

BEFORE THE GOVERNOR OF THE STATE OF TEXAS

AND

THE TEXAS BOARD OF PARDONS AND PAROLES

REQUEST FOR COMMUTATION OF A SENTENCE
OF DEATH TO A LESSER PENALTY
FOR THOMAS BARTLETT WHITAKER

AND

REQUEST FOR AN INTERVIEW
BY AT LEAST ONE BOARD MEMBER OF
THOMAS WHITAKER AND KENT WHITAKER

AND

REQUEST FOR A COPY OF ANY RESPONSE
BY THE STATE TO THIS CLEMENCY PETITION

Respectfully submitted by

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Attorney for Thomas Whitaker

Thomas Whitaker is scheduled for execution on February 22, 2018.

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

Appellate History and Current Legal Status

On March 5, 2007, a jury in Fort Bend County, Texas 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 Court of Criminal Appeals affirmed the conviction and death sentence. *Whitaker v. State*, 286 S.W.3d 355 (Tex.Crim.App. 2009). On June 30, 2010, the Court of Criminal Appeals denied relief to Mr. Whitaker’s petition for a writ of habeas corpus. *Ex parte Whitaker*, WR-73,421-01 (Tex. Crim. App., June 30, 2010) (unpublished opinion).

On March 17, 2015, the United States Southern District Court of Texas denied Mr. Whitaker relief. *Whitaker v. Stephens*, No. H-11-CV-2467, 2015 U.S. Dist. LEXIS 35434 (S.D. Tex. Mar. 17, 2015). On April 4, 2017, the United States Fifth Circuit Court of Appeals affirmed. *Whitaker v. Davis*, 853 F.3d 253 (5th Cir. 2017). The Supreme Court of the United States denied his writ of certiorari on October 10, 2017. *Whitaker v. Davis*, 138 S. Ct. 317 (2017).

On November 24, 2017, the state district court set his date of execution for February 22, 2018. Mr. Whitaker plans on filing a subsequent writ petition. This *Request for Commutation of Death Sentence to a Lesser Penalty* is filed more than 21 days from the date of the scheduled execution.

Requests

Previously, counsel had also asked for a 30-day reprieve. However, any reprieve would merely impose additional suffering on the living victim in this case, Kent Whitaker. Counsel therefore withdraws this request.

Counsel requests that the Board recommend to the Governor a commutation of a sentence of death to a lesser penalty. Counsel further requests that the Governor commute the sentence of death to a lesser penalty.

Counsel asks that at least one Board member interview the surviving victim in the case, Kent Whitaker. Kent Whitaker would like to meet with each Board member, if possible.

Mr. Thomas Whitaker also asks for an interview by at least Board member.

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. Thomas Whitaker or Mr. Kent Whitaker at any time or date. Undersigned counsel welcomes anyone and everyone to interview Mr. Thomas Whitaker himself, in person, face to face without reservation, constitutional, statutory or otherwise, at any date, time or place.

Finally, counsel requests that he been afforded a review of any response to his clemency petition filed with the Board by the State of Texas.

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 simple as sympathy or as formidable 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. 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. The crucible of Kent’s anguish and tribulations is 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 merely 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 can explain to each member of this Board. 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 to restlessly wander the world.

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 or execute Bart Whitaker. We will instead mark him to wander his own mind within the desolation 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!" King David's army was perplexed and disheartened by the king's deep mourning.

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 into the wilderness of horror, sorrow, shock and loss. It is territory with scope we can barely survey. 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. Kent literally fell to his knees and begged the prosecutor to spare his 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, who was sentenced to 15 years in prison in exchange for his trial testimony. 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 survivor in this case in the same manner as the prosecution. On the contrary, this Board can and should afford

the constitutional “right to be treated with fairness and with respect for the victim’s dignity ... throughout the criminal justice process.” Tex. Const. art. I §30(a)(1). Kent is, as a matter of law, both a victim and the only close relative of a victim. Tex. Code Crim. Pro. art. 56.01(1) & (3). His voice must be heard.

The Texas Constitution lists no less than seven constitutional rights granted to victims like Kent Whitaker. The Code of Criminal Procedure lists no less than 14 rights. One of these rights is consideration of “victim impact” by this Board. Tex. Code Crim. Pro. art. 56.01(12)(B). While this right clearly addresses the impact of imprisonment and parole, it should apply with equal or greater force in cases where the penalty is death. Kent Whitaker is a victim who has the right to be heard, the impact of execution on him considered, and each Board member has an obligation to truly listen.

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. Each member of this Board has sworn an oath that promises the prevalence of humanity over the automation of state-enforced death. Your duty to your oath calls to you now in this extraordinary case.

You cannot escape this oath or its duty. You have sworn to the State of Texas and you have sworn to God. No matter what you do, your own conscience will follow you. The magnitude of the decision you make in this case will not allow anything less than your true obedience to law and the fullness of your own heart and soul.

You may object and believe that your approval of the killing of Thomas Bartlett Whitaker would be justice. It is more than a little presumptuous for anyone, including a Board member or a Governor, to elevate his own, arm-chair definition of justice above those who have lived and survived the actual tragedy. It is arrogant and inhumane in its indifference to the surviving victim in this case.

The belief that the execution will fulfill justice is also misinformed. 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 small sample of 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, for our own soul's sake, 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 confounded at his father's immediate, loving reception to the return of his wayward brother because he did not understand. The father saw not the degenerate, greedy miscreant who had left, but the good man who had returned home. The other son could not see it.

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 grasp why his father celebrated. This Board should follow the path of the skeptical brother. You should take a closer look.

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 people are living testaments to the light a spared Thomas Whitaker can bring to this world, even from the darkened recesses of prison.

