

an incompetent, inexperienced expert who failed to credibly address the crucial issue of battered women's syndrome. Had they employed an expert with experience and credentials, that person would have thoroughly and effectively supported the diagnosis of battered women's syndrome and brought it to light during the appeals process. **It is unprecedented in Tennessee to execute a defendant who was denied competent expert witness testimony and apt legal guidance.**

4. **Tennessee has executed only four women.** All of them were hanged, and the last execution of a woman in Tennessee was more than 180 years ago, in 1820.

This Court has not commuted a death sentence since 1901. But a highly unusual case demands highly unusual action by this Court. Based on the unprecedented facts in this case, Ms. Owens respectfully requests that this Court deny the Attorney General's Motion to set an execution date for Ms. Owens and instead commute Ms. Owens's death sentence to life. At the very least, this Court should issue a certificate of commutation.¹

¹As the supreme judicial authority of Tennessee, this Court has the inherent, supreme judicial power under Article VI §1 of the Tennessee Constitution (In Re Burson, 909 S.W.2d 768, 772 (Tenn. 1995)), and undisputed "broad conference of full, plenary, and discretionary inherent power" under Tenn. Code Ann. §§16-3-503 & 504 (Burson, 909 S.W.2d at 772-773), to deny the Attorney General's motion to set an execution date for Ms. Owens and instead vacate Ms. Owens's death sentence and modify it to life – action this Court has not taken since 1901. See Ray v. State, 67 S.W.553 (1901)(modifying death sentence to life); Poe v. State, 78 Tenn. 673 (1882)(modifying death sentence to life). This Court also has the statutory authority to recommend that the Governor commute Ms. Owens's sentence by issuing a certificate of commutation under Tenn. Code Ann. §40-27-106 (see Green v. State, 14 S.W. 489 (Tenn. 1889)(recommending commutation)), order a new sentencing hearing, or recall the post-conviction mandate and grant post-conviction relief.

I. Gaile Owens Is the Only Inmate in Tennessee Who Received a Death Sentence After Accepting a District Attorney's Offer to Plead Guilty in Exchange For a Life Sentence.

Within days of her arrest, Gaile Owens told her very first attorney, Steve Shankman (now Federal Public Defender for the Western District of Tennessee), that she "was extraordinarily remorseful for hiring someone to kill her husband" and wanted to plead guilty and avoid a trial. (Exhibit 1, Affidavit of Stephen B. Shankman, p.1). In Mr. Shankman's words, Ms. Owens's "most immediate and profound concern was the well-being of her children," and she believed that pleading guilty would spare her children and the rest of her family further pain. (*Id.*).

Just days before Gaile Owens's trial was to begin, on January 2, 1986, Shelby County Assistant District Attorney General (ADAG) Don Strother, offered Gaile Owens the opportunity to spare her children and her family further pain by pleading guilty and avoiding a trial. ADAG Strother indicated by letter that "after conferring with General Stanton and the family of the deceased [], the State would recommend to the Court upon a plea of guilty as charged to either count of the Indictment that a Life sentence be imposed upon your client, Marsha Gaile Owens." (Exhibit 2, January 3, 1986 Letter from Strother to Jim Marty and Brett Stein). ADAG Strother made his offer contingent upon its acceptance by both Ms. Owens and Mr. Porterfield.

Consistent with Ms. Owens's acceptance of responsibility from the beginning and with her longstanding desire to avoid a trial, Ms. Owens immediately accepted ADAG Strother's offer. (Exhibit 3, January 3, 1986 Letter from ADAG Strother to Jim Marty and Brett Stein Bearing Ms. Owens's Signature Of Acceptance). Mr. Porterfield, with whom Ms. Owens had no prior relationship and over whom she had no control, did not want to plead guilty, but wanted to go to trial. Mr. Porterfield is likely mentally retarded with a measured IQ between 67 and 75.

His lawyer is currently litigating the constitutionality of his death sentence based on mental retardation in a Motion to Reopen Post-Conviction Proceedings in the Shelby County Criminal Court. See Porterfield v. State, Shelby County Criminal Court No. P 14675. Mr. Porterfield insisted at the time of trial, and continues to insist, that he is innocent of first-degree murder. As a result, Mr. Porterfield rejected ADAG Strother's plea bargain. ADAG Strother then refused to honor Ms. Owens's acceptance of the plea bargain. (Exhibit 4, Trial Transcript (In Chambers Conference), pp.30-36). ADAG Strother told the trial court that the trials of Ms. Owens and Mr. Porterfield were unseverable – he believed that he needed the two to be tried together in order to get a conviction against Mr. Porterfield for first-degree murder. (Id.).

After ADAG Strother refused to honor Ms. Owens's acceptance of the plea bargain, Ms. Owens's trial counsel asked the court to allow Ms. Owens to plead guilty to the Court and for the Court to sentence her to life in accordance with the spirit of the plea agreement. The trial court refused.² (Id., pp.31-32,34). In their plea to the trial court, Ms. Owens's lawyers argued that "We don't think Your Honor, in a Capital Case, . . . I'm not talking about armed robbery or shoplifting or some other offense. We don't think that's a viable reason to withhold an offer of settlement to one defendant simply because another doesn't understand . . . may not understand . . . doesn't have whatever facilities (*sic*) to understand or accept it." (Id., p.36). However, the trial court refused to

²Prior to her sentencing hearing, Ms. Owens also sought to have the evidence that she was willing to plead guilty and accept a life sentence introduced as mitigating evidence on her behalf. The trial court would not permit it, finding that evidence of plea negotiations is not admissible in court proceedings. As a result, the jury that sentenced Ms. Owens to death did not know that Ms. Owens had sought to avoid putting her family through a trial, accepted responsibility, and admitted that a punishment of life in prison was appropriate. Nor did they know that the DA and the victim's family believed pre-trial that a life sentence would be an appropriate punishment for Ms. Owens.

allow Ms. Owens to plead open to the court based on ADAG Strother's insistence that Ms. Owens and Mr. Porterfield had to proceed to trial together.³

Twenty-four years ago, Ms. Owens agreed to plead guilty and accept a life sentence. Today, she is on death row because Sidney Porterfield, a man who is likely mentally retarded, would not do the same: he refused to accept responsibility and accept a life sentence. Indeed, Ms. Owens is **the only death row inmate in Tennessee** who accepted a plea bargain in exchange for a life sentence, yet found herself on death row.

Based on Ms. Owens's unique position, this Court should exercise its inherent, supreme judicial power and should restore Ms. Owens's sentence to life – a sentence approved and offered by the Shelby County District Attorney and accepted by Ms. Owens over twenty-four years ago. At the very least, this Court should issue a certificate of commutation.

II. Gaile Owens Was a Battered Wife: Had the Jury Heard Details of the Abuse She Endured at the Hands of Her Husband, the Victim, at Least One Juror Would Have Voted for Life. This Court Should Exercise Its Inherent Authority to Reduce Ms. Owens's Sentence to Life, or at the Very Least, Issue a Certificate of Commutation Because It Is Against Public Policy for Tennessee to Execute a Battered Woman.

Battered wife or battered women's syndrome, now more often referred to as a subcategory of Post-Traumatic Stress Disorder, includes a cluster of behaviors: "(1) intrusive recollections of

³ADAG Strother's insistence that the trials of Ms. Owens and Mr. Porterfield could not be severed was based on his fear that he would not be able to use Ms. Owens's statement against Mr. Porterfield if he proceeded to trial without her because it would have been inadmissible hearsay. In that same vein, at trial, ADAG Strother introduced Mr. Porterfield's statement to the authorities implicating Ms. Owens, despite the fact that Mr. Porterfield did not testify. The introduction of Mr. Porterfield's statement against Ms. Owens violated Ms. Owens's right to cross-examine Mr. Porterfield under the Sixth Amendment and Bruton v. United States, 391 U.S. 123, 126, 88 S.Ct. 1620 (1968). In Bruton, the United States Supreme Court held that the admission into evidence of a non-testifying co-defendant's confession incriminating the defendant, even when accompanied by jury instructions to consider the confession only against the co-defendant, violates the Sixth Amendment.

the traumatic events; (2) hyperarousal and high levels of anxiety; (3) avoidance behavior and emotional numbing (usually expressed as depression, dissociation, minimization, repression and denial; (4) disrupted interpersonal relationships from batterer's power and control measures; (5) body image distortion and/or somatic or physical complaints; and (6) sexual intimacy issues." (Exhibit 5, Lenore Walker: "Battered Women's Syndrome: Key Elements of a Diagnosis and Treatment Plan," *Psychiatric Times*, Vol.26, No.7 (July 7, 2009)). As the New Jersey Supreme Court succinctly put it in 1979, battered women's syndrome was "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives." State v. Kelly, 478 A.2d 364, 371 (N.J. 1984). And even as early as 1984, it was "widely accepted that battered women share common characteristics of feeling shame for their situation and attempting to hide their battering from others." Brief and Appendix of Amici Curiae American Civil Liberties Union of New Jersey and the New Jersey Coalition for the Defense of Battered Women, reprinted in *Amicus Briefs*, 9 *Women's Rts. L. Rep.* 247, 249 (1986). See also, Ibn-Tamas v. United States, 407 A.2d 626, 634 (D.C. 1979)(experts report that "battered women are very reluctant to tell anyone that their husbands beat them[]").

As early as 1983, Tennessee courts recognized the concept of "battered wife syndrome." See State v. Rose Horn Leaphart, 673 S.W.2d 870 (Tenn. 1983)(identifying "battered wife syndrome" and recognizing defense counsel's use of a psychology expert to describe "the cycle that typically characterizes physically abusive marriages."); State v. Barker, 1986 Tenn. Crim. App. LEXIS 2314 (acknowledging that defendant, who killed her husband, was a "battered wife" and acknowledging that the situation "constitute[s] the sort of 'exceptional circumstances' that will

support probation in a case involving a death at the hands of the petitioner); State v. Kirkland, 1986 Tenn. Crim. App. LEXIS 2422 (discussing battered wife syndrome and the importance of "the petitioner['s] . . . right to explain her motivation in the incident. Given the background of abuse, the petitioner's testimony might well have made a difference in the outcome of this case."). However, in 1985, at the time of Gaile Owens's arrest and in the proceedings that led up to her January 1986 trial, the trial court and the prosecution completely dismissed any allegations or discussion of domestic abuse or battered wife syndrome, insisting that Ms. Owens must provide medical proof (Exhibit 6, Pre-Trial Hearing Transcript (Motion for Battered Women's Expert), p.157), without which "there is not one scintilla of evidence before this court to show or indicate" that Ms. Owens had been battered. (Id., p.155).

As discussed in Section III, *infra*, had Ms. Owens's trial lawyers only looked, they would have uncovered a wealth of mitigating evidence about the abuse Ms. Owens endured both as a child and in her marriage. If her post-conviction attorneys had not squandered the right to hire a qualified and credible expert witness on the issue of battered wife syndrome, they could have presented this mitigating evidence.

It was not until current counsel were preparing for clemency that a thorough and competent assessment of Ms. Owens's entire life history was conducted. Counsel hired Jan Vogelsang, a licensed clinical social worker and mitigation specialist with over twenty-five years of experience, who conducted a Biopsychosocial Assessment, based on all of the information (interviews, records, documents, memorandum) gathered during post-conviction, federal habeas, and by current counsel, as well as her own interviews with Ms. Owens. (Exhibit 8, Biopsychosocial Assessment of Jan Vogelsang). Ms. Vogelsang's affidavit represents the kind of

thorough life history that a competent, credible, and experienced expert should have developed on Ms. Owens's behalf and also highlights the breakdowns both at trial and in post-conviction as Ms. Owens's case was repeatedly botched. (Exhibit 7, Affidavit of Jan Vogelsang).

A. In Actuality There Was a Plethora of Evidence Demonstrating That Gaile Owens Was Physically, Emotionally, and Sexually Battered Her Entire Life – First at the Hands of Her Father and Mother, Her Uncle, and Ultimately Her Husband

As we know today, domestic violence is cyclical. Gaile Owens was a victim of the “cycle of violence” with a “family history of domestic violence and sexual abuse across generations.” (Exhibit 7, Affidavit of Jan Vogelsang, p.7). By examining and “[u]nderstanding the role of family history in the life of Ms. Owens” including the physical, sexual, and emotional abuse, alcoholism, the rigid restrictions of the Pentecostal faith, and the secretiveness that was encouraged and ultimately enforced, “[one] can shed light on much of [Ms. Owens's] behavior, including how it is that she came to marry an abusive man, and why she was unable to extricate herself from her marriage.” (Id., p.2).

1. Gaile Owens Was Physically and Emotionally Abused and Neglected By Her Parents as a Child and Throughout Her Teenage Years

Gaile Owens was born in 1952 to Jewell and Izora Kirksey. Her father, Jewell, considered Ripley, Tennessee, home and had two sisters and a brother, whose name was Marshall. (Exhibit 8, Biopsychosocial Assessment of Jan Vogelsang, p.2). Gaile's mother, Izora, was born in a small town in Mississippi and was the youngest of seven children. (Id.).

