

AFFIDAVIT OF JAN VOGELSANG, M.S.W., BCD

Jan Vogelsang, being of lawful age, states the following:

1. I am an adult resident residing in Greenville, Greenville County, South Carolina.

2. I am a clinical social worker. I have testified as an expert in family and criminal courts for twenty nine years and have been qualified as an expert witness in ten states including Tennessee. My cases have included physical, sexual and emotional abuse, neglect, battered women, divorce, custody, termination of parental rights, non-capital crimes and capital crimes. My work history includes experience related to post traumatic stress, family violence, child welfare, family systems, child development, neurological impairments that affect learning, and other areas related to mental health. Among my work history, I spent two years as program director of a shelter for battered women. In that capacity I worked with wives and children who were being victimized by fathers and boyfriends. I testified on their behalf in court.

3. I have an undergraduate degree in psychology from Pepperidge University in California and a masters degree in social work from the University of South Carolina. I am licensed by the South Carolina Board of Social Work Examiners and am board certified by the American Board of Examiners in Clinical Social Work. I have a private practice in Greenville, South Carolina.

4. Clemency counsel for Gaile Owens asked me to evaluate the investigation and presentation of mitigating evidence on Gaile Owens's behalf at both the trial and post-conviction hearing, and provide an expert opinion about what went wrong. Clemency counsel expressed their frustration that almost no mitigation investigation took place prior to trial, that the expert used in state post-conviction proceedings completely dropped the ball in his testimony, and that

as a result the hands of the federal court were tied as to making any new factual findings. In addition, they asked me to do a Biopsychosocial Assessment and to provide an expert opinion about how and why Gaile Owens came to be in a situation where she would cause the murder of her husband. While I am very confident in my findings, I am certain that I would have been able to provide much richer detail if I had been contacted at the time of trial. However, what I found in my evaluation of the case follows in this Affidavit and in the attached Affidavit and Biopsychosocial Assessment.

5. A few preliminary remarks are in order. What I found in this case is a shocking example of ineffective assistance of counsel and a complete failure on the part of the expert in post-conviction to present the truth of Ms. Owens's life and experiences and a full picture of who she was in mitigation.

Trial of Gaile Owens (1986)

6. Gaile Owens was arrested in February 1985 for hiring Sydney Porterfield to kill her husband, Ron Owens. Ms. Owens was charged with accessory before the fact to first degree murder, and co-defendant Sidney Porterfield was charged with first-degree murder.

7. Prior to her trial in January 1986, there is no indication that anyone undertook any investigation in preparation for her sentencing hearing. Ms. Owens's attorneys did not hire an investigator, a mitigation specialist, or any other kind of mental health expert to assist them with her case.

8. However, Ms. Owens's attorneys did inform the trial court in October 1985 that they believed that Ms. Owens had a meritorious defense in battered wife syndrome and requested expert funding. The trial court would not approve expert funding to hire someone to assist Ms. Owens's attorney in developing that defense. Instead, the court ordered the State's mental health

professionals at Midtown Mental Health Center to evaluate Ms. Owens for competency to stand trial and insanity. From a legal standpoint, the questions of mental competency and insanity are very different from the concept of mitigating evidence. Mitigating evidence is evidence which makes a defendant less morally culpable, i.e., mental disorders, but does not necessarily provide a defense to the charge of first degree murder like competency and sanity.

9. Contained within the Midtown file were several items that would have offered solid clues for a competent mitigation investigator or capital defense attorney to pursue. Sadly, from the records I have seen, Ms. Owens's attorneys never reviewed the Midtown file. The notes from Dr. Lynn Zager and Julianne Venable's evaluation of Ms. Owens in October 1985 include a discussion of Ms. Owens's very unhappy marriage, including her husband's affairs for the past four or five years, his sexual humiliation of her, and his verbal abuse of her. In addition, the notes indicate that Ron Owens had threatened Ms. Owens that he would take her two boys if she asked for a divorce. Overall, the notes indicate that Ms. Owens's marriage was tumultuous and difficult and as a result, Ms. Owens was suffering from significant anxiety and depression.

