NO. 14-8663 and 14A910

IN THE SUPREME COURT OF THE UNITED STATES

KELLY RENEE GISSENDANER,

Petitioner-Appellant,

v.

KATHY SEABOLDT, Warden,

Respondent-Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTION PRESENTED

SHOULD THIS COURT GRANT CERTIORARI TO REVIEW A CLAIM THAT DOES NOT RAISE A CONSTITUTIONAL ISSUE OR CONFLICT WITH THE PRCEDENT OF THIS COURT?

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BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

The state habeas court, applying state procedural law, properly dismissed Petitioner's second state habeas petition as procedurally barred as she had previously presented the same claim to the state habeas court, the federal habeas court and this Court.

Again, Petitioner argues that her execution would violate the Eighth and Fourteenth Amendments because her sentence of death is disproportionate. Petitioner bases her arguments on the same arguments previously submitted to the state habeas court, the Georgia Supreme Court, the Eleventh Circuit Court of Appeals, and this Court. (See Attachments A-I).[1] All denied Petitioner the relief

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[1] Attachment A-Applicable portion of Petitioner's direct appeal brief to the Georgia Supreme Court.

Attachment B-Applicable portion of Petitioner's Supplemental Brief on direct appeal to the Georgia Supreme Court.

Attachment C- Applicable portion of Petitioner's Motion for Reconsideration after the Georgia Supreme Court denied Petitioner's direct appeal.

Attachment D-Applicable portion of Petitioner's first state habeas petition.

Attachment E-Applicable portion of Petitioner's post-hearing brief and Petitioner's reply brief.

Attachment F-Applicable portion of State Habeas Final Order denying relief.

Attachment G-Applicable portion of Petitioner's Application for Certificate of Probable Cause to Appeal from the denial of state habeas relief.

requested. As the state habeas court properly dismissed Petitioner's second state habeas petition as barred under Georgia law and as there is no state or federal law prohibiting the execution of a person who instigated, planned and helped carry out the murder of their spouse, the decision does not conflict with this Court's precedent.

Petitioner also alleges that her sentence is disproportionate because she has "changed" since being incarcerated on death row. In support of this claim she argues the exact same material presented during her clemency hearing before the Board of Pardons and Paroles on Tuesday, February 25, 2015.[2] This portion of Petitioner's proportionality claim fails to present a constitutional claim upon which relief may be granted in a habeas proceeding. Certiorari review should be denied.

Attachment H-Applicable portion of Petitioner's Motion for Reconsideration after the Georgia Supreme Court denied Petitioner's Application for Certificate of Probable Cause to Appeal.

Attachment I-Application portion of Petitioner's Petition for Writ of Certiorari in the United States Supreme Court following the denial of federal habeas relief by the Eleventh Circuit Court of Appeals.

[2] After reviewing her case and listening to twenty-one witnesses, including two of her children, the Board denied her clemency. See http://www.gwinnettdailypost.com/news/2015/feb/25/parole-board-denies-clemency-in-kelly-gissendaner/

I. STATEMENT OF THE CASE

A. Trial Proceedings

Petitioner, Kelly Gissendaner, was indicted by the Gwinnett County Grand Jury on April 30, 1997, for the offenses of malice murder and felony murder. Following a jury trial, Petitioner was convicted of malice murder and felony murder on November 18, 1998. The felony murder conviction was vacated by operation of law. The jury recommended a sentence of death on November 19, 1998 and the jury found the following statutory aggravating circumstances to impose the death penalty: that the murder of Douglas Morgan Gissendaner was committed during the commission of kidnapping with bodily injury, a capital felony, O.C.G.A. § 17-10-30(b)(2); and that Petitioner caused or directed another to commit murder, O.C.G.A. § 17-10-30(b)(6).

B. Motion for New Trial Proceedings

Petitioner filed a motion for new trial on December 16, 1998 and an amended motion for new trial on August 18, 1999. Petitioner's motion for new trial, as amended, was denied on August 27, 1999.

C. Direct Appeal Proceedings

The Georgia Supreme Court affirmed Petitioner's conviction and sentence on direct appeal on July 5, 2000, and on July 28, 2000, denied her motion for reconsideration. Gissendaner v. State, 272 Ga. 704, 532 S.E.2d 677 (2000).

This Court denied Petitioner's petition for writ of certiorari on February 26, 2001. Gissendaner v. Georgia, 531 U.S. 1196, 121 S. Ct. 1201 (2001). The only issue raised by Petitioner was whether this Court should grant certiorari review to determine whether the trial court's exclusion of mitigation evidence, which consisted of hearsay, was in violation of this Court's precedent and the Eighth and Fourteenth Amendments. Petitioner filed a motion for rehearing of the order denying the writ of certiorari, which was denied on April 23, 2001.

D. State Habeas Corpus Petition

On December 18, 2001, Petitioner filed her petition for writ of habeas corpus in the Superior Court of Dekalb County. An evidentiary hearing was held on December 13-14, 2004.