Both Jewell and Izora came from difficult backgrounds. Jewell was known as a “‘mean-spirited man’ with a ‘wild temper’ who had a hard life as a child.” Jewell's father was “known to be abusive to Jewell and his brothers and sisters and to be cruel to animals. His mother was

known to be demanding and jealous as demonstrated by her temper.” (Id., p.3). Izora’s father abandoned her and her six siblings when she was still an infant. (Id.). Izora has been described as “uneducated and not very intelligent. She was ‘small-minded’ and focused on her medical problems (both real and perceived).” (Id.).

Jewell and Izora had three children – born during a period of three years. Wilson, who was born just eighteen months before Gaile, suffered from cerebral palsy. Wilson’s disabilities “deeply affected emotionally and financially” the marriage of Izora and Jewell. (Id., p.8). In fact, “Izora believed Wilson’s disabilities were her fault. Jewell’s mother convinced her Wilson wasn’t normal because during the pregnancy Izora raised her arms above her head while hanging curtains.” (Id.). Carolyn, Gaile’s younger sister, was born fifteen months after Gaile. (Id., p.7). Although Gaile was the “middle child, [she] assumed the role of the older child due to her brother’s disabilities.” (Id., p.8).

Gaile’s father ran a gas station in town and her mother babysat eight to ten children at a time to earn extra money. “The house was messy and it fell to Gaile to keep it clean from the time she was small. Izora prided herself on toilet training and potties were lined along the pantry hallway of their small home. Baby beds were in every room and Gaile had to sleep with a baby. There was never any privacy or special attention. Izora martyred herself before others as the caretaker of her special-needs child, Wilson. Yet at the same time, she filled the home with other children to make extra money. Little energy was left for Gaile’s emotional and developmental needs,” (id., p.4), although Izora required Gaile to help her care for eight to ten other children she babysat, in addition to her brother Wilson.” (Id., p.9). Finances were always an issue in the home as “Wilson’s disabilities created costly expenditures for the family.” (Exhibit 7, Affidavit of Jan

Vogelsang, p.13).

Not only were finances an issue, but so was alcoholism and physical abuse. Gaile's father, Jewell, had a problem with alcohol and "came home drunk frequently." (Exhibit 8, Biopsychosocial Assessment of Jan Vogelsang, p.4). Gaile's mother would force her to stay up at night to wait with her for Jewell to come home. "When Jewell staggered in, Izora would confront him and set up a fight." Then Izora would "use[] Gaile as a buffer and would not let her leave the room." (Id.) Ms. Owens would then be left to witness her parents fight, "watch[ing] her father re-establish his position of power in the family by beating Izora." (Id.).

Izora was not the only one in the house who was beaten by Jewell. Gaile not only "witnessed her father's beating of her mother, [but also] her disabled brother, and her sister and [she] was herself the victim of his physical violence." (Id., p.5). Jewell's beatings "resulted in welts and bruises. Jewell's physical violence knew no bounds. One time, Gaile witnessed her father hold a knife to her mother's throat threatening to kill her." (Id., p.4).

In addition to the physical abuse Gaile endured, "Gaile rarely had a friend come to her house because of her father's drinking and his scary behavior toward other boys and girls. She and her one girlfriend would plan the friend's visits around her father's drinking days." (Id., p.10). In addition, "Jewell was hung up on sex and prevented normal social relationships for his daughters by scaring boys away. In fact, he . . . kept a shotgun at the door, further alienating Gaile and her sister from the opportunities to create healthy social relationships." (Id., p.3).

Gaile's younger sister, Carolyn, dealt with the stress of their home by withdrawing and staying out of the chaos as much as possible. "As Gaile became more of a 'yes' person to her parents, Carolyn used invisibility as a way to say no to Izora and Jewell. Whereas Gaile was

drawn into and used as a buffer between her mother and father, Carolyn quietly avoided family conflict and ultimately spent most of her adolescence with pastor Jimmy Greer and his family. Quite the opposite, Gaile catered to her father's and mother's wishes." (Id., p.9).

Gaile did have a reprieve "two days every two weeks with her Uncle Nicky, Aunt Nanny, and cousins Mary and Thelma. Unfortunately, this time only added to the confusion that was pervasive during Gaile's childhood. (Id., p.8). Constantly manipulating, even this time of retreat was stressful as "Izora held the removal of this special time with her aunt and uncle and cousins over [Gaile's] head, requiring her to perform unreasonable chores with the threat of losing that break from Izora and Jewell. Gaile believed that those breaks with Uncle Nicky and Aunt Nanny were the only thing that saved her during childhood and she began to clean obsessively and perfectly to get that reward." (Id., pp.8-9).

As a teenager, "Gaile continued to suffer in the middle of her parents' conflicts. Gaile's father would yell at her to go to bed and Izora would insist that she stay." (Id., p.11). Gaile continued to be a good student in high school, quiet and compliant, much like she was at home. But those years were unhappy; unlike most teenage girls, Gaile "was afraid to get involved with anyone because of her father. One boyfriend had to slip in and out of the house so as to avoid her father. Girlfriends had to do the same and so relationships were brief." (Id., p.12).

Despite the oppressiveness of her life at home, Gaile's loyalty and submissiveness to her parents endured even after she graduated from high school as she continued to live there and help out. However, a breaking point finally came "[w]hen Gaile was a young woman working and still living at home[.] [S]he had gone to stay with a friend to get relief from her situation at home. When she returned, Jewell forced Gaile to strip naked and examined her body in the presence of

Izora on the pretense of looking for signs of drug use even though he had no reason to suspect her of any wrongdoing. Gaile had been a good student and had never been in trouble nor had she ever used drugs. Izora looked on without defending her daughter. Gaile was degraded, humiliated and shamed by her father's violation of her body and mistrust." (Id., p.5). Soon after this incident, "Gaile moved into a small apartment of her own and experienced freedom for the first time." (Id., pp.12-13).

2. Gaile Owens Grew Up in a House of Secrets Where She Was Taught By Her Mother to Lie, Steal, and Hide Things from Her Father

Gaile's mother, Izora, was an unhappy wife and mother. Izora wanted Jewell's approval "but went about getting it in the wrong way. She was a jealous woman who would steal from her husband and lie about it. In fact, Izora was jealous of everybody including her daughters. She would set the children up to be punished by rushing to the door to tell their father all the things they had done wrong during the day." (Id., p.3). "Then she would rush to defend them [the children] after Jewell began to beat them, when it was too late." (Id., p.4).

Izora manipulated and stole from her husband when he was drunk, often blaming Gaile if she got caught. She would "get around [Jewell] by lying and stealing when he was drunk knowing he would not be able to remember about his money. Jewell ran a gas station and kept a bag of cash and receipts in their house. Izora would wait until he passed out, steal his money and lie to him often telling him that Gaile took it. Then Izora would stand by quietly as Gaile would be beaten for her mother's offenses." (Id., p.6). As a result of her role as her mother's scapegoat, "Gaile came to believe that her father's drinking and the abuse of her mother was her fault, that she was bad, and that she deserved to be mistreated." (Id.).

Izora's way – keeping secrets, stealing from her husband and blaming her daughters, and allowing them to take the beating for her – created a “[h]ouse of secrets” where “asking questions was met with silence and disapproval.” (Id., p.4). In fact, “When Izora's marriage to another man prior to marrying Jewell was discovered by her daughters, Izora continued to deny it even when there was no reason to do so.” (Id.).

3. The Rigidity and Submissiveness Demanded By Ms. Owens's Pentecostal Faith Further Isolated Ms. Owens, Making Her Feel Fearful, Confused, and Devalued As a Woman

Gaile grew up in a home that was divided when it came to religion. Gaile's mother, Izora, “had been raised in a very fundamental Pentecostal religion, and she created a home atmosphere of fear, one lacking in joy.” (Id., p.3). Izora's church was “‘legalistic’ and failure to follow the rules resulted in burning in hell.” (Id.). Gaile's father was Methodist, but “went along completely with her mother and enforced all the strict Pentecostal rules until the children were older.” (Id., p.7). “Izora was legalistic and believed that any broken rules doomed you to hell.” (Id., p.6). In fact, “[t]hose who broke the rules were disfellowshipped . . . So abusive were many of the beliefs of the church that in more recent years, a formal spiritual healing group and website were developed to help former members of Pentecostal churches to overcome the mental, emotional, and behavioral damages done by the teachings.” (Id., p.5).

Not only was the Pentecostal church where Gaile was raised characterized by speaking in tongues, fainting, and the laying on of hands, but also by “thought reform” which ensured that rules were enforced by dictating that “no one ever questions anything. Men and women were held to a different standard and women were to be kept childlike, to be seen and not heard. They were required to be submissive and to demonstrate that submissiveness in their dress and behavior.

Men controlled the home and their wives.” (Id., p.5).

As a female child, Gaile was isolated from school classmates because of “thought reform” and because of the rigid church rules – “inflexible rules that forbade short sleeves, short hair, movies, TV, gym clothes, the state fair, fingernail polish, pants, and other normal activities,” (id., p.7), “swim[ming] or watch[ing] boys who were swimming[,] go[ing] to movies or participat[ing] in gym.” (Id., p.10). Though Gaile grew to love athletics as a child, she was never allowed to play because of church rules. (Id.).

The rules of the Pentecostal faith not only isolated Gaile, but created confusion when she was encouraged to ignore or disobey them. For instance, “when Gaile visited her cousins, she was allowed to paint her nails but her aunt and uncle would stop for polish remover on the way home and have her nails clean by the time she reached Izora’s front door.” (Id., p.6). Her own father allowed her to disobey the rules, sneaking Gaile and Carolyn to see the movie “‘Bambi’ while swearing them to secrecy. Terrified of hell, but with a child’s curiosity and longing to be like other children, Gaile went . . . The joy of that experience was followed by weeks of fearing that she would die and go to hell because she went to the movies.” (Id., p.7). When Gaile’s mom got a permanent and other women in the church suddenly cut their hair, “Gaile was terrified [they] would go to hell.” (Id.).

“The thought reform and legalism of the Pentecostal faith tells girls that they have no worth, they are under the control of men, and they are to submit and to hide their bodies.” (Id., p.19). The emphasis on “legalism and thought reform kept members rule-bound and living in fear.” (Id., p.20). “This combination of religious dogma and influence that demanded the submission of women” and promoted living in secrecy and fear further emphasized the oppression

that Gaile endured from her parents. (Id., p.27).

4. Gaile Owens Was Physically and Sexually Abused by Her Paternal Uncle and Grandfather

From the ages of five to twelve, Gaile was sexually molested by her paternal uncle Marshall Kirksey. Gaile loved her Uncle Marshall because he showed her attention, taking her for tractor rides, showing her around his farm, and telling her that her first name, Marcia, was in honor of him and that this was why she had to let him touch her. (Id., p.10). Uncle Marshall would slip his hands into Gaile's pants when she was only five years old. As time went on, Uncle Marshall would take Gaile on the tractor and "hold her tightly against him as he rubbed himself against her." (Id.). Eventually, Uncle Marshall tried to penetrate Gaile and "although he failed, Gaile was frightened enough to tell her mother." (Id.).

Sadly, when Gaile told her mother about Uncle Marshall's sexual abuse, Izora ignored her. Izora was worried that her husband would find out because she was afraid that Jewell would kill Marshall, so "she protected Marshall instead of her child." (Id.). Because of Izora's refusal to acknowledge Gaile's cry for help, "Gaile never received any intervention or treatment or even recognition or validation that she had been molested." (Id.). She did not know how to handle Uncle Marshall's professed love for her juxtaposed with his sexual assaults and found herself asking "what did I do?" (Id., p.11). She felt dirty and ashamed and would "run into the house during [Uncle Marshall's] visits and scrub herself in the shower." (Id.).

Not only was Gaile left alone to endure Uncle Marshall's sexual abuse, but she also was forced to endure physical abuse at the hands of her paternal grandfather who would beat her with a belt buckle when he was drunk and enraged. (Id.). "As was the pattern in this family, [Gaile's]

grandmother called Izora and Jewell and told them that Gaile needed to stay with them for another week because they were enjoying her so much. In truth, they wanted to wait until her bruises had healed.” (Id.). This family pattern of secretiveness and protecting the abuser continued to demonstrate to Gaile “the powerlessness and helplessness of women and the confusion of their willingness to protect the abuser.” (Id.).