10. Julianne Venable, M.A., a psychology intern at Midtown, gave Gaile a diagnostic impression of Adjustment Disorder with Depression. She found Gaile to appear distressed and depressed during the evaluation and shaking and wringing her hands.

11. These "red flags" in the Midtown file would have alerted a competent investigator or an attorney to formulate a plan for exploring Gaile's very unhappy and likely abusive marriage. Despite their belief that Ms. Owens had a defense of battered wife's syndrome, the trial attorneys never interviewed Dr. Zager or Ms. Venable, nor did they investigate Gaile's marriage in any way. Had they done so, the attorneys would have discovered

that their initial impression was correct, they did have a "meritorious case" in that Gaile Owens was a battered wife. Moreover, that investigation would have led them to significant and compelling evidence of childhood trauma and neglect which would have provided mitigating evidence in its own right.

12. It does appear that in the two weeks prior to trial, Ms. Owens's attorneys attempted to speak with Dr. Max West, a psychiatrist who had spent one hour with Ms. Owens in 1978. Counsel contacted Dr. West by letter on December 26, 1985. Counsel then apparently obtained Dr. West's very short file just a few days before trial, and spoke with him briefly before calling him to testify.

13. However, there is no evidence that trial counsel carefully reviewed Dr. West's file from 1978 or followed up on any of the information contained therein. 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 to a mitigation investigator.

14. The following demonstrates the issues in Dr. West's file that would have caught the attention of a mitigation investigator from Dr. West's file:

a. Dr. West writes that Ms. Owens's brother, Wilson, has disabilities.

However, from his letter, it was not clear exactly what his deficits were. It would be important to obtain Wilson's medical records and school records to get a sense of his condition. Medical and school records would also have offered case notes relating to Wilson and his family dynamics. Without his records, it was impossible to know exactly what was wrong with Wilson and how

the parents treated him. As my Biopsychosocial Assessment indicates, Wilson's disabilities played a major role in Ms. Owens's life. The way in which the family dealt with Wilson was also significant in understanding Ms. Owens's development. A qualified mitigation investigator would have followed up on this notation.

b. Dr. West reports in his letter that Ms. Owens stated that as a child she was exposed to deceit and lying on the part of her mother. This would have been an important area for a focused investigation into the nature of that lying. In addition, Ms. Owens's father's strictness, lack of trust, and her mother's confusing reactions to father would be among the family dynamics to be explored.

c. Patients typically tell the therapist initially that they have a good marriage and good sexual adjustment. However, Ms. Owens indicated that there had been sexual problems in the past. For an investigator, the sexual adjustment in their marriage would have been an important area to explore with Ms. Owens – especially where counsel already knew that Ron Owens had been sexually abusive to Ms. Owens, as they revealed in their request for expert funding in October 1985.

d. Again, while a patient typically minimizes their problems during their first session with a mental health professional due to anxiety and embarrassment, Ms. Owens admits during that first hour to lying about money and taking money for her family. These quick and clear admissions were of course obvious clues that something was wrong and that further investigation was necessary.

e. Also included in Dr. West's file was a sentence completion test. While not considered a scientific instrument, this test provides additional "red flags" for further

investigation. In her answers, Ms. Owens demonstrated her love for her sons and their importance in her life and her remorse for lying. Ms. Owens also answered that she never wanted to be at home as a child, she has to lie to be accepted, men are the stronger of the two sexes, she was sorry for stealing money, she never feeling needed, she felt self-hatred, her father was hard-hearted and did not show affection, her family felt her parents were too hard on her and her siblings, she felt insecure, and she tries to buy love. The sentence completion test thus offers an enormous amount of information about Ms. Owens and her family, including answers that intimate that Ms. Owens's childhood was very unhappy and that she has great disdain for herself.

