IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

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| STATE OF TENNESSEE | ) | |
| | ) | |
| v. | ) | No. M1981-000125-SC-DPE-DD |
| | ) | |
| GAILE K. OWENS | ) | |
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**RESPONSE OF STATE OF TENNESSEE TO OWENS' REQUEST FOR MODIFICATION OF HER SENTENCE OR FOR ISSUANCE OF A CERTIFICATE OF COMMUTATION**

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On December 8, 2009, the State of Tennessee filed a motion in this Court to set an execution date for Gaile K. Owens ("Owens"). The motion stated that Owens had completed the standard three-tier appeals process and, therefore, that an execution date should be set under Tenn. Sup. Ct. R. 12.4(A). On February 5, 2010, Owens filed a response opposing the State's motion. As part of that response, Owens now affirmatively asks this Court to modify her death sentence to life imprisonment or, under the authority of Tenn. Code Ann. § 40-27-106, to issue a certificate to the governor recommending commutation. As grounds for modification of her sentence or the issuance of a certificate of commutation, Owens asserts:

1. Her acceptance of the district attorney's pretrial offer to plead guilty in exchange for a life sentence mitigates her punishment;

2. She was a battered wife suffering from battered-wife syndrome and deserves mitigation of punishment;

3. Her post-conviction claim under *Brady v. Maryland*[1] had merit; and

4. Her death sentence is disproportionate to the penalty imposed in similar cases.

For the following reasons, Owens' motion to modify her sentence or to issue a certificate of commutation should be denied.

### A. *This Court Is Without Jurisdiction to Modify Owens' Death Sentence.*

This Court's jurisdiction is appellate only, Tenn. Code Ann. § 16-3-201(a), and the Court is "bound by precedent and statutes setting forth the process of appellate review." *Workman v. State*, 22 S.W.3d 807, 808 (Tenn. 2000). Owens has no appeal pending before this Court. Her direct appeal became final in 1988, *see State v. Porterfield*, 746 S.W.2d 441 (Tenn. 1988), and her post-conviction appeal became final in 2000. *See Owens v. State*, 13 S.W.3d 742 (Tenn. Crim. App. 1999), *app. denied* (Tenn. Feb. 28, 2000). This Court's jurisdiction is now properly invoked only under Tenn. S.Ct. R. 12.4(A) for the setting of an execution date or Tenn. Code Ann § 40-27-106 for a certificate of commutation. There is no authority, statutory or otherwise, that would permit the Court to modify Owens' death sentence now.

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[1] 373 U.S. 83 (1963).

*B. There Are No Extenuating Circumstances Warranting the Issuance of a Certificate of Commutation.*

Owens has presented no extenuating circumstances warranting the issuance of a certificate of commutation. Section 40-27-106, Tennessee Code Annotated, provides:

> The governor may, likewise, commute the punishment from death to imprisonment for life, upon the certificate of the supreme court, entered on the minutes of the court, that in its opinion, there were extenuating circumstances attending the case, and that the punishment ought to be commuted.

Although it is possible for a defendant to demonstrate "extenuating circumstances attending the case" based upon record facts or a combination of record facts and new evidence that is uncontroverted, *Workman*, 22 S.W.3d at 808,

> [s]ection 40-27-106 does not authorize relief when a death-sentenced prisoner, in what amounts to an original action, relies upon extra-judicial facts and challenges the accuracy of the jury's verdict and the credibility of the evidence upon which his or her conviction was based.

*Id.*[2]

Owens' assertions that she deserves mitigation of her death sentence because she accepted the State's pretrial plea offer, because her post-conviction *Brady* claim had merit, and because her sentence is disproportionate merely seek to revisit issues that have already been adjudicated by this Court adversely to her. For instance, on

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[2] At least one member of this Court has opined that, given the extensive appellate review process for capital cases, including this Court's proportionality review on direct appeal, Tennessee's statutory provision for certificates of commutation has largely become obsolete and may be constitutionally suspect under the doctrine of separation of powers. *Workman*, 22 S.W.3d at 813-16 (Barker, J., concurring); *see also* 22 S.W.3d at 813 (Drowota, J., concurring) ("executive clemency decisions are outside the domain of the courts").