5. The Combination of Physical, Emotional, and Sexual Abuse That Ms. Owens’s Endured as a Child, Her Mother’s Deceitfulness, and Her Pentecostal Faith Left Ms. Owens Isolated, Confused and Emotionally Fragile – The Perfect Candidate to Become a Battered Wife

As a child, trying to “manage her fear of church teachings about the power of men, to deal with her violent father and grandfather, to cope with the sexual abuse of a beloved uncle, and ultimately to contend with her violent and sexually abusive husband” left Gaile confused, fearful, and insecure. “[T]here was no intervention for Ms. Owens during the years of ongoing and unrelenting stress at the hands of men who did not have her best interests at heart.” (Id., p.13). Moreover, Gaile’s “opportunities for developing social skills were stunted by the isolation she experienced because of her religion and her home life. Gaile [became] the submissive, approval-seeking child her parents created with their limited world view.” (Id., p.10). Studies show that “young girls, who watch their mothers beaten only to forgive and go on as though nothing happened, are believed to be at higher risk than others to marry into a relationship that is abusive. Girls who are molested are at higher risk to marry a sexually abusive man.” (Id., p.19).

“It is significant that there was an accumulation of factors that prevented [Gaile] from developing resilience and placed her at risk to one day succumb to her past and lose at her efforts to overcome the wounds in her childhood.” (Id., p.22). “Gaile was programmed from birth to

comply, to ignore her own needs, to bend to the will of parents, church, husband with the eternal threat of hell ever present.” (Id., p.23). As a result, “Gaile entered adulthood with no identity of her own, an emotional fragility that she covered with an attempt at perfection, and a consuming need to be loved. Her developing years would leave her vulnerable and unable to cope when faced with accumulating stress. Her lack of understanding about freedom and independence led Gaile to create a false self fueled by aspirations of perfect behavior and a perfect life. This superficial appearance was exhausting to maintain over time and would eventually wear Gaile down.” (Id., p.13). Gaile’s childhood was the beginning of the “cycle of violence” in her life and created the perfect storm, making her a prime candidate to marry an abusive man and to submit to him no matter the cost.

B. Gaile Owens’s Unhappy Marriage to Ron Owens Was Rife With Emotional, Sexual, and Physical Abuse, and Infidelity

At age twenty, Gaile Owens married Ron Owens. Ron had just completed duty in the Air Force. Gaile, who was grateful that Ron wanted to date her because of her insecurity about her looks, was infatuated with Ron and “thought he walked on water.” (Id., p.13). Gaile believed that by marrying Ron she was on her way to fulfilling her dream of having an “All American Family.” (Id.).

But as early as the wedding night, the problems began. Gaile realized that first night “the impact that her years in the Pentecostal church had had as she simply did not know what to do with the fear and pain of intercourse.” (Id.). When Gaile bled and found sex to be painful on their wedding night, Ron threatened that he would find someone who was not so frigid to have sex with.” (Id., p.14). Thus, from the beginning their sexual relationship was troubled and

unsatisfying to both. (Id.).

After less than two years of marriage, “Gaile was terrified to learn she was pregnant in 1972.” She feared having a child with disabilities like her brother, Wilson. Ron, who had planned to enter school and whose goal was financial stability, was unhappy about the financial strain he felt having a child would cause. (Id.). Their first son, Stephen, was born in January 1973. (Id.). Gaile immediately began to work as a receptionist in a doctor’s office to help ease some of Ron’s financial stress about having a child.

With their first child at home and “[a]fter only two years of marriage, Gaile had begun to suspect that Ron was having an affair. Gaile, who was desperate for Ron’s love and approval, began using medications to improve her looks and attractiveness to him.” (Id.). When diet pills didn’t resolve their marital problems, Gaile reverted to an early childhood behavior learned at her mother’s side, a way to ease the stress and hurt, to steal. Gaile believed that by stealing additional money from Dr. Halle she would make Ron happy and relieve some of the worry about finances.” (Id.). Gaile was caught and had to borrow money from her mother to repay what she had taken.

Gaile still was unable to gain Ron’s approval and love. “Gaile tried to keep a perfectly clean house because Ron was a stickler for cleanliness. She ironed all their clothes.” (Id., p.15). She maintained her regimen of diet pills in order to have the extra energy boost – eventually “taking as many as three amphetamines a day . . . [leaving herself] exhausted but . . . [unable to] rest.” (Id.).

During this time, “Ron’s demands for sex had grown more frequent and violent.” (Id.). Ron would force sex upon her, and Gaile would fail to please despite the extra energy boost from the diet pills. Unfortunately, “[n]o one, including Gaile herself, was making any connection

between her childhood molestation by her uncle and sexual humiliation by her father, her church teachings and the dramatic toll these events had taken on Gaile and her marriage.” (Id.). Instead, “Diet pills (amphetamines) would help Gaile to keep her weight off to please Ron, and valium would numb her to his sexual demands. The amphetamines made her feel like a supermom and superwife who could do anything. (Id.).

In 1974, Ron completed his associate degree and applied for a nursing position at Baptist Hospital. Much like his false claims of injury in Vietnam, Ron falsely claimed on his employment application that he had a bachelor’s degree. Though Ron was hired, the hospital soon found out about his dishonesty and he was placed on probation at the hospital.” (Id.). Gaile similarly lied to Ron in order to gain his approval – she did not know how to express her needs to Ron and “pretended everything was alright when it was not.” (Id., p.16). Because “making Ron happy was central to her existence . . . [Gaile] pretended everything was alright when it was not.” (Id.).

Ron was not only violent in the bedroom, but was often violent with Gaile when he was angry – hitting her when he lost his temper. In addition, Ron continued to demand non-traditional sex. (Id.). The violence in the bedroom escalated the night before the scheduled C-section of their second son, when Ron insisted on sex. “Despite her discomfort . . . [Ron] became angry and frustrated with [Gaile] and kept trying to penetrate her.” (Id.). The following morning, Gaile was bleeding profusely and upon arrival at the hospital was told she had a partial abruptio placenta, or a torn placenta, which is very often caused by physical trauma. (Id., p.16).

After the birth of their second son, Brian, Gaile again began using diet pills and valium to lose weight – “she was willing to do anything to get the weight off and please Ron.” (Id.). Also,

after Brian's birth, "Ron's demands for sex and use of violence during sex increased. Ron began using objects to penetrate Gaile which made sex even more painful and difficult." (Id.). In addition to Ron's increasing demands and use of violence during sex, Gaile again suspected that Ron had a girlfriend. "Gaile believed that their financial stress and her weight was driving him to commit adultery." (Id.).

In hopes that she could ease the financial stress, Gaile, who was working in another doctor's office, again turned to stealing from her employer. However, this time, Gaile was caught forging checks and the doctors pressed charges. (Id.). While friends assisted by helping Gaile find a lawyer and even a psychiatrist, "Ron refused to offer any help or support to Gaile." (Id.). Gaile went to jail for 60 days pending disposition of charges, ultimately pleaded guilty, and was sentenced to five years probation and ordered to make restitution. (Id., p.17).

"Over the next two years, Gaile worked and mothered her children, attended church and worked to pay the restitution she owed the doctors. Trying to redeem herself and pushing herself on little sleep and with the side of amphetamines for energy, Gaile enrolled at Shelby State Community College in 1980 and attended through the winter of 1981." (Id.). At the same time, Ron began to travel, attending seminars and recruiting nurses. Gaile again believed that Ron was involved with other women – particularly women with whom he worked at the hospital (in fact, he was involved with a nurse named Gala Scott)⁴ – and was forced to endure even greater violence in the bedroom. Ultimately, "sex with Ron had become marital rape" as Ron began "using a wine bottle and a pot pipe shaped like a penis and testicles to penetrate her. For Gaile it

⁴Ron's charming and charismatic personality caused women at the hospital to flock to him, but often his behavior crossed a line. On one occasion he brought a penis-shaped birthday cake to a nursing supervisor at the hospital. (Id., p.17).

was painful and degrading, but she submitted while begging him to stop.” (Id.).

Eventually, “Ron and Gaile no longer had any sexual relationship at all and while sex was a miserable experience for Gaile, she took Ron’s rejection as proof of her worthlessness . . . honesty and respect between Gaile and Ron was no longer even a pretense. Ron’s disdain for Gaile was no secret and he told her that he stayed with her only because of the children. When she asked him if he could say anything nice about her, he said, ‘you don’t sweat much for a fat person.’” (Id., pp.17-18). Gaile tried to talk to Ron about their marriage, but he threatened to successfully take the boys from her because of her history of her forgeries. “The thought of losing her boys drove Gaile over the edge emotionally and the fear of that loss consumed her.” (Id., p.18).

“Gaile was overweight, depressed, and in fear of losing not only Ron but her children. Growing more and more anxious about her situation, her fears intensified when Ron failed to show up for a dinner with the boys and called her to say that he was staying with Gala Scott, who had a miscarriage. Over the next few months, Gaile grew increasingly agitated and anxious. She was beginning to hate her image in the mirror and felt a self-loathing over Ron’s rejection that she could not control.” (Id., p.18).

“In late 1984, Gaile, feeling abandoned and alone, followed Ron to the hospital early one morning, suspecting that he was meeting Gala. She found Ron and Gala together in the parking lot. Gaile confronted Ron. He called her a ‘bitch’ and ordered her to never follow him again. He slapped her and pushed her into the car. From that moment, Gaile was changed forever. Whatever tenuous threads that had kept her together were broken and her subsequent actions that resulted in Ron’s death were set in motion.” (Id., p.18).

The combination of Gaile's fear of Ron taking her sons from her, along with the reality of Ron's infidelity, "created a panic and fear that was insurmountable and obscured her already impaired judgment. Ron's affairs were rejection enough but the threatened loss of her boys after the years of faith, dedication and submission to physical and sexual abuse, left Gaile in a state where she could no longer cope. Gaile succumbed to her feelings of overwhelming helplessness. Unable to commit an act of violence even in response to years of accumulated abuse, Gaile sought and found others who could initiate a process that she could not control resulting in the death of her husband." (Id., p.29).

C. Having Been Caught in the Cycle of Violence Her Entire Life, By the Time of Her Husband's Murder, There Is No Question That Gaile Owens Suffered From Battered Women's Syndrome When She Hired Someone to Kill Her Husband

As Jan Vogelsang has so eloquently stated, "It is impossible in these cases to point to one life event, one incident, one moment in time and say with confidence that this is why someone took a life. It is the accumulation of stressful factors over a lifetime that contribute to a breakdown of functioning." (Id., p.20). "For Gaile, the combination of religious dogma and influence that demanded the submission of women, a violent and abusive father, an abusive uncle, an abusive grandfather, a mother who stayed in her marriage and failed to protect her children from the abusers, made life as a female demanding and shameful. As a result, Gaile spent her energy trying to please, seeking approval, fearing hell and damnation, and craving love." (Id., p.28). As a result, "Gaile was a typical battered woman – having been raised to endure abuse and neglect as a child and then married a man who also abused her." (Id., p.27).

In examining the history of Gaile Owens, "it is significant that there was an accumulation of factors that prevented her from developing resilience and placed her at risk to one day succumb

to her past and lose her efforts to overcome the wounds in her childhood. Gaile was programmed from birth to comply, to ignore her own needs, to bend to the will of parents, church, husband with the eternal threat of hell ever present.” (Id., p.23). Some of these risk factors include an alcoholic, violent father; a mother who used her as a buffer; exposure to the Pentecostal faith, legalism, thought reform; fear of damnation and lack of joy; a religion that belittled and demeaned females and taught submission to men; abuse by her father, mother and grandfather; sexually abuse by her uncle; isolation from opportunities to develop independence and identity; and, isolation from opportunities to develop social skills and healthy relationships. (Id., pp.23-24). Ultimately, “Ms. Owens’s development had impaired her abilities to reason, to step back, to soothe herself, and examine her options rather than react to her impaired judgment, insight and decision-making..” (Exhibit 7, Affidavit of Jan Vogelsang, p.15).

As a result, the psychological, sexual, and physical abuse by her husband was more than Ms. Owens was equipped to handle. Ron’s “continuing pattern of behavior that include[d] physical and non-physical manifestations of power and control,” was especially devastating as it was accompanied by psychological abuse. See Statement of Amici Curiae National Clearinghouse for the Defense of Battered Women and Tennessee Coalition Against Domestic and Sexual Violence In Support of Gaile Owens, Appendix: Brief of Amicus Curiae National Clearinghouse for the Defense of Battered Women, n.6. Researchers have noted that “At the interpersonal level, psychological abuse accompanying violence often invokes feelings of guilt and shame in the battered victim. Men define violence as a response to their wives inadequacies or provocations which leads battered women to feel that they have failed. Such character assaults are devastating and create long-lasting feelings of inferiority . . . Psychologists working with

battered women consistently report that self-confidence wanes over years of ridicule and criticism.” *Id.*, pp.10-11.