15. Ultimately, only Dr. Max West, who had one, one-hour session with Ms. Owens in 1978, and two prison employees, who worked with Ms. Owens in the laundry, were called to testify on her behalf at sentencing. Dr. West was able to testify only that Ms. Owens was having some sort of severe problem. He was prevented by the court from further testifying about his notes, the sentence completion test, or his impressions of Ms. Owens and her family history. Upon cross examination, Dr. West stated that he gave Ms. Owens some "psychological profiles" to fill out and suggested that she return with her husband. The two prison employees testified that Ms. Owens was a good worker and that she spoke often about her love for her children.

16. No family members testified because none had been contacted or interviewed. Ms. Owens's attorneys did not gather any records whatsoever from any source - no school records, no hospital records, no employment records, no medical records, no records relating to Wilson and his disability. They did not obtain any records at all relating to Ms. Owens, except for Dr. West's file.

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

and pursue obvious red flags identified in Ms. Owens's own reporting to her attorneys, her Midtown Mental Health evaluations, and Dr. West's file. Counsel's failure to gather records, to speak with family members or friends, to interview the 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 presentation of mitigating evidence in court.

18. Had I been retained at trial to work as a clinical social work expert in Gaile Owens's case in 1985, the following would have occurred before and during my work as one of the expert witnesses:

a. A trained mitigation investigator would have been retained and would have begun the most basic steps in preparation for the penalty phase, including meeting with Ms. Owens on a regular basis in order to establish a relationship of trust; meeting with Ms. Owens's family, extended family, friends, neighbors, teachers, etc.; obtaining records of Ms. Owens and her family members going back several generations (medical, school, employment, mental health, legal, military, etc.); and providing information to counsel on a regular basis.

b. With the information gathered by the mitigation investigator, a family tree (genogram) would have been designed to expose any patterns of problems in the family across the generations that might be relevant. The family tree would ultimately have been used as a visual aid in court to demonstrate who's who in the family and the patterns of behavior uncovered. For example, in this case, the family tree would have revealed a family history of domestic violence and sexual abuse across generations. Such a visual depiction of the cycle of abuse would have been important to the jury in understanding how Ms. Owens found herself to

be married to a batterer.

c. The mitigation investigator would have continued over the next year at least, to gather data on socio-economic status, education, military service, mental health, race, culture, medical history, and religion, etc. The mitigation investigator would have traveled to Ms. Owens's community and would have consulted with other professionals regarding their ongoing findings. Based on the information gathered, the defense team would have begun to develop themes and theories of mitigation.

d. The mitigation investigator would have worked with counsel to identify and select the appropriate experts and lay witnesses who could best describe Ms. Owens's life, her experiences, and their impact of her life

e. I would have been introduced to the family, friends, etc., and I would conduct clinical interviews with them. I would have interviewed Ms. Owens at least three times and reviewed all of the records gathered and documents generated during the investigation (typically, hundreds, sometimes thousands of pages of records depending on the case). Finally, I would have consulted with other retained experts, reviewed research and literature related to my findings, visited Ms. Owens's community and the Abundant Life Church, and prepared any additional visual aids to be used in court to help the jury understand the story of Ms. Owens's life.

f. I would have been called as witness to testify on Ms. Owens's behalf. I would have testified beginning with Ms. Owens's intergenerational history, her parents' childhood histories, their marriage, her birth, infancy, childhood, adolescence and young adulthood up to the time just before the crime. I would have used photographs, documents, and

other visual aids to assist the court in understanding the information obtained and the conclusions drawn. I would have relied on numerous sources in a search for consistent and corroborative information. At each stage, I would have explained what the information means and its impact on Ms. Owens. Other experts would then testify about their own findings, relying on the information I provided in my biopsychosocial assessment.

g. The biopsychosocial assessment, as described above, usually requires 150-200 hours of work (barring any unusual circumstances) by the clinical social work expert. I have attached my recent Biopsychosocial Assessment of Gaile Owens (in Affidavit form) as an Exhibit to this Affidavit. (Exhibit 1, Biopsychosocial Assessment of Gaile Owens). In my opinion, this level of assessment was not conducted on behalf of Gaile Owens either at trial in 1986 or at her post-conviction hearing in 1997.

