Rd Ex 2-8-10

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: GAILE OWENS	) :)	NO. 85-01174 Shelby County

TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS' AMICUS STATEMENT IN SUPPORT OF GAILE OWENS' RESPONSE TO THE ATTORNEY GENERAL'S MOTION TO SET AN EXECUTION DATE FOR GAILE OWENS AND REQUEST FOR A CERTIFICATE OF COMMUTATION

The Tennessee Association of Criminal Defense Lawyers, as *amicus curiae*, respectfully submits that the unique facts of Ms. Owens' case raise serious questions as to the appropriateness of execution of Gaile Owens when she tried her best to plead guilty and accept responsibility but was prevented from doing so by circumstances over which she had no control. Further, a review of the procedural history of Ms. Owens' case shows that her fate has not been determined pursuant to an individualized, fully informed, sentencing decision showing that she was among the worst class of offender.

Despite the fact that there are a number of levels of review available in capital cases, there will always be a few cases in which justice is elusive. The facts of Ms. Owens' case illustrate that this is such a case. Having reviewed Ms. Owens' Response, the Association writes to emphasize that this Court has the authority at this stage to decline to set an execution date and either to modify the judgment to

life imprisonment or to recommend that the governor commute the sentence. (Owens' Response at page 2, note 1). TACDL recognizes and emphasizes that this procedure should be carefully and rarely used.[1] TACDL respects the jury system and is not asking this Court to substitute its judgment for the judgment of a jury that heard all relevant evidence and was properly instructed. In this case, Ms. Owens never had a trial at which all the relevant facts were presented to a jury. The Court has discretion, however, in a rare case like this to prevent execution of a defendant when the truth finding process has not been fairly and accurately applied, regardless of the reason or assignment of blame.

Acceptance of responsibility. There is no question that our system is generally designed to reflect that society values acceptance of responsibility by the defendant. The jury that sentenced Ms. Owens never knew that she had attempted to plead guilty and accept responsibility. TACDL urges the Court to look closely at the fact that Ms. Owens attempted to plead guilty and accept responsibility for her actions. It is the understanding of the Association that Ms. Owens is the only death-sentenced defendant who signed and accepted a plea offer allowing her to accept

---

[1] In fact, the case presents an opportunity for the Court to help educate the public on the capital process. Courts are routinely criticized for allowing multiple appeals and taking too long to carry out death sentences. The Court here could set out in its order the precise history of this case and emphasize the role of different levels of review and show how it is possible in a rare case like this that the facts are never presented in a way that fulfills the requirement that death sentences are only carried out on the basis of a reliable and individualized finding that the defendant is among the worst class of offender. This would be in keeping with the educational role that has been adopted by this Court.
See http://www.tsc.state.tn.us/OPINIONS/TSC/CapCases/CapCases.htm, setting out capital case information and filings and the SCALES program.

responsibility for her conduct. The only impediment was the behavior of the codefendant who did not share her desire to accept responsibility. The prosecutor certainly had valid grounds for offering a life sentence to Ms. Owens. One need only read an account of the facts that were known to the State to understand that Ms. Owens was not among the worst class of murderer sufficient to warrant the death penalty. Owens v. Guida, 549 F.3d 399, 424-25 (6th Cir. 2008)(dissent) cert. denied, 130 S. Ct. 281, 175 L. Ed. 2d 135 (U.S. 2009).[2]

Ms. Owens' attempt to plead guilty was rejected for an unconstitutional reason. TACDL agrees that courts should not participate in the plea bargaining process and recognizes that criminal defendants do not have a right to receive plea offers. It has often been held that a District Attorney has the right not to engage in plea bargaining. What happened here is different. Having determined that a plea offer should be made to Ms. Owens, that plea was controlled by a third party who had no legal training and no connection to Owens. While contingent plea agreements have been upheld, here, the District Attorney's desire to keep the codefendants together was based in this case on an unconstitutional motivation. Ms. Owens' response points out that the Assistant District Attorney resisted severance because he was afraid he could not use Ms. Owens' pretrial admissions against the codefendant if they were not tried together. Thus, the decision was based on a desire to violate the confrontation clause. Bruton v. United States, 391

[2] While the majority opinion in Owens v. Guida finds no cognizable right to present evidence of an attempt to plead guilty, this Court can consider the fact in exercising its discretion.

U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); Cruz v. New York, 481 U.S. (1987)(confrontation clause violated by introduction of non-testifying codefendant statement even if "interlocking").

Having engaged in plea bargaining, the State should not be allowed to base its final approval either on the actions of a third party or, even more importantly, on an unconstitutional motivation. It does not appear that this issue has ever been addressed by any court. The circumstances presented show that Ms. Owens' fate was not determined by decisions on the merits that were specific to her. See Woodson v. North Carolina, 428 U.S. 280 (1976).

Plea bargaining would not be affected by the requested relief. The action that TACDL advocates here does not threaten the plea bargaining process. District Attorneys will still have the authority to engage in plea bargaining or not as long as it is not for an unconstitutional purpose. There will no effect on the day to day operations that prosecutors and defense counsel have in resolving cases. Courts will still be prohibited from engaging in the plea bargaining process, and the District Attorney's office is not losing any of its discretion as to which cases merit plea negotiation.

If the Court sets an execution date, this evidence will never be presented. Ms. Owens will be executed without her story ever accurately having been told in court. As an association that is devoted to the proper functioning of the criminal justice

process, TACDL respectfully asks this Court to use its inherent authority to prevent an execution under these circumstances.

Respectfully submitted this 8th day of February 2010.

JERRY P. BLACK, JR. [BPR #002069]
Associate Professor
U.T. College of Law
1505 W. Cumberland Avenue
Knoxville, TN 37996-0001
(865) 974-233
jblack1@utk.edu

President of Tennessee Association of Criminal Defense Lawyers

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing pleading has been forwarded to Gordon Smith, Assistant Solicitor General, 425 Fifth Avenue North, Nashville, Tennessee 37243 this the 8th day of February 2010.

JERRY P. BLACK, JR.