Based on her life history of abuse and the abuse in her marriage, Ms. Owens was in fact a battered woman and suffered from what was known at the time as Battered Women’s Syndrome. As discussed *supra* (see pp.5-6), the criteria for battered women’s syndrome includes a cluster of behaviors “most of which are incredibly consistent with Gaile’s behavior and experiences”:

- (a) posttraumatic stress and re-experiencing the trauma,
- (b) high levels of anxiety and arousal,
- (c) emotional numbing, avoidance behaviors, and depression,
- (d) disrupted interpersonal relationships,
- (e) distorted body image and physical illnesses, and,
- (f) sexual issues, including feelings of guilt, shame, and jealousy.

“Ms. Owens also meets the criteria for Post-Traumatic Stress Disorder, in Remission.” (Exhibit 8, Biopsychosocial Assessment of Jan Vogelsang, p.27).

Because Gaile Owens is a battered woman and because public policy of Tennessee would not condone the execution of a woman who has endured a life of physical, sexual, and psychological abuse about which the courts and the jury knew nothing, this Court should exercise its inherent, supreme judicial power and should reduce Ms. Owens’s sentence to life imprisonment. At the very least, this Court should issue a certificate of commutation.

III. No Court or Jury Has Ever Fully or Properly Considered Compelling, Mitigating Evidence that Ms. Owens Suffered From Battered Women's Syndrome as a Result of Her Husband's Emotional, Physical, and Sexual Abuse Because of a Series Of Failures By Trial Counsel, Post-Conviction Counsel, and the Trial and Post-Conviction Courts

Because of breakdowns in the judicial process at every turn, no court or jury ever heard that Ms. Owens was a battered woman and suffered from battered women's syndrome. The jury that sentenced Ms. Owens to death heard not a word about her husband's abuse or about battered women's syndrome because of the trial court's lack of knowledge relative to the topic and her trial lawyers' failure to investigate, despite the fact that Ms. Owens had revealed significant details of her husband's emotional, sexual, and physical abuse both to her lawyers and to mental health professionals prior to trial. Trial counsel spent a mere two hours investigating for the penalty phase of trial. During post-conviction proceedings, despite the fact that Ms. Owens's first set of post-conviction lawyers fought hard for the right to retain a battered women's expert, her second set of post-conviction lawyers squandered that opportunity by hiring a graduate student with a degree in counseling and failing to present the credible and compelling evidence that Ms. Owens suffered from battered women's syndrome that was available. Finally, in federal court, Ms. Owens was unable to present her credible and compelling evidence of her life-long history of abuse because she was bound by the AEDPA and its restrictions on the presentation of evidence outside the state court record. As a result, no court or jury has ever had the opportunity to fully consider compelling mitigating evidence that Ms. Owens "suffered at the hands of her husband, who was, like her father, mother, and her grandfather, physically abusive; like her uncle, sexually abusive; and like both of her parents, psychologically and verbally abusive and emotionally neglectful. Gaile was a typical battered woman – having been raised to endure abuse and neglect

as a child and then married a man who also abused her.” (Exhibit 8, Biopsychosocial Assessment of Jan Vogelsang, p.27).

Over and over again, this compelling evidence was not presented. This was not the fault of Ms. Owens, but rather due to the ineffectiveness of trial counsel, the ineffectiveness of post-conviction counsel, and the federal statutory restrictions under the AEDPA. Indeed, had this evidence ever been properly presented, it would have caused at least one juror to vote in favor of a life sentence or would have persuaded the post-conviction court to vacate Ms. Owens’s death sentence and resentence her to life. Today, this evidence should compel this Court to refuse to set an execution date for Ms. Owens and instead commute Ms. Owens’s death sentence to a sentence of life.

A. Gaile Owens Revealed Both To Her Trial Lawyers and To Mental Health Professionals Details About Her Husband’s Abuse and Mistreatment Of Her, Yet The Jury That Sentenced Her To Death Heard Nothing About It

1. Ms. Owens Told Her Trial Attorneys Before Trial About Her Husband’s Abuse

When Gaile Owens was arrested in 1985 for hiring Sidney Porterfield to kill her husband, she, like most women suffering from battered women’s syndrome, initially reported to law enforcement officers only that she had “bad marital problems” with her husband and that “over the years, and I just felt like he had been cruel to me,” although “there was very little physical violence.”⁵ Owens v. State, 746 S.W.2d 441, 444 (Tenn. 1988). Before her arrest, Ms. Owens

⁵Ms. Owens’s statements regarding her husband’s cruelty and that “there was very little physical violence” did not, as state and federal courts have claimed, discount the fact that she was abused by her husband. Instead, in the context of a domestic violence case, her reporting to law enforcement is quite consistent with a battered woman who, as part of the syndrome, feels shame and attempts to hide her battering from others. See Statement of Amici Curiae National Clearinghouse for the Defense of Battered Women and Tennessee Coalition Against Domestic

had been audio-taped without her knowledge talking to a police informant and had revealed that she hired someone to kill her husband because “they had a bad 13 year marriage.” (Exhibit 9, General Assignment Report of Investigation, p.7).

However, just days after her arrest, when talking in confidence with her newly appointed lawyer, Steve Shankman, Ms. Owens revealed more about her relationship with her husband, explaining that Ron Owens “was abusive and cheated on her regularly” and had threatened to take custody of their children if she asked for a divorce. (Exhibit 1, Affidavit of Stephen B. Shankman, pp.1-2; Exhibit 10, Affidavit of Dr. Lynne Zager, p.2). After talking with Ms. Owens about her husband’s abuse and infidelity, Mr. Shankman believed that Ms. Owens’s best line of investigation and defense was battered women’s syndrome.⁶ (Exhibit 1, Affidavit of Stephen B. Shankman, p.2).

Ms. Owens also told her next set of trial attorneys, Wayne Emmons and Jim Marty, who were appointed to represent her in May 1985, about Ron Owens’s abuse and adultery. As a result, the lawyers requested that the trial court provide funding for specialized expert assistance in battered wife syndrome: “We believe and honestly state to the court that we believe this case has a meritorious defense in the battered-wife syndrome.” (Exhibit 6, Pre-Trial Hearing Transcript (Motion for Battered Women’s Expert), p.152). “We don’t believe that a thirty minute visit by a

and Sexual Violence In Support of Gaile Owens, ¶7, and Appendix: Brief of Amicus Curiae National Clearinghouse for the Defense of Battered Women, pp.6-10.

⁶Attorney Shankman withdrew from his representation of Ms. Owens just weeks after his initial appointment (which was for the purpose of her arraignment and preliminary hearing) because he was unable to reach an agreement with Ms. Owens regarding his payment as her retained lawyer and declined appointment by the Shelby County Criminal Court. (Exhibit 1, Affidavit of Stephen B. Shankman, p.2).

jail doctor can determine if she needs to be examined psychiatrically for matters that are way beyond the purview of competence to stand trial and insanity at the time of the commission of the alleged offense. We're talking in terms of state of mind. We're talking in terms of criminal intent. We're talking in terms of a highly specialized and very unusual defense, that being battered-wife syndrome." (Id., p.148). Mr. Emmons went on to admit that he was inexperienced in the area of battered wife syndrome, making it even more critical that Ms. Owens receive expert assistance: "I've never encountered this before. I don't know if a battered-wife syndrome can cause a person to be under the – to have a mental disease or defect to the extent that you cannot appreciate the wrongfulness." (Id., p.160). But the trial court was unsympathetic and retorted: "Isn't that a question for you to school yourself on as counsel?" (Id.).

In order to further demonstrate the need for an expert in battered wife syndrome, Mr. Marty informed the court about a few of the specifics of the abuse: "During the course of our investigation with Ms. Owens, we have determined and learned from her that the deceased engaged in certain sexual perversions, to wit, sodomy, fellatio, to the point where she was required to throw up, to the point where she was – her rectum was torn ..." (Id., p.157). But, the prosecution insisted that Ms. Owens's word was not enough: "There is not one scintilla of evidence before this court to show or indicate" that Ms. Owens had been battered. (Id., p.155) Similarly, the trial court insisted that the lawyers should provide medical proof that Ms. Owens was battered, and thus denied the request for funding. (Id., p.157). Instead, the trial court ordered that Ms. Owens receive the typical competency/insanity evaluation from Midtown Mental Health Center: It's "the only thing I can do." (Id., p.163).

2. Ms. Owens Told Dr. Lynne Zager, A Psychologist Who Evaluated Ms. Owens Prior to Trial, About Her Husband's Abuse

In accordance with the trial court's order, Ms. Owens was evaluated by Dr. Lynne Zager of Midtown Mental Health Center, which had an office located in the Shelby County Jail. (Exhibit 11, Affidavit of Dr. Lynne Zager, pp.2,4). Dr. Zager had been instructed by the court to evaluate and to opine only about Ms. Owens's competency to stand trial and whether she was insane at the time of the offense, but not about battered wife syndrome or any other penalty phase mitigation. (Exhibit 11, October 3, 1985 Order Directing Evaluation of Defendant). In fact, Dr. Zager was not informed by the court, the prosecution, or Ms. Owens's lawyers that there was a question about whether Ms. Owens suffered from battered wife syndrome or that battered wife syndrome had any relevance to her evaluation whatsoever. (Exhibit 10, Affidavit of Dr. Lynne Zager, p.2).

On October 22, 1985, Dr. Zager met with Ms. Owens and conducted her competency/sanity evaluation. During the evaluation, Ms. Owens revealed to Dr. Zager "significant information about her relationship with her husband, including affairs, sexual humiliation and overall mistreatment of her, along with the impact his behavior had on her psychologically. Ms. Owens indicated she was depressed, insecure, fearful of him, and could not cope. Ms. Owens was fearful because her husband told her that if she asked for a divorce, he would take custody of the children and keep them from her." (Id., p.2; Exhibit 12, Notes from Dr. Lynne Zager regarding October 22, 1985 Evaluation of Gaile Owens). Ms. Owens described the desperation of her situation to Dr. Zager: "Last 4-5 years affairs. Didn't admit but didn't deny. None of my business. I run house. It built up in me. I felt like explode. Ask for divorce. He told

me I never get kids." (Id.). As a result of the information Ms. Owens provided to Dr. Zager, "it was [her] impression Ms. Owens was a battered woman and that she could have attempted to assert that she had battered women's syndrome to explain her behavior at the time of the offense." (Exhibit 10, Affidavit of Dr. Lynne Zager, p.2).

However, in accordance with the trial court's order, Dr. Zager simply informed the court that Ms. Owens was competent to stand trial and that she had not reached a conclusion about Ms. Owens's sanity because Ms. Owens was reluctant to provide information about the crime itself without first speaking with her lawyers. (Exhibit 13, November 15, 1985 Letter from Dr. Lynne Zager; Exhibit 10, Affidavit of Dr. Lynne Zager, pp.3-4). In her 2009 affidavit, Dr. Zager explained that Ms. Owens's reluctance to discuss the crime was not at all uncooperative but was because "Ms. Owens was uncomfortable discussing the specifics of the crime until she had the chance to talk to one of her attorneys." (Exhibit 10, Affidavit of Dr. Lynne Zager, p.4). Though Dr. Zager "tried on several occasions to speak with [Ms. Owens] about the facts of the crime . . . she indicated she had not yet been able to speak with her attorneys. (Id.).⁷

Unfortunately, Dr. Zager did not have the opportunity to talk with Ms. Owens's trial attorneys. Neither Mr. Emmons, Mr. Marty, nor Mr. Stein ever interviewed Dr. Zager about her

⁷The post-conviction trial court and the Sixth Circuit incorrectly characterized Ms. Owens's failure to discuss the facts of the crime during Dr. Zager's evaluation as "uncooperative." Owens, 549 F.3d 399, 406-407 (6th Cir. 2008); Owens, 13 S.W.3d 742, 750 (Tenn.Crim.App. 1999). Dr. Zager's affidavit corrects that misunderstanding. In fact, Dr. Zager "was very disappointed to see that that opinion characterized Ms. Owens as 'uncooperative' in relationship to my evaluation of her." As Dr. Zager emphasized, "the forensic team, including myself, did not perceive Ms. Owens to be uncooperative at all. Instead . . . Ms. Owens provided me with very personal and significant information relating to her unhappy marriage, her husband's affairs, and her depression and desperation in the months and years prior to the offense. Ms. Owens simply wanted to speak with her attorneys before discussing the specifics of the crime." (Exhibit 10, Affidavit of Dr. Lynne Zager, p.4).

evaluation of Ms. Owens or asked to review her file or notes. Consequently, they never knew that Dr. Zager believed, and would have testified that, Ms. Owens was a battered woman. (Id., p.3). Had Ms. Owens's lawyers talked to Dr. Zager or obtained her file, they would have had the evidence they needed to show the trial court that a battered women's expert was necessary and critical to the presentation of Ms. Owens's case at trial. (Id.).