The state habeas court denied Petitioner's state habeas petition in an order filed February 16, 2007. Petitioner filed an application for certificate of probable cause to appeal with the Georgia Supreme Court on June 14, 2007. The Georgia

Supreme Court denied that application for a certificate of probable cause to appeal on November 3, 2008.

E. Federal Habeas Corpus Petition

Petitioner filed her federal petition for writ of habeas corpus on January 9, 2009. On March 21, 2012, the federal habeas court denied relief. The Eleventh Circuit Court of Appeals denied relief on August 8, 2013. Gissendaner v. Seaboldt, 735 F.3d 1311 (11th Cir. 2013).

On June 20, 2014, Petitioner filed a petition for writ of certiorari with this Court challenging only the proportionality of her sentence. The petition was denied October 6, 2014. Gissendaner v. Seaboldt, __ U.S. __, 135 S. Ct. 159 (2014).

On February 26, 2105, Petitioner filed a successive state habeas petition. The state habeas court denied Petitioner relief on March 1, 2015. The Georgia Supreme Court denied the application on March 2, 2015.

II. STATEMENT OF THE FACTS

This Court found that the evidence at trial established the following:

> Gissendaner and the victim had been married, divorced, remarried, separated, and reunited between 1989 and 1997. Ms. Gissendaner was in a relationship with Gregory Bruce Owen and at one point stated to a co-worker that she was unhappy with her husband and in love with Owen.
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> Prior to Gissendaner's trial, Owen entered an agreement not to seek parole within 25 years, pled guilty, and received a sentence of life in

prison. Owen testified at Gissendaner's trial that it was she who first raised the idea of murder and that she later raised the idea again several other times. Owen suggested divorce as an alternative, but Gissendaner insisted upon murder because she believed she would receive insurance money from her husband's death and because she believed he "wouldn't leave [her] alone by just divorcing him." Gissendaner had previously stated to Owen's sister that she intended to use the victim's credit to get a house and then "get rid of him."

During the days leading up to the murder, Gissendaner made 47 telephone calls to Owen and paged him 18 times. Telephone records also showed that the pair were together at a bank of payphones several hours before the murder.

On the evening of February 7, 1997, Gissendaner drove Owen to her family's home, gave him a nightstick and a large knife, and left him inside the home to wait for the victim. Gissendaner then drove to a friend's house, and, upon Gissendaner's insistence that the group keep their plans for the evening, she and her friends went out to a nightclub.

The victim arrived home shortly after 10:00 p.m. Owen confronted the victim from behind, held a knife to his throat, forced him to drive to a remote location, forced him to walk into the woods and kneel, and then killed him by striking him with the nightstick and then stabbing him repeatedly in the back and neck with the knife. As instructed by Gissendaner, Owen took the victim's watch and wedding ring before killing him to make the murder appear like a robbery.

Gissendaner returned home from the nightclub at about the time the murder was being carried out, paged Owen with a numeric signal, and then drove to the crime scene. After inquiring if her husband was dead, she took a flashlight and went toward the body to inspect it. Owen burned the victim's automobile with kerosene provided by Gissendaner, and the pair returned to their respective homes in Gissendaner's automobile. Owen disposed of the nightstick, the knife, a pair of his own jeans, and the victim's stolen jewelry by placing them in the garbage. A pair of Owen's sweat pants also worn on the night of the murder was recovered, however, and DNA analysis of blood found on them showed a likely match with the victim's and

Owen's blood.

> After the murder, Gissendaner concealed her relationship with Owen from police and claimed not to have initiated contact with him for some time. Telephone records, Owen's testimony, and other witness testimony proved otherwise. After her arrest, Gissendaner called her best friend and confessed to her active and willing role in the murder, although she then called a second time and claimed that she was coerced into participating. Gissendaner wrote a letter while in jail in an effort to hire someone to give perjured testimony and to rob and beat witnesses.

Gissendaner v. State, 272 Ga. at 704-705.

Petitioner attempts to distance herself from the murder of her husband. The trial transcript fully supports the Court's summary of the facts that there was considerable evidence that she was the person who planned her husband's murder. Petitioner first brought up the idea of killing Douglas to co-defendant Gregory Owen in November of 1996, when she asked Owen how to get rid of Douglas. (T. 2274). When Owen suggested that she divorce Douglas, Petitioner stated that divorce would not work because Douglas would not leave her alone if she simply divorced him. Id. Petitioner and Owen discussed killing Douglas on four or five occasions, all at Petitioner's initiation, before reaching a final agreement to kill him. (T. 2275). It was agreed that, on February 7, 1997, while Petitioner was out with friends, Owen would kill Douglas. (T. 2275). The murder went exactly as Petitioner planned.

