
BEFORE THE

THE TEXAS BOARD

OF PARDONS AND PAROLES

**REQUEST FOR COMMUTATION OF DEATH SENTENCE
TO A LESSER PENALTY**

Respectfully submitted by

Attorneys for Thomas Whitaker

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Thomas Whitaker is scheduled for execution on February 22, 2017.

TO THE HONORABLE MEMBERS OF THE TEXAS BOARD OF PARDONS AND PAROLES:

This request for a recommendation by the members of this Board to Governor Greg Abbott for a commutation of Thomas Whitaker's death sentence to a lesser penalty is submitted pursuant to Texas Administrative Code, title 37, part 5, chapter 142, subchapter E, Rule 143.57 by Mr. Whitaker's attorneys.

Thomas Bartlett Whitaker was convicted in Fort Bend County for the capital murders of Patricia Whitaker and Kevin Whitaker. This *Request for Commutation of Death Sentence to a Lesser Penalty* is filed more than 21 days from the date of the scheduled execution. Counsel for Mr. Whitaker requests an interview with a member of the Board as well as a 30-day reprieve.

Counsel for Mr. Whitaker waives any and all objections, real or potential, to any communication this Board and/or its agents may wish to instigate with Mr. Whitaker at any time or date. Undersigned counsel welcomes anyone and everyone to interview Mr. Whitaker himself, in person, face to face without reservation, constitutional, statutory or otherwise, at any date, time or place.

Kent Whitaker is Thomas' father. Together with his wife, Patricia, and his son, Kevin, Kent was shot. Patricia and Kevin died. Kent survived and desperately seeks clemency for his son.

Reasons for Clemency

This case is unique. Kent Whitaker was almost murdered during the same ambush that took the life of Kent's wife, Patricia, and son, Kevin. He survived to learn that the person who was behind his attempted murder and the murders of Tricia and Kevin was his other son, Thomas "Bart" Whitaker.

There is only one person on Earth who is intimate with the murderous attack, the lives and deaths of the other victims, and the life of Thomas Whitaker – Mr. Whitaker's father, Kent. Kent was there. He speaks to clemency with a moral force and detail of experience that no district attorney or judge or anyone else can possess.

For the rest of us, the case against commutation to a life sentence seems clear. We can't forgive; we have no sympathy. But clemency is not about something so easy as sympathy or as difficult as forgiveness. Clemency is about lenity, and it is a moral question rendered far more complex by the unique circumstances of this case.

Imagine two people in your family who you love most. Now, imagine one of them murders the other. There must be punishment. But would you prefer execution? What if that person was your only remaining child?

Kent lived the assassinations. He watched his son, Kevin, walk into the house, heard the first and fatal shot, and saw his son's fallen body in their darkened home. He heard Tricia's last, wet coughs as Kent himself lay dying from his own gunshot

wound, knowing that every member of his family had been shot. The bullet hit Kent nearly six inches from his heart. He also later experienced the revelation that his own son was behind the killing of his beloved wife and younger son and his own attempted murder. Kent's anguish and tribulations are beyond the ken of our imagination.

The moral choice now before each member of this Board is a diminished and distant version of the deeply personal choice Kent Whitaker faced. You are asked: Is clemency warranted where execution might be justice for a wicked crime, yet would also permanently compound the suffering and grief of the remaining victim?

Kent looked to God. He found the answer early in his tragedy, as he has written. While lying in his hospital bed, Kent considered whether he should slip into bitterness and despair. His faith rescued him from that fate.

We know from the Bible that God's first decision regarding humankind was to expel Adam and Eve from the Garden of Eden. God's third decision should be just as instructive. God let humanity spring forth from Adam and Eve. But in the face of the first murder, God set an example. One of Adam's sons – Cain – killed Adam's other son, Abel.