3. After the Trial Court Refused to Appoint a Battered Women's Expert, Ms. Owens's Lawyers Not Only Failed to Obtain Dr. Zager's File or Talk to Dr. Zager, They Also Failed to Obtain Any Records Whatsoever and Do Any Investigation to Prepare For Ms. Owens's Sentencing Hearing

Having failed to obtain Dr. Zager's file or to discuss with Dr. Zager her evaluation of Ms. Owens, and without an expert in battered wife syndrome, Ms. Owens's lawyers abandoned any investigation relating to Ms. Owens's allegations of abuse, and in effect, abandoned any investigation at all in preparation for Ms. Owens's sentencing hearing.⁸ As timesheets filed in this Court in order to obtain payment indicate, Ms. Owens's lawyers spent **only two hours** investigating to prepare for Ms. Owens's sentencing hearing. (Exhibit 14, Timesheets of Jim Marty and Brett Stein).⁹ In fact, Ms. Owens's lawyers failed to gather any records whatsoever and

⁸Prior to trial, Ms. Owens's lawyers had also pursued an investigation of Ron Owens's infidelity by requesting from the prosecution in discovery letters, notes, etc. relating to affairs, etc. that they believed were collected during a search of Ron Owens's office and home. This line of investigation was also abandoned when the prosecution lied to the trial court and to Ms. Owens's lawyers and reported that no such evidence existed. See Section IV, *infra*.

⁹Wayne Emmons, who represented Ms. Owens from May 1985 through December 1985 and had signed most of the pleadings filed in Ms. Owens's case, including those relating to obtaining expert funding and evidence of Ron Owens's infidelity, withdrew just one month before Ms. Owens's trial began. At that time, Brett Stein was appointed to assist Jim Marty.

failed to interview any witnesses, including Ms. Owens's family members and friends.¹⁰

With no expert witness, no records, and no social history whatsoever, Mr. Marty and Mr. Stein only called three witnesses to testify on Ms. Owens's behalf at sentencing – Dr. Max West¹¹

¹⁰The only witness that Ms. Owens's lawyers contacted was Dr. Max West, who Mr. Stein called just two weeks prior to trial. Dr. West was a psychiatrist who had seen Ms. Owens in 1978 for one, one-hour therapy session. During his hour-long session with Ms. Owens, Dr. West compiled a very brief history from Ms. Owens, including information about her brother's physical and mental disabilities, her mother's deceitfulness, her father's strictness, indications of sexual problems in Ms. Owens's marriage in the past, and Ms. Owens's own acknowledgment of her problems with lying and stealing. (Exhibit 7, Affidavit of Jan Vogelsang, pp.4-6). In response to Mr. Stein's inquiry, Dr. West provided a copy of his file to Ms. Owens's lawyers just days before trial and agreed to testify on Ms. Owens's behalf at sentencing regarding the brief history that he obtained. However, but for the brief history that he gathered during his one-hour session, Dr. West had no additional information about Ms. Owens from her lawyers nor did he have an opportunity to interview Ms. Owens prior to trial.

¹¹Dr. West's testimony at sentencing, while hampered by his limited knowledge of Ms. Owens, was ultimately even shorter than expected because Ms. Owens's attorneys did not know that hearsay was admissible in the penalty phase. As a result, they failed to properly overcome the State's hearsay objection to Dr. West's testimony. As a result, Dr. West was unable to testify about the brief history Ms. Owens had provided to him and instead simply indicated that Ms. Owens had some unspecified and undefined "severe problem." (Exhibit 15, Trial Transcript (Testimony of Dr. Max West), p.1905). At post-conviction, Mr. Marty claimed that he had purposefully limited Dr. West's testimony because he was afraid that Dr. West would testify that Ms. Owens had homicidal tendencies. Owens, 549 F.3d at 414. Dr. West testified, at the very same post-conviction hearing, that he had never told Mr. Marty that Ms. Owens had homicidal tendencies and that indeed she did not. Id.

In reality, "even though the information Dr. West had was minimal (which is normal for a mental health professional after spending only one hour with a patient, who is likely to minimize any problems) and dated, there was information in Dr. West's reporting letter that would have stood out" and should have been further explored. (Exhibit 7, Affidavit of Jan Vogelsang, p.4). This information includes information about Ms. Owens's brother, Wilson, and his disabilities, "which played a major role in Ms. Owens's life,"; information that "Ms. Owens stated that as a child she was exposed to deceit and lying on the part of her mother"; indications that Ms. Owens had "sexual problems in the past" in her marriage; Ms. Owen's admissions "during that first hour to lying about money and taking money for her family"; and "answers that intimate that Ms. Owens's childhood was very unhappy and that she had great disdain for herself." (Id., pp.5-6).

Importantly, Dr. West testified in post-conviction that had he been provided with complete social history information relating to Ms. Owens, he would have agreed with the findings of post-conviction expert, Eric Gentry, who opined that Ms. Owens did suffer from

and two women who worked with Ms. Owens in the Shelby County Jail. Ms. Owens did not testify on her own behalf – which is not surprising given that Ms. Owens had not revealed her husband’s physical, sexual, and psychological abuse to anyone prior to her arrest, (Exhibit 10, Affidavit of Dr. Lynne Zager, p.3), and given the complete lack of investigation and support Ms. Owens received in preparation for trial. Testifying on her own behalf at trial in order to reveal the abuse that Ms. Owens, like most battered women, had hidden for years from the rest of the world was understandably not an option for a depressed, insecure, and fearful Ms. Owens.¹²

As a result, because of the trial court’s failure to provide expert funding, her lawyer’s failure to undertake any investigation or develop a social history, and the prosecution’s misrepresentations regarding the evidence, the jury never heard that Ms. Owens suffered from battered women’s syndrome or that she had endured years of mental torture because of her husband’s unfaithfulness or that her husband threatened to take custody of her boys if she asked for a divorce.

“What happened in Ms. Owens’s case is a complete and utter failure to investigate and

battered women’s syndrome and post-traumatic stress disorder. Owens, 13 S.W.3d at 753-754.. After a review of Mr. Gentry’s interviews and findings, Dr. West agreed with Eric Gentry’s conclusions and ultimately testified at post-conviction that he believed Ms. Owens was "ideally situated" to be a victim of abuse. Owens, 13 S.W.3d at 754.

¹²Gaile Owens has been criticized by the courts for not taking the stand herself and testifying about both the abuse she endured at the hands of her husband and her suspicions about her husband’s unfaithfulness. See Owens, 13 S.W.3d at n.4; Owens, 549 F.3d at 406. What the courts have failed to understand is that battered women’s syndrome is a serious mental disorder that includes "low self-esteem, self-blame, anxiety, depression, fear, suspiciousness, and loss of belief in the possibility of change." (Exhibit 10, Affidavit of Dr. Lynne Zager, p.2). Ms. Owens’s low self-esteem, self-blame, anxiety, depression, and fear did not disappear after the death of her husband. As Dr. Zager noted at the time of her evaluation in October 1985, Ms. Owens was still very clearly depressed, anxious, insecure and fearful. (Id., p.3).

pursue obvious red flags identified in Ms. Owens's own reporting to her attorneys, her [evaluation with Dr. Zager], and Dr. West's file. Counsels' failure to gather records, to speak with family members or friends, to interview mental health professionals at Midtown and review their file, or to timely interview Dr. West and review his file, was egregious and did not meet even the minimal standards for mitigation investigation and the presenting of mitigating evidence in court." (Exhibit 7, Affidavit of Jan Vogelsang, pp.6-7). Because of these failures, Ms. Owens was sentenced to death.

B. During Post-Conviction Proceedings, Lawyers for Ms. Owens Successively Litigated the Right to Funding for an Expert in Battered Women's Syndrome, But Then Ultimately a New Set of Lawyers Hired a Graduate Student With No Expertise in Battered Women's Syndrome, No Credibility with the Court, and No Experience as a Testifying Expert; As a Result, the Evidence Presented to the Post-Conviction Trial Court Was Not Credible and Was Discounted

1. From the Time of their Appointment, Post-Conviction Lawyers Ron Gilman and Stephen Shankman Pursued Funding for an Expert in Battered Women's Syndrome to Assist Them In Their Investigation and to Testify at a Hearing

In 1990, after the conclusion of Ms. Owens's direct appeal, now Sixth Circuit Judge Ron Gilman and Stephen B. Shankman were appointed to represent Gaile Owens in state post-conviction proceedings. Judge Gilman asked Mr. Shankman to assist him, and Mr. Shankman agreed because he was "so disappointed that Ms. Owens had not been allowed to plead guilty, that her attorneys had not raised a battered women's defense and that Ms. Owens had received the death penalty" after he had withdrawn from his representation of her prior to trial. (Exhibit 1, Affidavit of Stephen B. Shankman, p.2).

Because both Judge Gilman and Mr. Shankman believed from the outset that the centerpiece of Ms. Owens's case was that she suffered from battered women's syndrome, they

contacted Dr. Lenore Walker. (Id., p.2). At the time, Dr. Walker was the pre-eminent expert on battered women's syndrome. It was, in fact, Dr. Walker's research that first identified the cycle of violence associated with battered women and coined the term "battered women's syndrome." Because of this expertise and the importance of her research, she was asked to testify before Congress and the Senate about family violence and battered women on multiple occasions in the 1980s.

Judge Gilman and Mr. Shankman asked Dr. Walker to review documents relating to Ms. Owens "to determine if there is reason to believe that Ms. Owens was a battered woman and if her history of victimization influenced her behavior and functioning." (Exhibit 16, Affidavit of Dr. Lenore Walker, p.2). Dr. Walker did so, and opined that "there is a strong possibility that Ms. Owens was battered and subjected to chronic sexual abuse by her husband." (Id.) Dr. Walker indicated that additional investigation and mental health evaluations would be necessary to make a final diagnosis and indicated her willingness to work on Gaile Owens's case. (Id.) Dr. Walker agreed to work on Ms. Owens's case if funding was approved. (Id.).

Much like at trial, the post-conviction trial court denied Ms. Owens's motion for expert funding. Judge Gilman and Mr. Shankman took an interlocutory appeal that they pursued to this Court. Finally in 1995, this Court ruled that Ms. Owens, and all capital petitioners, were entitled to expert funding in post-conviction proceedings. Owens v. State, 908 S.W.2d 923 (Tenn. 1995). Ms. Owens and her lawyers now had the approval they needed to go forward in post-conviction proceedings with the battered women's syndrome expert that she was denied ten years before at trial. However, after their four-year fight for expert funding, Judge Gilman became a candidate for judge on the United States Court of Appeals for the Sixth Circuit. (Exhibit 1, Affidavit of

Stephen B. Shankman, p.3). As a result, both Judge Gilman and Mr. Shankman withdrew from their representation of Ms. Owens.

2. Newly Appointed Lawyers with the State Post-Conviction Defender's Office Squandered the Hard Fought Right To Expert Assistance By Hiring A Graduate Student to Testify at Ms. Owens's Post-Conviction Proceedings

In spite of the investment that Judge Gilman and Mr. Shankman made in order to obtain funding to hire a qualified battered women's expert, Paul Morrow of the Post-conviction Defender's Office, who was subsequently appointed to represent Ms. Owens along with Gerald Green of Memphis,¹³ did not hire Lenore Walker or a psychologist or psychiatrist or social worker of her caliber with expertise in battered women's syndrome. (Exhibit 7, Affidavit of Jan Vogelsang, p.10). Instead, they hired Eric Gentry, a "certified trauma specialist" with a Master's Degree in counseling and a "certificate of advanced study" in traumatology. (Id.). See also, Owens, 13 S.W.3d at n.4. At the time of his testimony at Ms. Owens's post-conviction hearing, Mr. Gentry was enrolled in a Ph.D. program studying marriage and family therapy and psychotraumatology in Florida but had just finished hiking the Appalachian Trail. (Id.). Mr. Gentry had never published, had no training or experience in forensic psychology, and had never before testified as an expert witness and was clear in his testimony that he would never take the stand again because it was too difficult. (Exhibit 7, Affidavit of Jan Vogelsang, p.11); Owens, 13 S.W.3d at n.4.

Prior to the hearing, Mr. Morrow had Eric Gentry do a "Psychosocial Assessment" of Gaile Owens. Mr. Gentry's assessment was based on Mr. Morrow's investigation, a few

¹³Mr.Green was "local counsel." His duties were primarily ministerial.

interviews Mr. Gentry did on his own, and records that had been gathered by Mr. Morrow. Unfortunately, Mr. Gentry's "Assessment" was far from thorough, incorporating too few interviews, historical records, and no development of inter-generational patterns. Mr. Gentry's report introduced "Ms. Owens's abuse . . . immediately with no explanation about the relevance of her family background, parental relationships, and her chronological history." (Exhibit 7, Affidavit of Jan Vogelsang, p.12). As experienced clinical social worker and mitigation specialist Jan Vogelsang has explained, "A mitigation expert should be trained to put a life into context, not to pluck out pieces that are the most convenient." (Id.). Mr. Gentry also failed to include critical and detailed information about Ms. Owens, including insight into the financial struggles during Ms. Owens's childhood, the effect that her brother's disability had on the family, an examination of the impact of the teachings of the Pentecostal faith on Ms. Owens and her family, Ms. Owens's positive conduct as a child and adolescent, and generally the lack of intervention for Ms. Owens while she "deal[t] with her violent father and grandfather, . . . cope[d] with the sexual abuse of a beloved uncle, and ultimately contend[ed] with her violent and sexually abusive husband." (Id., pp.13-14).