On February 7, 1997, Petitioner picked Owen up at his home and drove him

to her house at approximately 5:30 or 6:00 p.m. (T. 2276). Petitioner changed clothing, gave Owen a night stick and a six to eight inch hunting knife, and left. (T. 22782280). Petitioner spent the evening with Pamela Kogut, Kerri Otis and Nicole Bennett, eventually going dancing at "The Shack" at 10:30 p.m. (T. 2148, 2166). Kerri had attempted to reschedule the evening, but Petitioner insisted that they had to go out on Friday, February 7th. (T. 2149). The group left at 11:30 p.m. when Petitioner stated that she had a bad feeling and had to go home. (T. 2149, 2167).

Douglas arrived home at approximately 11:30 p.m. Owen was waiting for him inside the house. (T. 2282). As Douglas was closing the door, Owen walked up behind him, put a knife to his neck, and told him that he needed to go for a ride. (T. 2285-2286). The two got into Douglas' car, and Owen, with the knife in his lap, made Douglas drive in the direction of Luke Edwards Road in Gwinnett County, Georgia. (T. 2287, 2289).

When they arrived at a desolate area on Luke Edwards Road, Owen made Douglas get out of the car, walk toward the woods, and get down on his knees. (T. 2291-2296). As Petitioner had instructed Owen, he took Douglas' watch and wedding band to make it appear like robbery was the motive for the murder. (T. 2294). When Douglas was on his knees, Owen hit him in the back of the head with the night stick. (T. 2297). Douglas fell forward and was silent. (T. 2299). Owen

then stabbed Douglas in the neck eight to ten times. (T. 2298-2299).

Petitioner had arrived at the prearranged scene of the murder as Owen was stabbing Douglas, but remained in her car. (T. 2301). When Owen approached Petitioner's car after the stabbing Petitioner asked if Douglas was dead. (T. 2301). Although Owen replied that he thought he was dead. Petitioner went to check on the body anyway. (T. 23012302). After Petitioner walked back from the direction of Douglas' body, she got in her car, and Owen got into Douglas' car. (T. 2303). Owen followed Petitioner about three-fourths to a mile on the road. (T. 2303-2304). As Petitioner continued to the end of the road in her car, Owen stopped his car and picked up a can of kerosene that Petitioner had left for him earlier, doused Douglas' car with the kerosene and set it on fire. (T. 2304). Owen then walked to the end of the road, where Petitioner picked him up and drove him home. (T. 2308).

Owen accepted a plea deal, life with an agreement not to seek parole for 25 years. This same plea offer was offered to Petitioner. As found by the Eleventh Circuit Court of Appeals:

> The undisputed evidence (Gissendaner never testified) is that Gissendaner was unwilling to accept anything more than a straight life sentence no matter what because believing herself to be less culpable than Owen, she refused to accept the same sentence he had received. In light of the evidence, the state court reasonably concluded that there was no reasonable probability that, but for counsel's allegedly deficient advice, Gissendaner would have accepted the prosecution's

plea offer of a life sentence with a contract not to seek parole for 25 years.

Gissendaner , 735 F.3d at 1319.

III. REASONS FOR NOT GRANTING THE WRIT

A. THIS COURT SHOULD DENY CERTIORARI REVIEW OF THE STATE COURT'S ORDER DENYING PETITIONER'S APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE TO APPEAL FROM THE PROPER DENIAL OF HER SECOND STATE HABEAS CORPUS PETITION.

After filing a lengthy series of post-conviction proceedings in the state and federal courts, with her execution re-scheduled for March 2, 2015, Petitioner filed a successive state habeas corpus petition on January 12, 2015 again alleging that her execution would violate the state and federal constitutions because her sentence of death is disproportionate. First, Petitioner claims that her sentence of death is unconstitutional because it is disproportionate as she was allegedly not at the murder site when the man with whom she was having an extramarital affair murdered her husband at her direction. Second, Petitioner alleges that her sentence is disproportionate because she has "changed" since being incarcerated on death row. In support of this claim she argues the exact same material presented during her clemency hearing before the Board of Pardons and Paroles on Tuesday, February 25, 2015. The state habeas court found her first proportionality claim was barred under the doctrine of res judicata and her second claim was non-

cognizable in a habeas proceeding. These claims fail to present a question worthy of this Court's certiorari jurisdiction and this petition for writ should be denied.

Georgia law provides that:

> Res judicata thus "prevents the re-litigation of all claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies in identical causes of action."

Odom v. Odom, 291 Ga. 811, 812 (1), 733 S.E.2d 741 (2012); see also Bruce v. State, 274 Ga. 432, 434 (2), 553 SE2d 808 (2001) ("Without a change in the facts or the law, a habeas court will not review an issue decided on direct appeal."); Hall v. Lance, 286 Ga. 365, 687 S.E.2d 809 (2010).

