-HEARING DETENTION:____ HEARING LENGTH 45 (MINUTES)
OFFENDER SIGNATURE FOR RECEIPT OF FINAL REPORT: Refused to attend

C Miller — M Butler — [signature]
HEARING OFFICER (PRINT) WARDEN REVIEWER SIGNATURE

(FORM I-47MA)CONTACT COUNSEL SUBSTITUTE IF YOU DO NOT UNDERSTAND THIS FORM.
(REV. 04-10) COMUNIQUESE CON SU CONSEJERO SUSTITUTO SI NO ENTIENDE ESTA FORMA

EXHIBIT "V"

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
UNIT CLASSIFICATION COMMITTEE HISTORY FORM

OFFENDER NAME: WHITAKER, THOMAS B (Last, First, Middle I) TDCJ #: 999522

A. Purpose of Classification Review Codes

01	Assignment to Unit
02	Safekeeping Status Review
05	Other UCC/ASC/SMC Decisions
06	UCC Consideration for Promotion in Class/Custody
09	Death Row Review
10	Death Row Custody Change No Committee Action
11	Disciplinary Report
17	Classification Review No Committee Action
20	Initial Admin. Seg. Hearing
21	Admin. Seg. 30-day/SMC 7-day Review
22	Admin. Seg. 60-day Review
23	Admin. Seg. 90-day Review
25	Other State Classification Committee
26	Major Program Review/Changes
28	Admin. Seg. Restriction
29	Admin. Seg. 180-day Review
31	90-day Progress Report (State Jail)
34	Protection Status Review
35	Annual Review
36	Initial ITP Review
37	SSI Review
38	FI-R Review
39	Security Precaution Designator Review
40	Annual STG Review by SCC
41	Six Month STG Review by ASC/SMC
50	Cell Assignment Status

B. Standard Overrides

30	SCC Promotion to G1 - OT

C. Custody Codes

OT	General Population Level I (Assigned to Trusty Camp)
G1	General Population Level I
G2	General Population Level II
G3	General Population Level III
G4	General Population Level IV
G5	General Population Level V
P1	Safekeeping Level I
P2	Safekeeping Level II
P3	Safekeeping Level III
P4	Safekeeping Level IV
P5	Safekeeping Level V
J1	State Jail Level 1
J2	State Jail Level 2
J4	State Jail Level 4
J5	State Jail Level 5
PJ	Safekeeping (State Jail)
SR	Special Management (State Jail)
1A	Security Detention Level I
2A	Security Detention Level II
3A	Security Detention Level III
4A	Protective Custody Level I
5A	Protective Custody Level II
6A	Protective Custody Level III
MD	Inpatient Paraplegic
MH	Mental Health Status
II	Mentally Retarded Offender Program
D1	Death Row Level I
D2	Death Row Level II
D3	Death Row Level III
DW	Death Row Work Capable
SA	Special Alternatives to Incarceration Program
IT	In-Prison Therapeutic Community
FT	Substance Abuse Felony Punishment Facility
PR	Pre-Release Therapeutic Community
CG	Grad Program Offender

Date of Review	TDCJ Unit	Classification Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
3/23/07	TL	01	D1	D1			

Comments: NEW ARRIVAL ; ASSIGNED DEATH ROW SEG

Override: _____

Justification: _____

Is DNA testing required? (circle one): Yes (No) If already tested, what date? _____

☆SSP-113 (Revised 10/02)

UNIT CLASSIFICATION COMMITTEE HISTORY FORM
(Subsequent Hearings)

OFFENDER NAME: WHITAKER, THOMAS B (Last, First, Middle I) TDCJ #: 999522

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
3/30/07	TL	21	D1	D1			

Comments: 1ST 7day - Remain D1
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
4/6/07	TL	21	D1	D1			

Comments: 2ND/ remain D1
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
4/13/07	TL	21	D1	D1			

Comments: 3RD - Remain D1
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
4/20/07	TL	21	D1	D1			

Comments: 4th 7day - Remain D1
Override:
Justification:

UNIT CLASSIFICATION COMMITTEE HISTORY FORM
(Subsequent Hearings)

OFFENDER NAME: WHITAKER THOMAS B. TDCJ #: 999522
Last First Middle I

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
4/27/07	TC	21	D1	D1			

Comments: 5th/7day Remain D1
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
5/4/07	TC	21	D1	D1			

Comments: 6th/7day Remain D1
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
5/11/07	TC	21	D1	D1			

Comments: 7th/7day - Remain D1
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
5/18/07	TC	21	D1	D1			

Comments: 8th/7day - Remain D1
Override:
Justification:

UNIT CLASSIFICATION COMMITTEE HISTORY FORM
(Subsequent Hearings)

OFFENDER NAME: WHITAKER, THOMAS B (Last, First, Middle I) TDCJ #: 999522

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
5/25/07	TL	21	D1	D1			

Comments: 9th/7day - Remain D1
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
6/1/07	TL	21	D1	D1			

Comments: 10th/7day Remain D1
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
6/8/07	TL	21	D1	D1			

Comments: 11th/7day Remain D1
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
6/15/07	TL	21	D1	D1			

Comments: 12th/7day Remain D1
Override:
Justification:

UNIT CLASSIFICATION COMMITTEE HISTORY FORM
(Subsequent Hearings)

OFFENDER NAME: WHITAKER (Last) THOMAS (First) B (Middle I) **TDCJ #:** 999522

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
6/22/07	TC	21	D1	D1			

Comments: 8th Mo Remain D1
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
8/12/08	TL	05/09	D1	D1			

Comments: Review Double hand cuff x 30 days 9/17/08
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
9/17/08	TL	05/09	D1	D1			