Partially to blame for Mr. Gentry's limited assessment was the incomplete investigation of Mr. Morrow. While a number of interviews were conducted, Dr. Lynne Zager, the first mental health professional to see Ms. Owens after her arrest, was never interviewed; nor was Mr. Shankman, Ms. Owens's first lawyer and first confidante after her arrest. These were critical mistakes (Id., p.11), as both Dr. Zager and Mr. Shankman could have provided critical information about Ms. Owens's abuse, her husband's infidelity, and her motivations for the crime,

as well as context for a claim that Ms. Owens suffered from battered women’s syndrome.¹⁴ Along with these investigative failures, Mr. Morrow failed to properly call lay witnesses, who had been interviewed, to testify on Ms. Owens’s behalf, including co-workers of Mr. Owens who could have testified about their suspicions of abuse, friends of Mr. Owens who could have testified about Mr. Owens’s repetitive infidelity and the illicit relationship he was involved in at the time of his murder, and friends and family members of Ms. Owens who could have testified about physical and sexual abuse in Ms. Owens’s family of origin, her father’s alcoholism, and the extreme tension and abuse between Ms. Owens’s mother and father. See Section II, pp.8-24, *supra*. As Jan Vogelsang has described, “Post-conviction counsel and his investigators did investigate Ms. Owens’s case prior to the hearing, gathering a number of records relating to Ms. Owens and her extended family and interviewing family members and friends that were still living. This investigation proved fruitful and revealed very relevant information about Ms. Owens’s difficult childhood, her physical and sexual abuse as a child, her husband’s infidelity and mistreatment of her, and Ms. Owens’s very positive role as caretaker to her brother, Wilson, and mother to her two boys. However, neither counsel nor Eric Gentry used this information in a

¹⁴Importantly, Ms. Owens lost her claim of ineffective assistance of counsel in the Sixth Circuit Court of Appeals because the two-judge majority believed, based on Ms. Zager’s report, that she was uncooperative with her trial lawyers. Owens, 549 F.3d at 406-407. Dr. Zager’s affidavit proves that this was simply not true – Ms. Owens was cooperative and provided significant information that led Dr. Zager to believe that Ms. Owens likely suffered from battered women’s syndrome. (Exhibit 10, Affidavit of Dr. Lynne Zager, pp.2-4). Mr. Shankman’s affidavit also corroborates that Ms. Owens was cooperative and had immediately disclosed to him information about her husband’s abuse and expressed her great remorse. (Exhibit 1, Affidavit of Stephen B. Shankman, pp.2-3). If either Dr. Zager or Mr. Shankman had been interviewed and their testimony presented during post-conviction proceedings, the complexion of this case would have radically changed. Because they were not, the Sixth Circuit’s opinion is based on basic factual misunderstandings that drove the outcome of its ruling.

meaningful or thorough way. Moreover, counsel didn't call any lay witnesses to testify about the mitigating information gathered and instead only used the testimony of Eric Gentry and Dr. Max West." (Exhibit 7, Affidavit of Jan Vogelsang, pp.10-11).

As the only expert witness, and with no lay witnesses testifying to corroborate his report, the testimony of Eric Gentry was Ms. Owens's entire case in post-conviction. Thus, the failure of Mr. Morrow to properly prepare Eric Gentry to testify was devastating. Indeed, Mr. Gentry's "inexperience took a dramatic toll on his testimony at Ms. Owens's post-conviction hearing." (Id., p.11). The problems began with his credentials. The post-conviction trial court barely accepted Mr. Gentry, a post-graduate student and ex-social worker with a lapsed license, as an expert in anything. Owens, 13 S.W.3d at 752-753, n.4. Ultimately, this post-graduate student was accepted as an expert in "traumatology." Id. A good lawyer would have anticipated these problems and either (1) prepared the witness on how to handle the questioning of his credentials or (2) hired someone with more credibility in the eyes of the Court. Not so here. Instead, during Mr. Gentry's testimony, he became so overwhelmed by the questioning that he exclaimed that he would never testify again because it was just too hard. Id.; (Exhibit 7, Affidavit of Jan Vogelsang, p.11).

As a result of his lack of experience and limited Assessment (and probably his anxiety about being on the stand), Mr. Gentry's testimony failed to provide context for Ms. Owens's life, failed to explain childhood and adult responses to trauma, failed to address Ms. Owens's prior conviction for embezzlement and place it in the context of her family history, and failed to address the power of neglect or the accumulation of stressors in Ms. Owens's life. (Id., pp. 11-15). "Mr. Gentry's disjointed presentation disrupted any hope that the post-conviction trial court would make reasonable connections between the accumulation of stressors in Ms. Owens's life and the

crime, not in order to excuse her, but to meet even the most minimal standards for examining Ms. Owens's development into a person who could commit this crime." (Id., p.16).

Indeed, the Court of Criminal Appeals' (CCA) review of the post-conviction proceedings hammers this point home. The CCA characterized Mr. Gentry's "psychosocial" assessment as a "social history combined with Gentry's impressions thereof" and quoted extensively from the post-conviction trial court's opinion which repeatedly referred to Mr. Gentry's "lack of training and experience" and "lack of qualifications" when finding that his testimony lacked any credibility. Owens, 13 S.W.3d at 752-753, n.4.

Thus, despite the fact that Ms. Owens's case is the case in which this Court established the right to expert funding in post-conviction, Ms. Owens's right to have a credible expert testify on her behalf about battered women's syndrome was completely squandered. There was no credible testimony presented about the battering that Ms. Owens endured in her marriage, about her husband's infidelity, or about the effects of battered women's syndrome on Ms. Owens. With none of this information properly or coherently presented, the post-conviction trial court (and ultimately the CCA) disbelieved that she was abused and denied her claims of error. Id., at 755.

C. The Failure to Hire a Credible, Experienced Expert and to Present Available, Compelling Mitigating Evidence About Ms. Owens's Abuse and Battered Women's Syndrome Prevented the Federal Court From Reviewing This Evidence in Ms. Owens's Case

Unfortunately, because no compelling evidence was properly or credibly presented on Ms. Owens's behalf during post-conviction proceedings, the federal courts, who are bound by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), determined that the evidence should not be considered during habeas proceedings. Owens, 549 F.3d at 408.

It is for this reason that state post-conviction proceedings, and the hearing in particular, are considered critically important – in all likelihood these proceedings are a defendant’s last chance to present their case, including claims that counsel was ineffective at trial. Because the proceeding is post-direct appeal, the burden of proof is on the defendant to prove her claims. It is not enough to simply allege that your lawyer did a bad job or didn’t work hard enough on your case. The defendant must also prove what evidence would have been presented had the lawyer done an effective job. The only way to meet that burden of proof is for the post-conviction lawyer to conduct the investigation that the trial lawyer should have conducted and then present the evidence in court, just as if he were presenting the sentencing case to the jury.

Most importantly, the failings of post-conviction counsel to present evidence on the defendant’s behalf, or “failures to develop,” are attributed to the defendant in federal court. See 28 U.S.C. §2254. Thus, the federal courts blamed Ms. Owens, instead of post-conviction counsel, for "failing to develop" evidence relating to battered women’s syndrome and the ineffectiveness of her trial counsel and refused to consider any evidence outside the post-conviction record. Owens, 549 F.3d at 408.

D. Because Breakdowns in the Judicial Process Prevented the Jury and Every Court From Hearing the True Story of Gaile Owens, This Court Should Now Consider This Compelling Evidence and Should Commute Ms. Owens’s Sentence to Life

The judicial process failed Ms. Owens at every step. As a result, the jury and every court that has reviewed her case were deprived of crucial evidence that radically changes the circumstances of this case. Ms. Owens was not driven by greed, as the prosecutor argued. Ms. Owens was a battered wife who acted out of desperation, shame, and fear.

Tragically, no court has been able to review or grant relief to Ms. Owens because her

original trial counsel were ineffective, her post-conviction lawyer failed in his job, and the procedural default rules in post-conviction and federal habeas have barred a complete presentation of Ms. Owens's powerful mitigating evidence. For that reason, it is now appropriate for this Court to step in and to exercise its inherent, supreme judicial power to consider this evidence that has never been fully and properly presented and to find that Ms. Owens was indeed a battered woman who was prevented from presenting compelling mitigating evidence of the battering – evidence that would have caused at least one juror to vote for a life sentence – by the ineffectiveness of her trial and post-conviction lawyers and the trial court. In so concluding, this Court should deny the State's motion to set an execution date and reduce Ms. Owens's sentence to life imprisonment. At the very least, this Court should issue a certificate of commutation.

IV. This Court Should Correct Its Earlier Erroneous Ruling That Ms. Owens's Was Not Denied Her Constitutional Rights Under Brady v Maryland When the Prosecutor Unequivocally Disavowed the Existence of Sexually Explicit Love Letters Which Were Specifically Requested By Trial Counsel

A. The Prosecution Blatantly and Purposefully Denied The Existence Of And Withheld Sexually Explicit Letters Specifically Requested By Ms. Owens's Lawyers That Proved That Ron Owens Was Involved in an Illicit Affair

When Gaile Owens was arrested, she told law enforcement officers that she hired Sidney Porterfield to kill her husband, Ron Owens, because he had long been cruel to her and because they had a bad marriage. See Owens, 746 S.W.2d at 444. Ms. Owens later provided details to psychologist Dr. Lynne Zager about Ron Owens's cruelty and her belief that he had been repeatedly unfaithful. (Exhibit 10, Affidavit of Dr. Lynne Zager, p.2; Exhibit 12, Notes from Dr. Lynne Zager regarding October 22, 1985 Evaluation of Gaile Owens); see pp.29-31, supra. Ms. Owens also told her trial lawyers, Wayne Emmons and Jim Marty, that she believed that her

husband was cheating on her. Based on that, Emmons and Marty made a pre-trial discovery request for any information that Ron Owens “had numerous girl friends, extra marital sexual affairs possibl[y] involving unusual sexual proclivities and/or perversions.” (Exhibit 17, Motion for Exculpatory Evidence, p.1). The motion stated that there was “good reason to believe that the deceased husband of the defendant had numerous girlfriends” which he “flaunted ...with such regularity and in such ways as to contribute to [Ms. Owens’s] state of mind” and that “proof of such is material to issues of guilt and punishment.” (*Id.*). The motion recited Mr. Emmons’ belief that the prosecution would have collected this sort of evidence during the “search of the entire house of the deceased after the defendant was in custody” and when “[the victim’s] personal possessions at his office were inventories and seized.” (*Id.*). The motion requested “names, addresses, **correspondence to and from “lovers”** which would be of great benefit to the defense.” (*Id.*, p.2)(emphasis added). Lawyer Emmons explained both in his motion and during a pre-trial hearing on the Brady motion information about Ron Owens’s extra-marital affairs was necessary both to Ms. Owens’s defense and to her case in mitigation. (Exhibit 18, Pre-Trial Hearing Transcript (Motion for Exculpatory Evidence), p.69).

In response to the request of Ms. Owens’s lawyers, ADAG Strother¹⁵ announced to the

¹⁵The United States Supreme Court recently found that Don Strother, the very same Shelby County ADAG, withheld exculpatory evidence and made “false and misleading” arguments during the 1982 sentencing of Tennessee death row inmate Gary Cone in Cone v. Bell, 129 S.Ct. 1769 (April 28, 2009). In the Cone case, the theory of defense was that Gary Cone was a heavy drug user and as a result was less culpable because he was unable to appreciate the wrongfulness of his conduct. ADAG Strother knew this and withheld evidence, including multiple statements from multiple witnesses about Mr. Cone’s heavy drug use at the time of the offense. ADAG Strother then argued vehemently to the jury that rather than being a drug user, Mr. Cone was a drug seller: “I’m not trying to be absurd, but he says he’s a drug addict. I say baloney. He’s a drug seller. Doesn’t the proof show that?” Cone, 129 S.Ct. At 1775. In finding that ADAG Strother had withheld evidence and misled the jury about Mr. Cone, the Supreme

court at the pre-trial hearing: “we have shown them **every single scintilla of evidence** which we have seized and which we have that came from the house,” and “**everything we have** in the way of any kind of piece of physical evidence, any piece of paper, any notebook, any-anything along those lines, letters, et cetera that we have, **we have made available** to them.” (Id., pp.69,74)(emphasis added). When defense counsel continued to press on the existence of sexually explicit letters, ADAG Strother reiterated to the trial court that the prosecution had complied with its obligations under Brady:

Everything we have in the way of any kind of piece of physical evidence, any piece of paper, any notebook, any – anything along those lines, **letters** and et cetera that we have, we have made available to them.