In denying relief on Petitioner's second state habeas petition, the state habeas court properly found:

> This is Petitioner's second state habeas petition. Petitioner argues that her execution is a disproportionate punishment. This claim was rejected by the Georgia Supreme Court on direct appeal. Gissendaner v. State, 272 Ga. 704, 716-719 (2000). The Court finds that the Petitioner has not cited any new law or evidence to overcome the procedural bar contained in O.C.G.A. §9-14-51. Moreover, the Petitioner has not established a miscarriage of justice. Stevens v. Kemp, 254 Ga. 228, 230 (1984).
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> Petitioner also alleges that her death sentence is not proportionate because she is not the "same person" she was when she committed her crimes. In support of this claim, she has incorporated what appears to be a portion of her clemency petition. This Court has no authority to giant such relief. The power of clemency is vested exclusively in the State Board of Pardons and Paroles pursuant to Georgia Constitution, Art, 4, §2, ¶ II,

> Having found that the Petition sets forth no grounds for relief not barred by res judicata or otherwise not cognizable in habeas proceedings, it is, therefore, ORDERED, that the instant petition be and is hereby DISMISSED and Petitioner's request for Stay of Execution is hereby DENIED.

March 1, 2015 Order. Thus, the state habeas court dismissed Petitioner's second state habeas petition as procedurally barred applying state law finding that there were no new developments of facts or law.

Similarly, the Georgia Supreme Court reviewed Petitioner's application for a certificate of probable cause to appeal the denial of his second state habeas petition and denied the application, clearly declining to address the "merits" of any of Petitioner's successive habeas claims and without relying on any federal constitutional principles. Therefore, the Georgia Supreme Court's decision also rests solely on adequate and independent state law grounds and presents no federal question for this Court's review.

This Court has held on numerous occasions that a state court judgment which rests on an independent and adequate state law ground presents no federal question for adjudication by this Court in a petition for a writ of certiorari. See, e.g., Fox Film Corp. v. Miller, 296 U.S. 207, 210 (1935); Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Michigan v. Long, 463 U.S. 1032 (1983).

Therefore, as the decisions of the state habeas court and the Georgia Supreme Court, with regard to her claim that her sentence is disproportionate

because she did not commit the murder which Petitioner is requesting that this Court review, clearly rest upon adequate and independent state law grounds, this Court should deny Petitioner's petition for writ of certiorari.

With regard to her second claim that her death sentence is disproportionate because she has become a different person on death row, the state habeas court properly found this claim was not cognizable in a habeas proceeding. In Cavazos v. Smith, __ U.S. __, 132 S. Ct. 2 (2011), this Court reviewed the grant of federal habeas relief by the Ninth Circuit Court of Appeals essentially based upon its view that the evidence did not support the verdict. This Court reversed the grant of habeas relief and provided the following regarding the role of clemency:

> It is said that Smith, who already has served years in prison, has been punished enough, and that she poses no danger to society. **These or other considerations perhaps would be grounds to seek clemency, a prerogative granted to executive authorities to help ensure that justice is tempered by mercy.** It is not clear to the Court whether this process has been invoked, or, if so, what its course has been. It is not for the Judicial Branch to determine the standards for this discretion. If the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention.

Cavazos, 132 S. Ct. 2, *7 (emphasis added). Therefore, as Petitioner's second proportionality claim was clearly not a claim which would entitle her to habeas relief, this Court should deny certiorari review.

B. THIS COURT SHOULD DENY CERTIORARI REVIEW OF THE STATE COURTS' ORDER DENYING PETITIONER'S SECOND STATE HABEAS CORPUS PETITION AS IT DOES NOT CONFLICT WITH PRECEDENT OF THIS COURT.

Insofar as this Court finds that any of the state habeas court's analysis of the evidence is a merits review of Petitioner's claim or that there is a federal constitutional claim presented, it is clear that the state habeas court's findings do not conflict with the precedent of this Court as neither this Court nor any court in the country has held that Petitioner's proportionality claims shows a violation of her constitutional rights. Certiorari review is not warranted.

Petitioner's alleges there is a consensus that individuals who did not commit the actual murder are no longer eligible for a death sentence due to "evolving standards of decency." Petitioner fails to cite to any precedent that holds there is a consensus on this point as there is none. In fact, the cases in which defendants did not receive a death sentence upon which Petitioner relies to show this national consensus either largely pre-date or are within the same year of her trial. Accordingly, these cases do not support an evolving standard different from the time of Petitioner's trial and direct appeal. There is no consensus or precedent that holds a death sentence for the crimes committed by Petitioner is disproportionate. Whether she was there or wielded the actual knife does not absolve her of her clear orchestration of her husband's death. Indeed, **Doug would not have been murdered if not for her infidelity and desire to kill so that she could collect on**

life insurance policies. Petitioner set the entire series of crimes in motion and made sure they were carried out. The habeas court properly rejected her claim.