19. It has been my experience that in death penalty cases, family members and non-family members (friends, neighbors, ministers, teachers, etc.) are typically called to testify on a defendant's behalf in the sentencing phase. Typically, a clinical social worker and/or mental health professional will testify after the family, often for hours, maybe more than a day, about a defendant's life history, their family, their mental health issues, etc. It is routine for psychiatrists and psychologists to rely on a social history, also referred to by clinical social workers as a Biopsychosocial Assessment, which relays very detailed information about a defendant and their background.

20. I can say with confidence after twenty years of conducting Biopsychosocial Assessments in capital cases and testifying in the penalty phase as a clinical social work expert, that the penalty phase investigation and the presentation of mitigating evidence in Ms. Owens's

case did not meet even the minimal standards for mitigation investigation and testimony in court.

Mitigation in Post-Conviction Proceedings (1997)

21. The mitigation investigation and presentation of testimony on Ms. Owens's behalf at her state post-conviction hearing was equally egregious.

22. Post-conviction counsel hired Eric Gentry, who had Bachelor's and Master's Degree in Counseling and a Certificate of Advanced Study in Traumatology. Mr. Gentry was still a student, pursuing a Ph.D. in marriage and family therapy and psychotraumatology. Mr. Gentry had an inactive West Virginia Social Worker's license. Mr. Gentry had no other professional licensures. Mr. Gentry was hired just two months prior to Ms. Owens's post-conviction hearing.

23. Post-conviction counsel had other more relevant and experienced experts available to work on Ms. Owens's behalf yet failed to retain them. For example, in 1994, Dr. Lenore Walker, the pre-eminent expert in battered women's syndrome, had agreed to work on Ms. Owens's case. It is unclear why Dr. Walker was not able to work on the case or why counsel failed to pursue hiring an expert of her caliber, experience, and relevant expertise for Ms. Owens. There were other nationally recognized experts in the field who would have been available to work on this case. If I had been contacted in 1997, I would have agreed to work on this case.

24. 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 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. Critically, counsel failed to interview and present the testimony of Dr. Lynn Zager, the forensic doctor from Midtown Mental Health Center.

25. While Eric Gentry was well-meaning, his inexperience took a dramatic toll on his testimony at Ms. Owens's post-conviction hearing. As a result, Mr. Gentry's work and testimony did not meet the standards I have come to know, practice and present. Mr. Gentry had never before testified and admitted on the stand that he would never testify again.

26. Mr. Gentry testified about his credentials, which included many "certifications" - Certified Trauma Specialist, Certified Trauma Therapist, Certified in Time Limited Trauma Therapy and Time limited Treatment for Dissociative Disorders, Certified in Bio-feedback, and Registered Traumatologist. However, Mr. Gentry had only one license - an inactive West Virginia Social Worker's license. As the court and the prosecution pointed out, Mr. Gentry's "certifications" did not hold the same credibility as licensure would have.

27. Post-conviction counsel asked that Mr. Gentry be certified as an expert in traumatology, not social work. However, Mr. Gentry's testifying with a lapsed social work license did not meet the acceptable standards of practice.

28. Mr. Gentry testified that he was asked by post-conviction counsel to conduct a Psychosocial Assessment of Gaile Owens. Mr. Gentry's description of the assessment as Psychosocial and not Biopsychosocial is both misleading and inaccurate. An assessment for a

capital case should include a multi-disciplinary approach including references to and referrals from psychiatrists, psychologists, medical doctors and other specialists in the medical field. As a result, the "Bio" segment of the assessment is an integral part of the assessment, which should not be limited to just the psychological and the social aspects of a defendant's life.