(Id., p.74)(emphasis added). Ms. Owens’s lawyer replied, “Well I certainly accept that. I’ve got no reason not to.” Id. When counsel then asked if ADAG Strother could produce an inventory of the items seized, the trial court asked, “Do you have an inventory of the office, Mr. Strother?” (id., p.73) and ADAG Strother replied, “Not that I am aware of, Your Honor.” Id.

At trial, ADAG Strother theorized that Ms. Owens hired someone to kill her husband not because of cruelty or infidelity but because she wanted his life insurance money. Strother’s insurance theory was supported by no evidence whatsoever. In closing argument, ADAG Strother argued that Ms. Owens should be sentenced to death because Mr. Owens was a wholly innocent man:

If it takes the execution of ten Sidney Porterfields [sic] and Marsha Gaile Owens [sic], who would coolly and deliberately plot and design the death of a Ronald

Court determined that “It is possible that the suppressed evidence, viewed cumulatively, may have persuaded the jury that Cone had a far more serious drug problem than the prosecution was prepared to acknowledge, and that Cone’s drug use played a mitigating, though not exculpating, role in the crimes he committed.” Id., at 1786.

Owens ... if it takes ten of their deaths in the electric chair to make only one potential Sidney Porterfield or Marsha Gaile Owens say, “No, I will not kill that **innocent man**, because I might get electricuted [sic] for it,” it’s worth it.

(Exhibit 19, Sentencing Transcript (Rebuttal Argument of Strother), pp.1942-1943 (emphasis added)). ADAG Strother further argued during the guilt phase that Ms. Owens “was a desperate woman; not because of anyone else’s actions, but because of her own actions she was about to lose everything that mattered to her, and there was one way and one way only to salvage that; to salvage her way of life, and that was to have her husband killed and collect the insurance money.”

(Exhibit 20, Trial Transcript (Rebuttal Argument of Strother), pp.1833-1834). In turn, having been told by ADAG Strother that they had found no evidence whatsoever of Mr. Owens’s infidelity in the house or in his office, Ms. Owens’s attorneys completely abandoned any theory of the case relating to Mr. Owens’s unfaithfulness.

In fact, ADAG Strother was not being honest with the jury at trial about Mr. Owens’s innocence, or with the trial court or Ms. Owens’s lawyers at the pre-trial hearing about the existence of Brady material. To the contrary, ADAG Strother **knew** that Mr. Owens was not an innocent man because the Bartlett Police (who conducted the investigation) had seized sexually explicit cards and letters from Ron Owens’s office written by Ron Owens to Gala Scott, his lover, and from Gala Scott to Ron Owens. In the police’s investigative file was a typed report documenting the discovery of these sexually explicit cards and letters and a subsequent interview with Gala Scott, who admitted to having an affair with Ron Owens. (Exhibit 9, General Assignment Report of Investigation, pp.2-3). The letters were “juvenilistic love notes” in which, Ron Owens and his lover, Gala Scott, referred to each other by their pet names, “Fluff,” “Flufflicker,” and “Lollipop.” (Exhibit 21, Post-Conviction Transcript (Testimony of Bartlett

Detective), p.178); (Exhibit 9, General Assignment Report of Investigation, pp.2-3).

Despite the very specific request by Ms. Owens's lawyers for this very evidence before trial, this information was not discovered until post-conviction proceedings more than 10 years later, when pursuant to a Tennessee Public Records Act request, the police report detailing the search of Ron Owens's home and office and the discovery of the sexually explicit love letters, was finally disclosed by the state. At the post-conviction hearing, a Bartlett Detective testified that prior to trial, Mr. Owens's lover, Gala Scott, asked that the sexually explicit letters be returned to her. The detective testified that he called one of the prosecutors in the Gaile Owens case to get permission to return the sexually explicit letters to Ms. Scott: "To the best of my memory it was General Strother. It may have been a city prosecutor, George McCrary. Or it could have been Mr. Challen, I believe was involved in the – I'm sorry. I just don't remember who it was." (Exhibit 21, Post-Conviction Transcript (Testimony of Bartlett Detective), p.179). The prosecutor responded that the sexually explicit letters were not relevant to the case and to give them back to Ms. Scott, which he did. (*Id.*, p.178).

B. Throughout the Appellate Process, Both the State Courts and the Federal Courts Have Repeatedly Misunderstood and Mischaracterized the Prosecution's Misleading and Withholding From Ms. Owens of Sexually Explicit Letters Proving Mr. Owens's Unfaithfulness

After discovering that the prosecution withheld evidence during preparations for state post-conviction proceedings, Ms. Owens alleged that her rights under Brady v. Maryland, 373 U.S. 83 (1963), were violated *vis-a-vis* her capital sentence.¹⁶ Ms. Owens argued that the report and sexually explicit letters were mitigating evidence because people who commit murder

¹⁶Ms. Owens did not challenge her conviction for accessory before the fact to first degree murder in state post-conviction or in federal habeas proceedings.

because of a spouse's infidelity are generally believed to be less culpable than many others who commit murder. The post-conviction court denied relief finding first that the prosecution did not suppress the evidence because it was not in the possession of the State's attorneys (but was instead in police possession) and second that Ms. Owens was not prejudiced because she knew of her husband's affair with Gala Scott. Owens, 13 S.W.3d at 758.

On appeal, the CCA agreed with the post-conviction court finding that the State had no "duty" to provide the sexually explicit letters because Ms. Owens knew about or suspected that her husband was having an affair. The CCA went on to find that sexually explicit letters were not exculpatory because where Ms. Owens was alleging that the evidence was "relevant to the appellant's state of mind and the victim's treatment of the appellant," . . . "this evidence may have provided the appellant with a motive to kill her husband." Owens, 13 S.W.3d at 758-759.

The CCA never considered how Ms. Owens might have used the withheld evidence at sentencing – instead, the court focused on her defense lawyer's claim that the evidence may have somehow established a more negative motive for the killing. Their focus was misplaced where the court failed to acknowledge the state's alleged insurance motive for Ms. Owens's hiring someone to kill her husband – his life insurance money. Though it had no proof whatsoever of a life insurance policy, the state argued that Ms. Owens was a greedy, no-good, insurance proceeds-seeker, who killed an "innocent" man "in the prime of his life." (Exhibit 19, Sentencing Transcript (Rebuttal Argument of Strother), pp.1942-1943). Had Ms. Owens been able to use the withheld, sexually explicit letters, she would have had documentary proof to support the argument that she was simply a jealous, long-suffering wife, motivated to kill her husband by the betrayal and humiliation she felt as a result of her husband's infidelity and abuse. Moreover, having been

deprived of its “insurance money” motive, the prosecution would not have been able to contend that Mr. Owens was an “innocent man,” and would have had to concede that Mr. Owens had been a philanderer and that Ms. Owens was not as culpable as other killers who deserve the death sentence.¹⁷ (*Id.*) In addition, with the letters in hand establishing a more mitigating motive for the killing, Ms. Owens’s defense lawyers could have been emboldened to call Ms. Scott as a witness or had Ms. Owens chosen to testify, the letters would have insulated her on cross-examination, because she would have had powerfully persuasive proof that her husband was cheating on her and rubbing her nose in it.

Not only did the CCA fail to consider how this evidence established a much more understandable and mitigating motive, but also, the CCA ignored the fact that ADAG Strother affirmatively misled Ms. Owens’s lawyers about whether or not the affair even happened. Ms. Owens’s lawyers filed their discovery request for the letters based on what they had heard had been recovered. When ADAG Strother stridently denied that such evidence had ever been seized, the lawyers were left to conclude that the rumors of the affair were just that – rumors. The letters were the best evidence of the affair and could have been introduced in mitigation on their own. See Tenn. Code Ann. §39-2-203(c)(Michie 1982)(**any** evidence tending to establish a mitigating factor admissible).

This Court declined to review the CCA’s decision and denied Ms. Owens’s application for

¹⁷ Tennessee case law is replete with circumstances in which the unfaithfulness of a spouse – even if not providing a legal justification for the killing – has reduced the killing to something less than a death penalty case. See e.g., State v. Thornton, 730 S.W.2d 309 (Tenn. 1987); State v. Whitsett, 299 S.W.2d 2 (1957); Drye v. State, 184 S.W.2d 10 (Tenn. 1944); State v. Reagan, 2004 Tenn.Crim.App.Lexis 452; State v. McCarver, 2003 Tenn.Crim.App.Lexis 784; State v. Belcher, 2001 Tenn.Crim.App.Lexis 803. See also, Section V, *infra*.

permission to appeal, thus foregoing its opportunity to weigh in on Ms. Owens's Brady claim. Moreover, the federal courts, bound by the state court's fact-findings under the AEDPA, ruled similarly, finding reasonable the CCA's conclusion that Ms. Owens was not prejudiced because she could have testified herself or could have called Gala Scott to testify.¹⁸ Owens, 549 F.3d at 418.

There is no dispute that Ron Owens was unfaithful. That fact, in and of itself, would

¹⁸In the Sixth Circuit, one dissenting judge observed that with respect to prejudice or materiality, "The majority's [and the Tennessee Court of Criminal Appeal's] proposed rule is nonsense," *Id.*, and directly contrary to Brady, *i.e.*: "if a defendant has knowledge of any fact, or a reasonable suspicion of a fact, the defendant is not entitled to exculpatory evidence regarding that fact because she could testify regarding that fact herself." Owens, 549 F.3d. at 425 (Merritt, J., dissenting). Taken to its logical conclusion, the new rule means that even Mr. Brady himself would have lost – "Brady had knowledge that he did not kill the victim, but had no documentary evidence to support that knowledge or to support his view of the identity of the real culprit." *Id.* "[A]ccording to the rule announced by my colleagues, Brady should have taken the stand and testified about his knowledge or put the real culprit on the stand and examined him. This argument is directly contrary to Brady." *Id.*

The dissenting judge found that the "blatant prosecutorial misconduct" was material and prejudicial, recognizing not only that ADAG Strother had already acknowledged that Ms. Owens was less culpable by offering her a life sentence but also that ADAG Strother knowingly misled the jury when he argued that Ms. Owens had her husband killed simply for the insurance money:

The prosecution offered Owens life imprisonment (conditioned on the guilty plea of her confederate) because the killing under these mitigating circumstances - circumstances the jury never heard about at all - made her less culpable. The jury never heard the evidence in the hand of the prosecution that made her less culpable because the prosecution consciously and deliberately covered it up. And now my colleagues say, "fine, no problem, she should have taken the stand."

Rather than tell the jury the truth about the matter, the prosecution told the jury that she killed her husband to get "insurance money."

Id., at 426.

cause at least one juror to vote for a sentence of less than death for Ms. Owens. Yet, due to the deceit of ADAG Strother, the jury never heard this evidence. Respectfully, the Court of Criminal Appeals got it wrong when they were presented this claim in post-conviction. This Court, as the Supreme Judicial Authority in this State, ought to correct this egregious error and set aside Ms. Owens's capital sentence. In the alternative, if this Court believes it does not have the authority to correct this error in the context of these proceedings, then at the very least, this Court should exercise its supreme, judicial authority and issue a certificate of commutation.

V. Gaile Owens's Death Sentence Is Extremely Disproportionate in Light of the Sentences of Other Similarly Situated, Battered Women Who Were Convicted For Their Involvement in the Murder of Their Husbands

Gaile Owens is the only woman in Tennessee who has received a death sentence for hiring someone to kill her abusive and unfaithful husband. While Ms. Owens's case did pass through this Court's statutorily mandated proportionality review at the time of her direct appeal in 1988, any proportionality review undertaken by this Court was less than cursory. Indeed, this Court's opinion, written by Justice Robert Cooper, addresses the proportionality of the death sentence in a single sentence:

[T]he sentences of death under the circumstances of this case are in no way arbitrary or disproportionate.

Owens, 746 S.W.2d at 444. This Court then cited three cases where the defendants were sentenced to death: State v. Harbison, 704 S.W.2d 312 (Tenn. 1986); State v. Austin, 618 S.W.2d 738 (Tenn. 1981), and State v. Groseclose, 615 S.W.2d 142 (Tenn. 1981), implying that these cases were used comparatively to justify Ms. Owens's sentence of death. Id. Importantly, this Court did not have all the facts when it conducted its proportionality review.