Further, there are several women currently on death row across the nation that were sentenced to death based on evidence that they either hired or solicited the help of another who in fact killed their husband.[3] (See generally Edmonds v. State, 955 So. 2d 787, 2007 Miss. LEXIS 349 (2007) (Kristi Leigh Fulgham (direct appeal opinion has not been published, however, the Mississippi Department of Corrections reports Fulgham as being under a death sentence)[4] enlisted the help of her brother, Tyler Edmonds, to help kill her husband. Defendant, Tyler Edmonds shot Kristi's husband with help from Kristi. Tyler received a life sentence but his conviction was overturned on appeal and Tyler's case was sent back to the trial court); Andrew v. State, 2007 OK CR 23, 2007 Okla. Crim. App. LEXIS 25 (2007) (Brenda E. Andrew and her lover, James Dwight Pavatt, also the victim's life

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[3] Petitioner argued below "Georgia has **never** executed a non-trigger person murder defendant." (Application, p. 6) (emphasis in original). However, William Mark Mize was executed on April 29, 2009. The Georgia Supreme Court found on direct appeal, "Even assuming that Mize did not fire any of the shots, there is sufficient evidence that he intentionally aided or abetted the commission of the murder, or that he intentionally advised, encouraged, or procured another to commit the murder." Mize v. State, 269 Ga. 646, 648 (Ga. 1998)

[4] Fulgham's page on the Mississippi Department of Corrections website can be found at: http://www.mdoc.state.ms.us/InmateDetails.asp?PassedId=117337.

insurance salesman, conspired to kill her husband which resulted in Pavatt[5] shooting Andrew's husband to death), People v. Samuels, 36 Cal. 4th 96, 113 P.3d 1125 (2005) (Mary Ellen Samuels hired her daughter's boyfriend, James Bernstein, to kill her husband and following this murder Defendant hired another individual, Paul Gaul (received a plea deal) to kill her daughter's boyfriend, Mr. Bernstein); Byrom v. State, 863 So. 2d 836, 2003 Miss. LEXIS 535 (2003) (Defendant, Michelle Byrom, hired Joey Gillis (Sentenced to 15 years for conspiracy)[6], no relationship to Defendant, to kill her husband for $15,000); State of Tennessee v. Sidney Porterfield and Gaile K. Owens, 746 S.W.2d 441, 1988 Tenn. LEXIS 8 (1988) (Gaile Kirksey Owens hired Sidney Porterfield for approximately $5,000 to kill her husband. Porterfield and Owens were tried together and both received the death penalty.); Johnson v. State, 120 So. 3d 1100, 1104-1105 (2005) (Shonda Nicole Johnson, who was married to multiple men at the same time, enlisted the help of her husband, Timothy Richards, to kill her husband Randy McCullar.); Catherine Thompson (Thompson hired killer to murder her husband. See

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[5] Pavatt received the death penalty as well. Pavatt v. State, 2007 OK CR 19, 159 P.3d 272 (2007).

[6] No record on LEXIS that Joey Gillis was tried for a capital crime, however, the Mississippi Department of Corrections reports a Joseph Gillis from Tishomingo County, the same county in which Byrom was convicted, serving a 15 year sentence for conspiracy.
http://www.mdoc.state.ms.us/InmateDetails.asp?PassedId=K5892

www.deathpenaltyinfo.org/case-summaries-current-female-death-row-inmates); State v. Roberts, 110 Ohio St. 3d 71-80 (2006) (Donna Marie Roberts and her lover, Nathaniel Jackson, plotted to kill her boyfriend/ex-husband for insurance money).

As can be seen above, with the exception of one individual these women were sentenced to death for similar crimes belying Petitioner's claim that there is a national consensus. In addition, Petitioner has cited to no legislation that has been passed exempting individuals who direct others to murder on their behalf. As stated in Atkins v. Virginia, 536 U.S. 304, 312 (2002), "We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.' Penry, 492 U.S. at 331, 106 L. Ed. 2d 256, 109 S. Ct. 2934." Petitioner was not a passive party to murder of her husband. She was the moving force behind it. There is no "evolving standard of decency" that prohibits her execution.

Contrary to Petitioner's attempts to falsely revise the facts of her crime, Petitioner was a willing and active participant in the death of her husband. Petitioner has failed to present any new law or evidence that would remove the res judicata bar to this claim. Accordingly, the state habeas court properly found Petitioner's claim to be barred by the doctrine res judicata and this Court should dismiss the application.

Accordingly, the decision of the state court does not conflict with this Court's precedent and certiorari review should be denied.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for a writ of certiorari seeking review of the order of the Georgia Supreme Court denying Petitioner's request for appellate review and deny Petitioner's motion for stay of his execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing response, prior to filing the same, by email addressed upon:

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This 2nd day of March, 2015.