The Bible does not detail Adam's grief or shock or bewilderment about what should be done. Like, Adam, we cannot know Eve's judgment. But we do know that

she, like Adam, did not thirst for Cain's death. She did not cry out for his execution as God's answer to her grief. While the details are hidden from us, we do know what God did in the face of it, which, perhaps, is all we need to know.

God did not forgive Cain. God did not kill Cain. God marked Cain for his crime, as well as for Cain's own protection, and sent him into oblivion.

This Board has the power to recommend the same fate for Thomas "Bart" Whitaker as God imposed upon Cain. Commutation means that we as a society do not forgive Bart Whitaker. We do not execute Bart Whitaker. We will instead mark him to wander his own mind within the oblivion of his own cell. And this punishment will continue until God decides otherwise. We should mark him, like Cain, as "Thomas Whitaker" for reasons that will become very clear.

When Kent Whitaker, in his hour of greatest tragedy, sought the answer to his moral dilemma, he found two telling stories in the Bible, one found in the Old Testament, the other in the Gospel. Both are consistent with God's decision to spare Adam's murderous son, Cain. They also help explain Kent Whitaker's fervent effort for this Board to recommend clemency for his son.

King David's son, Absalom, killed the king's other son, Amnon. Absalom then took up arms against his own father and despite King David's orders to not kill him, Absalom was killed in battle. King David wept: "O my son Absalom, my son, my son

Absalom! Would God I had died for thee, O Absalom, my son, my son!”

Jesus told the story of the prodigal son. The son demanded his inheritance from his father, then left and squandered all of it. That son then found himself hungry and poor and miserable. When he returned home repentant, his father unhesitatingly welcomed him home. His other son was puzzled by his father’s reaction. But the father explained that for his sins, this son “was dead,” but his repentance had resurrected him. He was lost, and now, he is found.

None of us can follow Kent Whitaker’s journey of horror, sorrow, shock and loss. It is territory we can barely explore. But Kent has emerged from the deep forest of his despair. He deserves to be listened to, and his viewpoint fairly considered.

The District Attorney did not listen. Kent Whitaker’s plea for life sentences was disregarded. No one in either family sought the execution of Kent Whitaker’s son. The prosecution coldly ignored the sentiments of these victims and survivors.

The Fort Bend District Attorney spared the actual killer, Christopher Brashear. He did the same for the accomplice, Steven Champagne. His office was preparing to spare Bart Whitaker, but that negotiation went very wrong.

Bart Whitaker’s attorneys, Dan Cogdell and James Ardoin, ran into the lead prosecutor in the case, Fred Felcman at a local store. According to Mr. Cogdell and Mr. Ardoin, Mr. Felcman stated that he would consider a life sentence if Bart

Whitaker would give a written confession limited to the facts and without any expressions of remorse or contrition. Mr. Ardoin drafted a proffer and presented it to Mr. Felcman. According to Mr. Ardoin, Mr. Felcman then rejected the proffer because it failed to reflect any expressions of remorse. The outraged prosecutor then used the confession at trial to secure a death sentence. *Whitaker v. Stephens*, No. H-11-CV-2467, 2015 U.S. Dist. LEXIS 35434, at 8-9 (S.D. Tex. Mar. 17, 2015).

During the punishment phase of trial, the miscommunication became clear during the prosecutor's use of the proffer during his cross-examination of Bart Whitaker:

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.

Whitaker v. Stephens, No. H-11-CV-2467, 2015 U.S. Dist. LEXIS 35434, at 13-14 (S.D. Tex. Mar. 17, 2015).

Somewhere in the calculus of whether to recommend clemency in this case, this Board should consider the circumstances of the death sentence. Every member of Kent Whitaker's family and every member of Patricia Whitaker's family have been forced to undergo the long and gut-wrenching odyssey of a capital murder case through state and federal courts since March, 2007. They all supported or accepted a life sentence. But for ill-timed confusion, there would be no need for this *Request*.