Interestingly, none of these cases present a similar factual scenario nor were the defendants similarly situated to Ms. Owens. In Harbison, the defendant broke into an elderly woman's home, robbed her, and beat her to death with a 25 lb. vase. In Austin, the defendant hired someone to kill a law enforcement officer who had implicated Austin in another crime and was going to be the principal witness testifying against him. Finally, in Groseclose, defendant Groseclose hired Ronald Rickman to kill his wife. Rickman and another co-defendant raped and stabbed Debbie Groseclose, and left her in the trunk of a car where she froze to death and wasn't found until days later – a murder described as “the most atrocious and inhuman conceivable.”¹⁹ Groseclose, 615 S.W.2d at 145.

Ms. Owens's motivation was in no way similar to these three men. Ms. Owens was motivated by her husband's “affairs, sexual humiliation and overall mistreatment of her, along with the impact his behavior had on her psychologically. Ms. Owens . . . was depressed, insecure, fearful of him, and could not cope. Ms. Owens was fearful because her husband told her that if she asked for a divorce, he would take custody of the children and keep them from her.” (Exhibit 10, Affidavit of Dr. Lynne Zager, p.2; Exhibit 12, Notes from Dr. Lynne Zager regarding October 22, 1985 Evaluation of Gaile Owens). Moreover, Ms. Owens's acceptance of responsibility in the face of her arrest and indictment was in no way similar to Harbison, Austin or Groseclose, none of whom accepted a plea offer to serve life and all of whom contested their guilt at trial and on appeal.

Ms. Owens's case is more similar to that of Mary Winkler, who was convicted of second

¹⁹William Groseclose's sentence was vacated in federal court due to the ineffective assistance of counsel and that he was resentenced to life imprisonment in 1999. See Groseclose v. Bell, 130 F.3d 1161 (6th Cir. 1997);

degree murder and served 67 days in prison for killing her husband while her children were in the other room, or to a host of other Tennessee women who have been convicted of first degree murder for killing their husbands or hiring someone to kill them,²⁰ including:

- Barbara Tipton, who was sentenced to life in 1982, for hiring her younger lover to kill her husband;
- Joan Hall, who enlisted her own minor son to kill her husband and received a life sentence in 1996;
- Brenda Holleman, who hired two men to kill her husband and was sentenced to life without parole in 2002;
- Carolyn Strickland, who planned and executed the murder of her husband with her step-child and was sentenced to life in 1992;
- Dana Soloman, who solicited her boyfriend to kill her husband and received a life sentence in 1999;
- Deborah Furlough, who killed her husband and was sentenced to life in 1988;
- Evelyn Mosher, who hired Bobby Wilcoxson (whose death sentence was vacated) to kill her husband and received a life sentence in 1986;
- Elizabeth Smith, who shot her husband in the chest and received a life sentence in 1992;
- Erika East, who shot her husband and received a life sentence in 2002;

²⁰This list of intimate homicides (spousal killing) was compiled by the Federal Public Defender's Office using a disk generated by the Tennessee Supreme Court which contains all of the Court's Rule 12 forms, which trial judges in Tennessee are required to complete in every case where a defendant is convicted of first degree murder. See Tennessee Supreme Court Rule 12(1).

- Alicia Lovera, who with her lover, beat her husband to death, and received a life sentence in 1996;
- Janis Watson, who conspired to kill her husband with a co-defendant and was sentenced to life in 2004;
- Kimberly Ann Ross, who hired someone to kill her husband and was sentenced to life in 2007;
- Leah Joy Ward, who shot and killed her husband and then mutilated his body and was sentenced to life in 2005.
- Lee Etta Fugate, who shot her husband in the head while he was lying in bed and received a life sentence in 1987.
- Mindy Sue Dodd, who convinced her live-in nephew to kill her husband and received a life sentence in 2001.
- Sarah Kathryn Richardson, who conspired with her brother and another co-defendant to kill her husband and was sentenced to life in 1991.
- Teresa M. King, who conspired with her boyfriend to kill her husband for the life insurance money and was sentenced to life imprisonment in 1991.
- Twanda Ward, who killed her husband by setting him on fire and was sentenced to life in 1989.
- Vikki Spellman, who set her trailer on fire while her husband was inside and was sentenced to life in 1988.
- Y'Vette Vaden, who shot her husband four times and was sentenced to life in 1996.

Rule 12 forms indicate that of these nineteen women, eleven hired or conspired with another to have their husbands killed, just as Ms. Owens did. Rule 12 forms report that at least six of these women were motivated to kill their husbands because of his mistreatment or abuse of them, just like Ms. Owens, who from the time of her arrest indicated that it was her husband's cruelty and their bad marriage that motivated her to have him killed. And, based on the Rule 12 reports, at least five of these women were permitted to plead guilty to avoid a death sentence.

This Court has made clear that Tennessee's statutory comparative proportionality review "presumes that the death penalty is not disproportionate to the crime in the traditional sense, . . . [but] purports to inquire instead whether the death penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime. State v. Bland, 958 S.W.2d 651, 662 (Tenn. 1997), and requires an examination of the facts of the crimes, the characteristics of the defendants, and the aggravating and mitigating factors involved. Id. at 664. However, the Court had held that it will only consider those cases where "the State seeks that death penalty, a capital sentencing hearing is held, and the sentencing jury determines whether the sentences should be life imprisonment, life imprisonment without the possibility of parole, or death, regardless of the sentence actually imposed." State v. Godsey, 60 S.W.3d 759, 783 (Tenn. 2001). This Court specifically excludes from proportionality review cases where the defendant was permitted to plead guilty to avoid a death sentence or where the death penalty was not sought.

Comparing this narrow pool of cases, this Court has stated that it "considers many variables" including the motivation for the killing; the defendant's prior criminal record; the defendant's age, race and gender; the defendant's mental, emotional or physical condition, the

defendant's involvement or role in the murder; the defendant's remorse; and, the defendant's capacity for rehabilitation. Godsey, 60 S.W.3d at 786, citing Bland, 958 S.W.2d at 667.

However, it is clear that none of these factors were considered when this Court undertook its proportionality review for Ms. Owens, a female, who was motivated to kill her husband because of emotional, physical and sexual abuse; who had a very limited criminal history; who was under significant emotional and mental stress; who was not involved in the murder itself, but in hiring her co-defendant; who was immediately remorseful and accepted a sentence of life imprisonment; and whose capacity for rehabilitation is unmatched among death row inmates in Tennessee.²¹

²¹It is important to note that because Ms. Owens was the only female death row inmate in Tennessee for over a decade, Ms. Owens was punished more harshly than the male death row inmates. During her twenty-four years of incarceration, Ms. Owens, who has been described repeatedly as a model inmate, spent over 14 years living in segregation (from 1986 to 1992 and from 2002 to the present) despite her A-Level status and clean disciplinary record because there were no other female death row inmates with whom she could live, share meals, or to spend recreation, lobby or craft time (Christa Pike is the only other woman on death row in Tennessee and lives in segregation because she is a C-Level inmate). While during those 14 years, Ms. Owens was permitted to have a job despite being segregated from other inmates, her job only provided interaction with corrections employees, not with other inmates. For the ten years (from 1992 to 2002) that Ms. Owens was permitted to live in the general population of the prison, she thrived and served – holding every elected office that an inmate could, volunteering to lead and participate in educational, religious, and charitable activities, living in the Honor Pod, and working as an employee of Tri-Cor. Since 2005, Ms. Owens has been housed in the Mental Health pod of Unit III at the Tennessee Prison for Women (though she is not mentally ill) and is permitted to interact only with the women living in that pod, who are housed there because of mental illness. Ms. Owens spends her time as a Clerk for the Unit II and III Manager. Ms. Owens is known as a productive and reliable worker and is highly respected on the compound by administration, staff, other inmates, and volunteers. It is undisputed that Ms. Owens's capacity for rehabilitation, as demonstrated by her model behavior and productiveness during the last twenty-four years, is unmatched among all other inmates on Tennessee's death row. Based on Ms. Owens's clean disciplinary history and reputation as a model for other women incarcerated at Tennessee Prison for Women, this Court should exercise its inherent authority and reduce Ms. Owens's death sentence to life or issue a certificate of commutation.

As the only battered woman who has received a death sentence in Tennessee and the only inmate in Tennessee who has received a death sentence after accepting a District Attorney's plea offer in exchange for a life sentence, Ms. Owens's death sentence is certainly disproportionate.

Based on Ms. Owens's unique position, and given that Ms. Owens's death sentence is grossly disproportionate in light of other death-sentenced inmates and other women convicted of the first-degree murder of their husbands, this Court should exercise its inherent, supreme judicial power and should deny the State's motion to set an execution date and reduce Ms. Owens's sentence to life imprisonment. At the very least, this Court should issue a certificate of commutation.

VI. Conclusion

This is an historic case. This is not a case about the morality or legality of the death penalty. The death penalty is the law of this state. It is also the law of this state that the death penalty is reserved for the worst of the worst. Objectively, Gaile Owens is not the worst of the worst. Her death sentence is grossly disproportionate to others in similar circumstances.

The citizenry in whose name Gaile Owens's execution will be carried out have a right to know that the person who is executed was provided all of the protections that this great State and Country guarantee to each of her citizens. Gaile Owens was denied those rights.

Simply and tragically, the system failed Gaile Owens. She should never have gone to trial – her acceptance of the ADAG's plea offer in exchange for a life sentence should have been honored. It wasn't.

Once she went to trial, her lawyers should have spent more than two hours preparing for her penalty phase trial. They didn't.

At the penalty phase trial, the jurors should have been told the truth – that Gaile Owens was physically, emotionally and sexually brutalized by her philandering husband. They weren't.

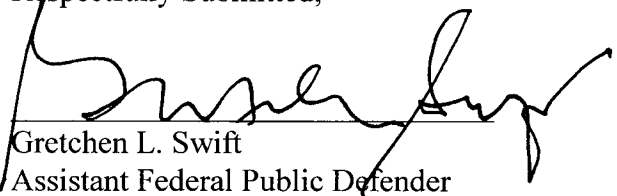
When the trial lawyers failed in their jobs, the post-conviction lawyers should have stepped up and brought forth all of the relevant evidence establishing these facts. They didn't.

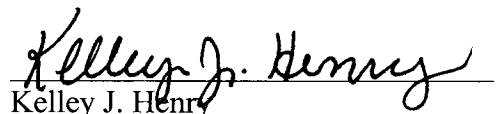
Finally, the AEDPA prevented the federal courts from considering all of the facts.

Thus, only one remedy remains for all of the missteps and wrongs that Ms. Owens encountered in her journey through the justice system. If Gaile Owens is to be executed by the State of Tennessee, it will be under the authority of this Court's order. This Court has never had the opportunity to review all of the facts in this case. This Court occupies a singular role in the Tennessee judicial system. This Court has the power to act as a failsafe, the power to step in and modify Ms. Owens's death sentence to life, and the power to correct the overwhelming injustices in this unprecedented case.

WHEREFORE, Ms. Owens respectfully prays to this Honorable Court to deny the State's Motion to Set Execution Date and modify her sentence to life in prison. In the alternative, this Court should issue a Certificate of Commutation.

Respectfully Submitted,

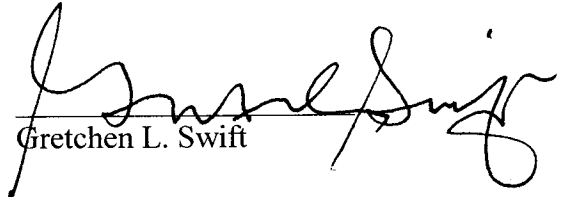

Gretchen L. Swift
Assistant Federal Public Defender


Kelley J. Henry
Supervisory Assistant Federal Public
Defender for the Capital Habeas Unit

Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
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VERIFICATION

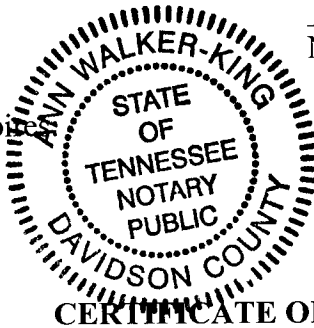
I verify that the statements contained in this motion are true and correct to the best of my knowledge.


Gretchen L. Swift

Subscribed and sworn before me this 5th day of February, 2010.


Notary Public, State Of Tennessee

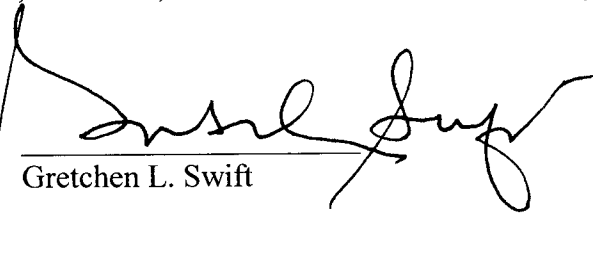
My Commission Expires



MY COMMISSION EXPIRES 09/25/11

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was served by email upon Gordon Smith, Assistant Solicitor General, 425 Fifth Avenue North, Nashville, Tennessee 37243 this the 5th day of February, 2010.


Gretchen L. Swift