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ATTACHMENT A

IN THE SUPREME COURT

STATE OF GEORGIA

KELLY RENEE GISSENDANER, *Appellant* v. THE STATE OF GEORGIA, *Appellee.*	No. S00P0289

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and the federal constitution. Because "death is a 'punishment different from all other sanctions,'" there is a heightened need for reliability in the jury's decision to impose capital punishment. Woodson v. North Carolina, 96 U.S. 2978,2991 (1976). Under these circumstances the State's sentencing argument cannot be said to be harmless. Because the prosecutor's improper remarks undermined that reliability and violated Ms. Gissendaner's due process rights, a new sentencing hearing is required.

ENUMERATION OF ERROR FOURTEEN

MS. GISSENDANER'S DEATH SENTENCE IS A DISPROPORTIONATE PUNISHMENT AND WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 1, PARAGRAPHS 1, 2, 11, 12, 14, AND 17 OF THE CONSTITUTION OF THE STATE OF GEORGIA AND GEORGIA LAW ON PROPORTIONALITY

Appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected the death penalty schemes invalidated by Furman v. Georgia, 408 U.S. 238 (1972) and its progeny. The teaching of Furman was that a state may not leave the decision of whether a defendant lives or dies to the unfettered discretion of the jury because such a scheme inevitably results in death sentences that are "wantonly and . . . freakishly imposed" and "are cruel and unusual in the same way that being struck by lightening is cruel and unusual." Id. at 309-310. (Stewart, J., concurring). Therefore, some form of meaningful appellate review is required to assess the sentencer's imposition of the death penalty. See Gregg v. Georgia, 428 U.S. 153 (1976) (holding that the Georgia capital-sentencing system, particularly the proportionality review, substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury).

While the Georgia death penalty scheme invalidated by Furman has been changed,[21] the arbitrariness continues. The Georgia statute which authorizes the imposition of the death penalty

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[21] See Gregg v. Georgia, 428 U.S. 153 (1976).

requires that the jury makes certain findings before it can impose the death penalty. See O.C.G.A. § 17-10-30. However, the State, by and through the district attorney, still has the sole discretion and authority about when and if the death penalty shall be sought.

Pursuant to O.C.G.A. § 17-10-35, before this Court can uphold Ms. Gissendaner's death sentence, it is required to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. In regard to the sentence of death, the following specific factors shall be determined by the Court:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) Whether . . . the evidence supports the jury's . . . finding of a statutory aggravating circumstance . . . ; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

O.C.G.A. § 17-10-35 (c) (emphasis added).

Since Georgia has chosen to include proportionality in the review of capital cases as an additional safeguard against the arbitrary and capricious imposition of the death penalty, this Court cannot administer that safeguard in an unconstitutional manner. See Evitts v. Lucey, 469 U.S. 387 (1985); Harmelin v. Michigan, 501 U.S. 957, 994 (1991) ("Proportionality review is one of several aspects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."). Therefore, the components of appellate review which have been created for a review of guilt/innocence and sentencing must comport with the demands of the due process and equal protection clauses. See Evitts, 469 U.S. at 403, 404.

A meaningful proportionality review must take into account not only other similar cases in which the death penalty has been imposed, but must also look to cases where the death penalty was

not imposed. Moreover, such an analysis under the statute must take into account the characteristics of the defendant herself.

In its proportionality analysis, this Court has consistently repeated that in its process of reviewing the death penalty in particular cases, "we have considered the cases appealed to this court since January 1, 1970, in which death or a life sentence was imposed and we find that those cases set forth in the appendix support affirmance of the death penalty." Douthit v. State, 239 Ga. 81, 235 S.E.2d 493, 499 (1977) (emphasis added).[22] Nearly identical language was cited by this Court in another capital case: "[i]n reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed and we find the similar cases listed in the appendix support affirmance." Blake v. State, 239 Ga. 292, 236 SE2d 637, 644 (1977) (emphasis added).[23] See also Smith v. State. 236 Ga. 12, 222 S.E.2d 308, 318 (1976) ("The cases selected for comparison were those since January 1, 1970, involving a death sentence for murder and those involving life sentences during the same period involving another simultaneous murder.") (emphasis added).

One case in particular stands out as testament to the blatant disproportionality of the sentence imposed on Ms. Gissendaner -- that of Frederic Tokars, a prominent Atlanta attorney and former prosecutor convicted in both federal and state court of the murder of his wife Sara Tokars. The Tokars case featured facts far more heinous than those alleged in Ms. Gissendaner's case. Sara

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[22]See O.C.G.A. § 17-10-37(a).

[23] A cursory review of caselaw finds this language repeated in Pryor v. State, 238 Ga. 698, 234 S.E.2d 918, 925 (1977); Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, 652 (1978); Green v. State, 242 Ga. 261, 249 S.E.2d 1, 10 (1978); Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524, 529 (1978); Finney v. State, 242 Ga. 582, 250 S.E.2d 388, 393 (1978); Johnson v. State, 242 Ga. 649, 250 S.E.2d 394, 400 (1978); Redd v. State, 242 Ga. 876, 252 S.E.2d 383, 390 (1979); Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620, 622-623 (1979); Collins v. State, 243 Ga. 291, 253 S.E.2d 729, 735 (1979); Gates v. State, 244 Ga. 688, 261 S.E.2d 349, 358 (1979); Collier v. State, 244 Ga. 553, 261 S.E.2d 363, 379 (1979), cert. denied, 445 U.S. 946 (1980); Brooks v. State, 244 Ga. 574, 261 S.E.2d 379, 3 (1979); and many more.