This Board is not bound to treat the victims and survivors in this case in the same manner as the prosecution. On the contrary, this Board can and should afford their "right to be treated with fairness and with respect for the victim's dignity ... throughout the criminal justice process." Tex. Const. art. I §30; Tex. Code Crim. Pro. art. 56.01(1). While the Legislature designated this Board to participate in recording

victim impact statements under Article 56.03 of the Code of Criminal Procedure, lawmakers did not address the role of the impact upon victims by the execution of a sentence. Instead, they left this consideration to this Board and the Governor. Kent Whitaker is a victim who at the very least deserves to be heard.

There is no reason for this particular execution to take place. No one close to the people involved in this case want it to happen. Some passionately oppose it. Others simply wish their lives could be restored to the time before the crime. It is only the State of Texas, through its employees and representatives, that mechanically marches forward onto the date of death, unlike the people closest to the crime and the criminal.

You may object and believe that your approval of the killing of Thomas Bartlett Whitaker is justice. This rationale is both presumptuous and misguided. It is presumptuous for anyone, including a Board member or a Governor, to elevate a definition of justice above those who have lived and survived the actual tragedy. As a religious matter, some might say that to do so is more than presumptuous; it is dangerous for Man to replace God's example with one of our own.

The belief that the execution will fulfill justice is also misguided. The planned execution is far too late. Bart Whitaker is already dead.

It is difficult to pinpoint the exact moment that Bart Whitaker left this Earth.

Kent believes it may have happened after he fled to Mexico and before his arrest. Perhaps it happened when he wrote his letter of remorse before his trial. But at some point in time only God can identify, the demented mind and tortured spirit of Bart Whitaker evaporated from our world. In his place, a genuinely good young man resides who, even as this *Request* is written, continues to lift the lives of others. Read the attached letters, but do not call him Bart Whitaker because he is Thomas Whitaker, the son Kent always knew and loved and loves today.

The name change is symbolic of the real transformation that should be celebrated, not destroyed. In darkness, he was lost. But Kent has found what we all can find. He has discovered the conquest of light over that darkness in the very heart of his own son with an intimacy we cannot know and should not presume to know. This Board should not only recognize the pointlessness of execution in this case. Each member should fully recognize the light it will snuff out.

Recall the brother's incredulity of his father's reaction to the prodigal son. We share it. This loyal, law-abiding son was struck at his father's immediate, loving reception because he did not understand. The father saw not the degenerate, greedy miscreant who had left, but the good man who had returned home.

Jesus did not inform his disciples how the brother reacted. He left it to them – and all of us – to reach the summit of the parable's point on our own. Kent

Whitaker is the first emissary of the good news of his son's metamorphosis. He believes that the skeptical son in the Parable of the Prodigal Son came to perceive why his father celebrated. This Board should join those who have perceived what Kent saw first. You should join Kent Whitaker.

Read these accounts from those who can attest to the truth of this case for clemency. Look to Death Row itself and its witnesses. These are people whose lives Thomas Whitaker has positively impacted.

“If we want this to be a better prison system, then we need to be better convicts,” Thomas told fellow death row inmate Arnold Prieto. (Letter, undated, Arnold Prieto, Jr.). Another death row inmate speaks to Thomas’ “special affinity of helping guys with mental illness.” (Letter, September 9, 2017, Keith Milam). Yet another death row inmate, Faryion Wardrip, reflects on Thomas’ “uncanny ability to calm others down,” and recounts how Thomas has inspired him and others to better themselves, despite being on death row. (Letter, June 10, 2011, Faryion Wardrip).

Thomas sent unsolicited food to one of the most hated men on death row, Johnathan “2 man” Green, and when asked about it, Thomas simply remarked, “the man doesn’t make store, and as big as he is, he must be hungry.” (Letter, undated, Arnold Prieto, Jr.). His acts are “genuinely extraordinary.” (Letter, September 6, 2016, Steven Bartholomew). Read why inmate Blain Keith Milam says, “I am

thankful for the honor of meeting him.” (Letter, September 9, 2017, Blain Keith Milam). How often do you get pleas like these from Death Row?