29. If he had had a clear understanding of what a Biopsychosocial Assessment entails, Mr. Gentry might have explained that his assessment incorporated too few interviews especially with non-family, a lack of historical records on Ms. Owens's extended family, and no development of inter-generational patterns.

30. Moreover, a Biopsychosocial Assessment should tell the story of the defendant's life in a way that makes sense. The information included should come from more than one source whenever possible and should be presented in a chronological fashion so as to avoid confusion. In Mr. Gentry's Psychosocial Assessment and in his testimony, Ms. Owens's abuse was introduced immediately with no explanation about the relevance of her family background, parental relationships, and her chronological history. A mitigation expert should be trained to put a life into context, not to pluck out pieces that are the most convenient.

31. Importantly, Mr. Gentry also failed to provide any context for Ms. Owens's life by explaining the role of child development and family systems, how children develop resilience and identity, and providing an overview of the family history. In response to one cross question, Mr. Gentry's response began with "as Gaile kind of developed." While Mr. Gentry included many of the details of Ms. Owens's life consistent with the information I obtained in my Biopsychosocial Assessment of Ms. Owens, the presentation was disjointed and confusing. As a result, the post-conviction trial court kept asking for clarification. I too found the information

from Mr. Gentry confusing and lacking in clarity. Mr. Gentry's failure to use visuals to allow the post-conviction trial court to follow along, contributed to the confusion in his testimony.

32. Mr. Gentry also failed to thoroughly address the socio-economic dynamic of Ms. Owens's family. Mr. Gentry failed to describe the family's financial struggles in terms of factual information, but instead just concluded that the Kirskey family was poor. Mr. Gentry should have provided detailed information. For example, Jewell Kirksey, Ms. Owens's father, was a hard working man and the family struggled; Izora Kirksey, Ms. Owens's mother, took in children to babysit for extra money; Wilson's disabilities created costly expenditures for the family; other family members and the church had to step in to assist the family with the needs of Ms. Owens and her sister. It was not enough for Gentry to simply state that the Kirksey family was poor.

33. Completely missing from Mr. Gentry's Psychosocial Assessment was any examination of the impact of the Pentecostal faith on Ms. Owens's early development. Ms. Owens's experience in the Pentecostal church with "thought reform" solidified the concept of female submission to males in her life from birth, to childhood, to adolescence and adulthood.

34. Mr. Gentry also failed to address how Ms. Owens, unlike her siblings, was left 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 violence and sexually abusive husband. As a child, there 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. Her sister escaped at a young age to the home of a pastor who was more modern and understanding in his approach. Her disabled brother received a different kind of care at Shriners School and was male, even if impaired. In spite of the best efforts of her Uncle Nicky

and Aunt Nanny, the ongoing and consistent help she needed was never there. Mr. Gentry failed

to explain this dynamic both in his Psychosocial Assessment and his testimony.

35. Mr. Gentry failed to use any visuals to help show the post-conviction trial court

how Ms. Owens's behaviors were consistent with trauma both in childhood and adulthood.

Moreover, Mr. Gentry did nothing to explain accommodation – how it is that children adapt to

abuse and learn to lie to protect their abusers when they see others who are supposed to protect

them, fail to rescue them from abuse. A visual of childhood symptoms of trauma (lying, stealing,

ruminating, fearing doom, etc.) and adult symptoms of trauma (substance abuse, obsessive

cleanliness, depression, etc.) that included observations of Ms. Owens's behaviors (anxiety,

panic, substances, response to rejection, overreactivity, emotional constriction, etc.), would have

been a powerful demonstrative to be prepared by a traumatologist. Using jargon like "triphasic,"

and "biphasic" does not have the same impact on understanding behavior as do simple examples

of behaviors consistent with trauma.