Tokars was the mother of two young boys, the oldest of which was only six years old. Both boys witnessed at close hand their mother being killed by a shotgun blast at point-blank range. Although Mr. Tokars initially denied any involvement, it later emerged that he had hired two men to commit the murder, offering to pay them $5000, in order to stop Mrs. Tokars from revealing the details of Mr. Tokars' deep involvement in an international money-laundering operation. The two co-defendants and perpetrators of the crime received sentences less than death: Curtis Rower, the triggerman, pled guilty and received life without parole; Eddie Lawrence, who assisted in the kidnapping, pled guilty and received a twelve and one-half year sentence in exchange for his cooperation and testimony. Mr. Tokars, after being convicted on murder and racketeering charges in federal court and sentenced to four life terms with no possibility of parole, was tried on the murder and kidaping charges in Cobb County (indictment no. 93-9-2614-33), where prosecutors aggressively sought the death penalty. During the high-profile trial in 1997, allegations of Mr. Tokars' obsession with money and his sexual infidelity, along with the grisly details of the murder-for-hire scheme, abounded. *Yet the jury sentenced Tokars to life imprisonment without parole.*[24]

This Court must consider cases such as Mr. Tokars', involving far more deplorable allegations against the defendant than in the present case yet where the jury imposes a life sentence, in reviewing the proportionality of Ms. Gissendaner's sentence. The only possible conclusion after such a review is that Ms. Gissendaner's death sentence "is excessive [and] disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." O.C.G.A. § 17-10-35(c).

A. Ms. Gissendaner's death sentence is not proportionate to the sentence imposed on her co-defendant.

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[24] See, e.g., Atlanta Journal Constitution, December 1, 1992; January 6, 1993; March 12, 1997; May 4, 1997; Fulton County Daily Report, December 27, 1997.

This Court's statutorily mandated proportionality review must include "special consideration of the sentences received by a co-defendant in the same crime." Allen v. State, 253 Ga. 390, 31 S.E.2d 710, 715 (1984). In this case, Ms. Gissendaner's co-indictee, Gregory Bruce Owen, received a sentence of life imprisonment with parole eligibility for the same offenses. In both Ms. Gissendaner's and Mr. Owen's cases, the offenses charged by the District Attorney of the Gwinnett Judicial Circuit were murder, felony murder, and possession of a knife during the commission of a felony. Notices of Intent to Seek the Death Penalty was filed in both cases. In exchange for testifying against Ms. Gissendaner, Mr. Owen, the sole assailant, pled guilty to the murder of Douglas Gissendaner. His punishment for proverbially "pulling the trigger" was a life sentence with parole eligibility. (T. 2268). Ms. Gissendaner, who neither committed the murder nor was even present at the scene, however, was sentenced to death.

By Mr. Owen's own admission at Ms. Gissendaner's trial, it was shown that Mr. Owen was the "triggerman," and that his own personal motivations spurred his actions. Mr. Owen entered the victim's house, walked up behind him, and put a knife to his neck. (T. 2281). The victim did not put up a struggle, but rather did exactly as Mr. Owen told him to do. (T. 2284-85). The two of them then drove, in the victim's car, to the middle of a dark, deserted area. (T. 2281-88). Mr. Owen then directed the victim to get down on his knees. (T. 2296). It was Mr. Owen who then hit the victim with a night stick on the back of his head forcing the victim to fall forward. (T. 2297). Mr. Owen then took the knife he had brought with him, stabbed the victim in the neck, ultimately causing his death (T. 2298-99). There has been no allegation that Ms. Gissendaner was present during any of the above scenario. (T. 2301).

Mr. Owen's testimony revealed a powerful motive for committing the murder -- he wanted Ms. Gissendaner all to himself. (T. 2341). By killing her husband, Mr. Owen believed he would no longer have to worry about whether Ms. Gissendaner was getting back together with the victim.

(T. 2341). It was Mr. Owen's plan that he take up residence with Ms. Gissendaner and her children after he killed her husband. (T. 2354). The fact that the State of Georgia, by and through the district attorney, offered Mr. Owen, the sole assailant, a favorable plea and corresponding sentence reflects that the State considered it to be a proper sentence for the crime considering all of the circumstances. This undoubtedly indicates that Ms. Gissendaner, according to the State's actions, is also deserving of such a plea offer considering the aggravating circumstances are of no consequential difference in the two cases. Mr.Owen was just lucky enough to be approached by the State, with their plea offer, first. (T. 2268, 2329, 2533).