“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.). Thomas believes it and works for this goal every day. He is a

blessing to the prison system and all who inhabit it.

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 existing – of all places – on Texas Death Row. (Letter, June 10, 2011, Faryion Wardrip). Death row inmate William Speer wrote:

Of all the people I have met over the years Thomas Whitaker is the person I believe deserves Clemency the most. He wasn't the shooter in his case. His dad wants him to live, and never wanted the death penalty at all. He is one of the best liked inmates on this farm by the guards and other inmates, and he has worked the hardest to rehabilitate himself. Killing him would be a crime, because the system needs men like him out on the farms keeping everyone calm and looking forward. Please give him another chance.

(Affidavit, William K. Speer, June 5, 2011). How often do you receive letters of admiration like these?

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 anecdotes 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). This Board should sustain these good works, unusual in their scope and depth, for the betterment of the human condition and for the mercy of Kent Whitaker.

It is worth reminding that 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, as the affidavits of guards attest. The judicial system got it 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 with a case like the present one.

This Board and the Governor, as the final branch of government to have a say in matters of capital punishment, may yet correct a mistaken judgment, disproven by time and deeds. You can right a wrong the judicial branch cannot, and have the exclusive power to prevent an even more profound injustice in your midst.

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. It is cold and sadistic to Kent Whitaker, and callous to all those who know – and would know – the living Thomas Whitaker.

¹ The authenticity of his 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).

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.

Life imprisonment 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, these are the profound questions of conscience you will live with for the rest of your life.

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 and his own near-death. This Board can spare him from the indignity and cruelty of searing into him a new memory, the experience of watching his son be killed. The Board can and should 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 clemency request by counsel on behalf of Thomas Whitaker seeking a board recommendation to the governor of commutation of the death sentence to a lesser penalty, seeking interviews with each Board member of Keith S. Hampton, Thomas Whitaker and Kent Whitaker, and requesting a copy of any response by the State to the clemency petition be given to undersigned counsel, and that the Governor grant clemency in this case. 15 copies of this *Requests* was personally delivered on January 31, 2018 to the Texas Board of Pardons and Paroles, Clemency Section, 8610 Shoal Creek Boulevard, Austin, Texas 78757.



Keith S. Hampton

APPENDIX OF CERTIFIED COURT DOCUMENTS

Execution Order and Death Warrant

Indictment

Court's Charge at Guilt/Innocence and Verdicts

Court's Charge at Punishment and Verdicts

Judgment and Sentence

APPENDIX OF LETTERS

Letter from Dr. Susan Sharp regarding the effect of Thomas Whitaker's execution on Kent Whitaker

Letter from Dr. Elizabeth Beck regarding the effect of Thomas Whitaker's execution on Kent Whitaker

Letter from Victoria Whitaker, Kevin and Thomas's first cousin

Letter from Rev. Dr. Keith Whitaker, Kent's brother and Thomas and Kevin's uncle

Letter from Heath Whitaker, Kevin and Thomas' first cousin

Letter from Nancy Ramsey is a friend and HS guidance counselor

Letter from Don T. Whitaker, Kent's brother and Thomas' and Kevin's uncle

Letter from Dina Milito, director of Minutes Before Six website

Letter from the Bishop of the United Methodist Church

Letter from Patrick Kelley, Kent Whitaker's pastor

Letters from guards at the Polunsky Unit

PREVIOUSLY SUBMITTED LETTERS

Letter from Dina Milito, director of Minutes Before Six website
Blaine Keith Milam, TX DR inmate 999558 (letter 2017)
Steve Bartholomew, inmate in Washington State (letter 2016)
Tracey Evans, friend (letter 2013)
Catherine Darcis, friend (letter 2012)
Tina Hutchison, friend (letter 2012)
Maggie MacAulay, friend (letter 2012)
Maria Vesco, friend (letter 2012)
Bonnie Pennypacker, friend, crime victim (letter 2012)
Charles Mamou, TX DR inmate 999333 (“affidavit”/letter 2012)
Fayrion Wardrip, TX DR inmate 999331 (letter 2011)
Arnold Prieto, Jr. TX DR inmate 999149 executed (letter dated 2012)
Arnold Prieto, Jr. TX DR inmate 999149 executed (undated)
David Mazel, Professor of English, Adams State College (letter 2013)
Koos Daley, Professor of English, Adams State University (letter 2013)
Koos Daley, Professor of English, Adams State University (letter 2011)
Peter Gyallay-Pap, International education/research consultant, Adams State College (letter 2013)
William Speer, TX DR inmate 999398 (letter 2011)
David Renteria, TX DR inmate 999460 (letter 2012)
Magdalena Hubman, Swiss citizen friend (letter 2017)
Dorothy Ruelas, friend for past 10 years (letter 2017)
Juan Jose Ruelas, known Kent for 10 years (letter 2017)
Heather Land, friend and social worker Australia (letter 2017)
Kenneth Miller, pen pal (letter 2017)
Teri O’Neill, friend Australia (letter 2017 – UPDATED 1/8/2018)
Camille Chauvin, pen pal (letter 2017)
Lloyd G. Misner, Christian friend (letter 2017)
Jenna Insero, friend and psych (letter 2017)
Tanya Whitaker, step mom (letter 2018)
Victoria Whitaker, paternal cousin (letter undated)
Scott Jones, United Methodist Church (letter 2018)
Ilaria Vesco, friend/penpal since 2007 (letter 2018)
Catherine Darcis, pen pal (letter 2018)
Matthew Bright, (letter 2018)
Danielle Bissell (letter 2018)
James (Mike) McCutchan (letter 2018)
Darlene Havener (2018 letter)