direct appeal, this Court rejected her claim that her acceptance of the life sentence proffered by the State was a proper mitigating circumstance:

> The state had indicated that it would accept such a plea, conditioned upon both defendants pleading guilty. The state withdrew the offer when Mr. Porterfield declined to plead. Mrs. Owens wanted to show these negotiations to the jury as a mitigating circumstance.
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> This court has held that evidence is relevant to the punishment only if it is relevant to a statutory aggravating circumstance or to a mitigating factor raised by the defendant. *Cozzolino v. State*, 584 S.W.2d 765, 768 (Tenn. 1979). Evidence regarding Mrs. Owen's (sic) interest in accepting a plea bargaining offer is not relevant to either the issue of punishment or to any mitigating factor raised by the defendant, and was in our opinion properly excluded.

*State v. Porterfield*, 746 S.W.2d 441, 449 (Tenn. 1988). The federal courts likewise rejected Owens' claim, concluding that this Court's determination was not an unreasonable application of clearly established federal law. *Owens v. Guida*, 549 F.3d 399, 418-22 (6th Cir. 2008).

Owens' post-conviction *Brady* claim, alleging the prosecution's suppression of cards and notes that suggested a romantic relationship between the murder victim and Gala Scott, was rejected by the state courts after a full and fair evidentiary hearing in the trial court:

> The proof establishes that the appellant discovered the victim's affair with Gala Scott several months prior to the murder. This discovery led the appellant to consider suicide and subsequently solicit her husband's murder. Moreover, the appellant's attorneys were aware of extramarital affairs of the victim through their conversations with the appellant as evidenced by their request for information in their exculpatory motion. The duty upon the State under *Brady* does not extend to information

> already in the possession of the defense or that they are able to obtain or to information not in possession or control of the prosecution. *Banks v. State*, 556 S.W.2d 88, 90 (Tenn. Crim. App. 1977).
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> More importantly, however, is the requirement that the information suppressed must have been exculpatory, i.e., favorable to the appellant. We conclude that this evidence was not favorable and, accordingly, no *Brady* violation is found. In this regard, we would not disagree with trial counsel's testimony that introduction of this evidence may have provided the appellant with a motive to kill her husband. The issue is without merit.

*Owens v. State*, 13 S.W.3d 742, 758-59 (Tenn. Crim. App. 1999), *app. denied* (Tenn. Feb. 28, 2000). Again, the federal courts concluded that the state courts did not unreasonably apply *Brady*. *Owens v. Guida*, 549 F.3d at 415-18.

Owens' assertion that her sentence is disproportionate was rejected by this Court on direct appeal:

> After consideration of the several issues and of the entire record, we are of the opinion that no reversible error was committed in either the guilt or sentencing phase of the trial, that the verdicts and sentences are sustained by the evidence, and that the sentences of death under the circumstances of this case are in no way arbitrary or disproportionate. *See State v. Harbison*, 704 S.W.2d 314 (Tenn. 1986); *State v. Austin*, 618 S.W.2d 738 (Tenn. 1981); *State v. Groseclose*, 615 S.W.2d 142 (Tenn. 1981).

*State v. Porterfield*, 746 S.W.2d at 444.

To the extent that Owens now seeks to revisit any of these claims based on new facts, her assertions merely constitute an attempt to impeach the jury verdict with extra-judicial facts that are subject to dispute. Thus, those assertions fail to demonstrate "extenuating circumstances in the case" warranting a certificate of commutation.