Comments: Review Double Cuffs thru 03.17.09. REMAIN D1 ad Seg
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
10/17/08	TL	05	D1	D1			

Comments: Double cuff Extend DOUBLE CUFF THRU 03/17/09
Override:
Justification:

UNIT CLASSIFICATION COMMITTEE HISTORY FORM
(Subsequent Hearings)

OFFENDER NAME: WHITAKER THOMAS B (Last / First / Middle I) **TDCJ #:** 999522

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
8/18/08	TL	05/09	D1	D1			

Comments: Double cuffs Renew Double hand cuffs thru 8/18/09
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
8/18/09	TL	05/09	D1	D1			

Comments: D/C - Remain D1 - Remove double handcuffs -
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
12/15/10	TL	09	D1	D1			

Comments: Remain D1
Override:
Justification:

Date of Review	TDCJ Unit	Purpose of Review Code	Computer Recommended Custody	Committee Assigned Custody	Security Precaution Designator	Cell Assignment Code	Staff Initials
6/15/11	TL	09	D1	D1	NONE	XX	

Comments: Remain D1
Override:
Justification:

EXHIBIT "W"

ADAMS STATE COLLEGE

COLORADO

Great Stories Begin Here

SSN ***-**-2630

Date Issued: 24-AUG-2011
Date of Birth: 31-DEC

OFFICE OF RECORDS & REGISTRATION
OFFICIAL ACADEMIC TRANSCRIPT

Record of: Thomas Bartlett Whitaker
#999522
Polunsky Unit
3872 FM 350 South
Livingston, TX 77351
United States of America

Issued To: Thomas Bartlett Whitaker
#999522
Polunsky Unit
Livingston, TX 77351
United States of America

Course Level: Undergraduate

Current Program
Major : Interdisciplinary Stud/NonLic.

Secondary
Major : Interdisciplinary Stud/NonLic.

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R

TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:

FA98-SP01 Baylor University
Ehrs: 43.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00

SU98-SU01 Wharton County Junior College
Ehrs: 6.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00

FA01-SP03 Sam Houston State University
Ehrs: 13.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00

INSTITUTION CREDIT:

Summer Semester 2009

SOC	379	Victim Advocacy	3.00	A	12.00

Ehrs: 3.00 GPA-Hrs: 3.00 QPts: 12.00 GPA: 4.00

Fall Semester 2009

ENG	203	Major Themes in Lit GT-AH2	3.00	A	12.00
HIST	202	American Hist to 1865 GT-HI1	3.00	A	12.00
PHIL	201	Introduction to Philosophy	3.00	B	9.00

Ehrs: 9.00 GPA-Hrs: 9.00 QPts: 33.00 GPA: 3.66

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R

Institution Information continued:

Spring Semester 2010

MATH	104	Finite Mathematics GT-MA1	3.00	A	12.00

Ehrs: 3.00 GPA-Hrs: 3.00 QPts: 12.00 GPA: 4.00

Fall Semester 2010

ENG	210	The Study of Literature	3.00	A	12.00
SOC	201	Soc Imagination GT-SS3	3.00	A	12.00

Ehrs: 6.00 GPA-Hrs: 6.00 QPts: 24.00 GPA: 4.00

Spring Semester 2011

CRJ	301	Correctnl Inst Organizatn/Mgmt	3.00	A	12.00
ENG	259	Development of Vocabulary	3.00	A	12.00
ENG	359	Mythology	3.00	A	12.00
SOC	382	Victimology	3.00	IN	0.00
SOC	401	Social Psychology	3.00	A	12.00
SOC	445	Sociological Theory	3.00	IN	0.00

Ehrs: 12.00 GPA-Hrs: 12.00 QPts: 48.00 GPA: 4.00

Summer Semester 2011

CRJ	415	Theories of Criminal Behavior	3.00	IN	0.00
ENG	311	World Literature I	3.00	IN	0.00

Ehrs: 0.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	33.00	33.00	129.00	3.90
TOTAL TRANSFER	62.00	0.00	0.00	0.00
OVERALL	95.00	33.00	129.00	3.90

********** END OF TRANSCRIPT **********

M. Belén Maestas, Registrar

EXHIBIT "X"

PEN
American Center

588 Broadway
Suite 303
New York, New York
10012

February 23, 2011

Thomas Bartlett Whitaker 999522
Polunsky Unit
3872 FM 350 South
Livingston, TX 77351

Dear Thomas Bartlett Whitaker:

Congratulations! We are delighted to inform you that your submission *Hell's Kitchen* has been selected as the First Prize winner in the Nonfiction-Essay Category of the 2010 PEN Prison Writing Contest. This prize includes a $200.00 award and, with your permission, an online publication of your work and a brief biography on our website, www.pen.org/prisonwriting. We request a short biography and a photo of you if it is available. (If you are using a large photo, you may wish to send this in a larger envelope than the one we provide. In this case, you will need to pay for mailing expenses.)

Enclosed, please find the 2010 Winner Response Form, which we will need you to fill out and return at your earliest convenience.

- Regarding your award, please indicate the name and address we should use when we send your prize check, be it yourself or another party. Be sure to specify what name you would like to appear on the check itself.

- At times, PEN Prison Writing presents winners' work online and/or seeks publishers for contest winners. We require your explicit permission to publish your work. In the rare case that payment may be involved, that money belongs to you, and we would request that any publisher contact you directly.

- As a winner, you are eligible to participate in our mentorship program, another part of the PEN Prison Writing Program. This opportunity means an established writer will volunteer to correspond with you through mail. Would you be interested in having a mentor look at your work?

Again, our warmest congratulations from the entire Prison Writing Program on a job well done!

Sincerely,

Jonathan Dozier-Ezell
Coordinator, PEN Prison Writing Program