36. Also missing from Mr. Gentry's Psychosocial Assessment was a discussion of

Ms. Owens's good conduct as a child and the absence of any evidence of stealing, lying or other

poor behavior. Ms. Owens stole at home at the direction of her mother or because she had

watched her mother punish her father. Ms. Owens was never arrested as a juvenile, never

punished for any illegal activities, and never involved in drugs or alcohol. In fact, she was

exceptionally quiet, well-behaved and easily managed. Ms. Owens's small attempts at rebellion

as an older teenager resulted in no punishment until she had the courage to leave home and was

sexually humiliated by her father as he strip searched her for drugs and then beat her with a belt

while she lay naked across the bed.

37. Mr. Gentry's failure to discuss Ms. Owens's good conduct as a child, adolescent, and during the early years of her marriage eliminated any context for Ms. Owens's pattern of embezzlements around the time her sons were born. These embezzlements were clearly out of character for Ms. Owens, and importantly, were behaviors for which she was easily caught. Mr. Gentry's refusal to acknowledge and discuss this context and the embezzlements prevented the post-conviction trial court from understanding that rather than establishing Ms. Owens's bad character, these embezzlements were a symptom of the problems in her home. Ms. Owens was stealing because she was trying to please her husband, her abuser, and to lessen the financial burden in the home. Ms. Owens had learned this very dysfunctional coping mechanism at the feet of her mother, who stole from her father as a way of handling stress in the home. Thus, when viewed in the overall context of Ms. Owens's life, the embezzlements make more sense. It was also important to note that Ms. Owens's actions were not "selfish" in the sense that she was not stealing for her own financial gain, but rather was often spending the money on others.

38. Finally, Mr. Gentry made no effort to address the power of neglect or to summarize the accumulation of stressors in Ms. Owens's life, the impact of those stressors on her behavior, and her responses to stress. Importantly, Mr. Gentry failed to explain how Ms. Owens's development had impaired her abilities to reason, to step back, soothe herself, and examine her options rather than react to her impaired judgment, insight and decision-making. Overreactivity and hyperarousal are hallmark symptoms of trauma.

39. Mr. Gentry failed to include a discussion of Ron Owens's chaotic childhood. Mr. Owens's own deceptive behavior (including his lies about serving in Viet Nam and about his lies on his application for employment at the hospital) was never examined by Mr. Gentry. While it

is important not to blame the victim, in this case, Mr. Owens's own family life was worthy of contemplation and discussion, particularly in order to address what often happens when two adults who were abused as children marry.

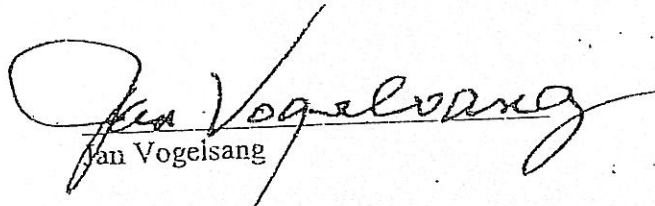
40: Mr. Gentry's disjointed presentation disrupted any hope that the post-conviction trial court would make reasonable connections between the accumulation of stressors in Ms. Owens's life and the crime, not in order to excuse her, but to meet even the most minimal standards for examining Ms. Owens's development into a person who could commit this crime.

CONCLUSION

41. In my opinion, a thorough and complete mitigation investigation, biopsychosocial assessment and presentation of the findings in court were never conducted on behalf of Gaile Owens in any court. This case represents a shocking failure on behalf of the trial and post-conviction lawyers. In my experience, even a minimally competent investigation would have produced important and compelling evidence which the jury should have heard before sentencing Ms. Owens and the judge should have been aware of during post-conviction proceedings.

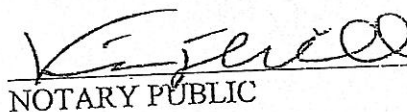
Further affiant saith not.

Dated this 22nd day of July, 2009.


Jan Vogelsang

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

Sworn to and subscribed before me on this the 22nd day of July, 2009.


NOTARY PUBLIC

My Commission Expires
July 10, 2017