Finally, Owens asserts that she deserves mitigation of her sentence because she was a battered wife suffering from battered-wife syndrome. However, the time for presenting any such evidence was at her trial, which "is the paramount event for determining the guilt or innocence of the defendant." *Herrera v. Collins*, 506 U.S. 390, 416 (1993). But, instead of presenting evidence in support of such a defense at trial, Owens steadfastly refused to testify and frustrated the efforts of her attorneys to develop a defense based upon the battered-wife syndrome:

> Owens foreclosed her attorneys from pursuing the best sources of mitigating evidence. First, contrary to counsel's advice, she refused to testify at either the guilt phase or the penalty phase of her trial. Her counsel explained that he "tried," "wanted" and even "had to" get her to testify given the strength of the evidence against her in order to win the jury's sympathy. Nevertheless, she refused.
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> Second, Owens refused to cooperate when her attorneys moved for an independent mental health examination because they believed that they might be able to raise a battered-wife syndrome defense. The state court ordered Owens to be evaluated by state physicians and stated that if the examination showed cause, it would then order funds and an independent evaluation. Experts from the Midtown Mental Health Center examined Owens *three times*. Each time Owens answered a few preliminary questions and then refused to speak further. During the post-conviction hearing, one of her attorneys testified that "I'm sure that I told her to cooperate" because "we needed the mental evaluation." Her non-cooperation deprived counsel of any evidence, or leads to evidence, that a complete mental evaluation could have produced.
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> Third, Owens refused to let her attorneys interview her family members or call them to testify on her behalf. The state post-conviction court found this to be a fact. . . . Owens's sister Carolyn Hensley testified at

> the state post-conviction hearing that Owens told her that Owens had ordered her counsel "not to involve [the family] in any way" with the trial.

*Owens v. Guida*, 549 F.3d at 406-07 (internal citations and footnotes omitted). Significantly, no court, state or federal, has ever found that Owens' attorneys rendered ineffective assistance of counsel for failure to present a battered-wife-syndrome defense or to investigate and present evidence of any such affliction in mitigation of her sentence.

Owens now contends that, "[b]ecause of breakdowns in the judicial process at every turn, no court or jury ever heard that [she] was a battered woman and suffered from battered women's syndrome." Resp. at 25. This is a startling assertion, given Owens' refusal to testify at trial or the post-conviction evidentiary hearing. In fact, at her post-conviction hearing, instead of testifying, she introduced most of her mitigating evidence though the report of her mental health expert, "traumatologist" Eric Gentry. *Owens v. Guida*, 549 F.3d at 408. But Gentry produced no medical evidence and performed no clinical tests; instead, he relied on his own "psychosocial" history of Owens' life, almost all of which was hearsay, "some of it 'double or triple hearsay from anonymous persons.'" *Id.* at 409. As the Sixth Circuit concluded,

> the state court and the district court correctly determined that Gentry is not credible. His qualifications are dubious, his sources suspicious, and his testimony subject to contradiction.

*Id* at 409. Aside from being intrinsically worthless, Gentry's evidence was contradicted by Owens' own sister, who testified that the severe abuses reported to

Gentry never happened and that "she did not trust what Owens said because 'over a period of years' Owens would 'just lie about stuff.'" *Id.* at 410. Finally, Owens' present assertion of spousal abuse is inconsistent with her own statement, made shortly after her arrest, that, although she and her husband experienced "bad marital problems," "[t]here was very little physical violence." *State v. Porterfield*, 746 S.W.2d at 444.

In short, to the extent that "no court or jury ever heard" that Owens was a battered woman, it is entirely Owens' own fault. Not only did she refuse to testify at trial, she frustrated her attorneys' efforts to establish a battered-woman-syndrome strategy. Then, in the post-conviction proceeding, she failed to develop any credible proof to support her claims of abuse. Now, more than twenty years after Owens' trial, she has produced, among other things, the affidavits of several experts in support of her claim of spousal abuse. As Justice O'Connor observed, regarding eleventh-hour, exculpatory affidavits:

> Affidavits like these are not uncommon, especially in capital cases. They are an unfortunate although understandable occurrence. It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism.

*Herrera*, 506 U.S. at 423 (O'Connor, J., concurring).

For the reasons stated, Owens' request for the modification of her sentence or, in the alternative, for issuance of a certificate of commutation should be denied.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

GORDON W. SMITH
Associate Solicitor General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-4150

## CERTIFICATE OF SERVICE

I certify that a true and exact copy of this document has been forwarded by electronic mail and by first-class mail, postage prepaid, to:

Gretchen Leigh Swift, Esq.
Assistant Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
gretchen_swift@fd.org

on this the 16th day of February, 2010.

GORDON W. SMITH
Associate Solicitor General