From murder victim survivor Bonnie Pennybacker: “Since being acquainted with Thomas, I have a sense of peace that I did not have for over twenty years. A peace that the justice system did not give me at the time of my own family tragedy. I implore you to look at who Thomas Barlett Whitaker is today and not who he was. We are all capable of change and this includes him.” (Letter, December 21, 2012, Bonnie Pennybacker).¹ Thomas has touched the lives of prisoners across the country. From Washington State Reformatory, inmate Steven Bartholomew writes about his contributions and ends with a plea:

Please allow us to live in a world where a clemency hearing is not simply a formality prior to execution, where conclusions regarding a man’s life are not foregone. Because if these proceedings are to have any validity, then an individual as remarkable as Thomas Whitaker would have to be as deserving to live.

(Letter, September 6, 2016, Steven Bartholomew).

Thomas Whitaker is on death row in part because he was believed to be a future danger to inmates. We know this to be untrue. The judicial system got it

¹ His genuine transformation is “very much evident” and inspiring to others. (Letter, January, 2013, Tracey Evans). “Thomas believes in people, something he never imagined himself ever doing. He wants to see the best in everyone and is eternally optimistic that we (himself included) can all strive to be greater.” (Letter, September 2012, Maggie MacAulay). “That Thomas not only works hard on himself, but additionally creates opportunities for others to do the same touches me deeply. I believe in the person he has become.” (Letter, September 4, 2012, Dina Milito).

wrong, but is incapable of self-correction. This Board has no such constraints. As a Board member, you are effectively this state's moral failsafe. When the imperfect judicial system has failed to achieve justice, this Board and the Governor, as the final branch of government to have a say in such matters, may yet right a wrong as well as prevent another.

Thomas Whitaker's execution would be meaningless. His death at the hand of the State does not fulfill any interests of the surviving victims. It does not advance any interest we may have in security. Ultimately, Thomas Whitaker's execution averages a zero on the scale of justice – an act literally signifying nothing.

Sparing Thomas Whitaker from execution means his good works in prison may continue. It also means that Kent Whitaker can have a son. Don't take that away from him. He has been victimized enough.

Clemency is enough. It is not a pardon. It reflects no forgiveness. But under the extraordinary circumstances of this case, it is enough.

In a way, clemency is a test for each Board member. Every member of this Board supports the death penalty. Every member also supports the rights of victims. In this exceptional case, these two allegiances irreconcilably conflict. Only one path can be selected.

Will the philosophy of the death penalty prevail over the constitutional duties

to the dignity and well-being of victims? Is death still the right answer even when it will subject a victim to new pain to be suffered in perpetuity? Is killing Thomas Whitaker more important than sparing Kent Whitaker? At the end of the day, this is a profound question of conscience.

On February 23, 2018, the sun will rise. Each member of this Board will begin a new day. From that day and every day thereafter, the impact of your decision will reverberate in the lives of everyone connected to this case, both directly and beyond. At the end of the day, you will close your eyes and you will know the path you chose.

When Kent Whitaker closes his eyes, he remembers the killings. This Board can spare him from the indignity and cruelty of searing into his memory the image of watching his son die. The Board can spare us all from such a miserable and meaningless spectacle.

On February 23, 2018, Kent Whitaker will also begin his day. From that day and every day thereafter, he will also know your path. May you choose justly and wisely. May you let Kent Whitaker open his eyes to a new day under the sunshine of your mercy.

Respectfully submitted,

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CERTIFICATE OF SERVICE: This amended written application in behalf of Thomas Whitaker seeking a board recommendation to the governor of commutation of the death sentence to a lesser penalty, and 11 copies, was personally delivered on January 10, 2018 to the Texas Board of Pardons and Paroles, Clemency Section, 8610 Shoal Creek Boulevard, Austin, Texas 78757.

Keith S. Hampton

APPENDIX