The Court is not limited to considering whether the sentence is disproportionate based on the crime alone, it must also consider "the defendant." Ms. Gissendaner has no prior criminal history with no prior history of violent behavior. Rather, it is undisputed that Ms. Gissendaner is a loving mother who has an extraordinary relationship with her three children. As demonstrated at trial, she has worked hard to support those children and provide a stable home for them. Ms. Gissendaner was not present for the murder or the kidnaping of her husband. There were no indications that she participated in any torture and depravity which would serve as aggravating circumstances.

Under the mandatory review of all death sentences, this Court must consider whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant," O.C.G.A. § 27-25-37(c)(3). Pursuant to this mandate, the Georgia Supreme Court has vacated at least five death sentences because it was convinced that they were comparatively disproportionate. See, e.g., High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981) (death sentence disproportionate for armed robbery and kidnaping); Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978) (death sentence disproportionate for felony murder when co-defendant received life sentence in subsequent jury trial); Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977) (death sentence disproportionate for murder when defendant had received life sentence for same crime in

previous trial); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975) (death sentence disproportionate for armed robbery).

This Court would later hold that its decision in Hall stands for the proposition that "our statutorily mandated proportionality review of death sentences includes special consideration of the sentences received by a co-defendant in the same crime." Allen v. State, 253 Ga. 390, 31 S.E.2d 710, 715 (1984). See also Slater v. State, 316 So.2d 539 (Fla. 1975) (setting aside death sentence and imposing life sentence where codefendant , the 'triggerman,' had been allowed to enter a pela of nolo contendre to murder charge and had been sentenced to life); Windsor v. State, 716 P.2d 1182 (Idaho 1985) (death sentence set aside as disproportionate and life sentence imposed where codefendant, whose participation in the crime was greater, also received death sentence; defendant should not receive identical sentence to more culpable codefendant where defendant, *inter alia*, cooperated with police, had no history of violent criminal activity, accompanied the officers to the crime scene, was an ideal inmate and had an extremely troubled childhood); State v. Stokes, 352 S.E.2d 653 (N.C. 1987) (setting aside death sentence where codefendant, who was more deserving of death than defendant, had been sentenced to life during separate trial); Sumlin v. State, 617 S.W.2d 372 (Ark. 1981) (comparing death sentence to life sentence imposed on wife/codefendant for the same crime and vacating death sentence as disproportionate); State v. McIlvoy, 629 S.W.2d 333 (Mo.banc 1982) (finding sentence disproportionate and setting aside death sentence of hired killer where hirer was sentenced to life for her involvement with the crime).

The State tried to establish that Ms. Gissendaner was in fact the prime mover in Douglas Gissendaner's murder and that she had ordered Greg to kill him. Ms. Gissendaner was not present when Owen kidnapped and murdered Doug Gissendaner, did not participate in stabbing her husband to death, and, apart from Owen's testimony, no evidence strongly establishes Ms. Gissendaner as the prime mover or the brains behind the murder. Moreover, Mr. Owen's testimony is of extremely

dubious credibility. Evidence that Ms. Gissendaner ordered the killing or was the prime mover in the crime was based solely on the confessed triggerman's testimony. In exchange for this testimony, Greg Owen Ms. Gissendaner's ex-boyfriend, who admitted to kidnaping Doug Gissendaner and stabbing him to death, received a life sentence. Additionally, Mr.Owen learned that he was not Ms. Gissendaner's sole boyfriend at the time from the police while he was being questioned, thus providing him with additional incentive to harm Ms. Gissendaner by implicating her in the murder. (T. 2352).

Other states that require proportionality review have vacated death sentences for defendants whose crime or personal history did not justify such an extreme penalty. See, e.g., Alvord v. State, 322 So.2d 533 (Fla. 1975) (court's responsibility is to review the sentence in light of the facts presented by the evidence as well as other decisions and determine whether or not punishment is too great); McCaskill v. State, 344 So.2d 1276 (Fla. 1977) (court must make reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of circumstances present); Smith v. Commonwealth, 634 S.W.2d 411 (Ky. 1982) (trial court decided that since triggerman had pleaded guilty and received minimum sentence, it would be unconstitutional to give non-triggerman the death penalty); Munn v. State, 658 P.2d 482 (Okl. Cr. App. 1983) (in determining appropriateness of a death sentence, a court must undertake proportionality review and couple that with any possible errors that may have occurred at trial).

Consideration of Ms. Gissendaner's character and circumstances (as mandated under the proportionality statute) as a devoted mother of three with no prior felony record militates in favor of a finding that the death sentence in her case was disproportionately imposed. Ms. Gissendaner is a mother of three children, ages 5, 8 and 12 -- children with whom she shares an extraordinarily close and loving relationship. This relationship has not waned even while Ms. Gissendaner has been

incarcerated pending the resolution of her trial. Indeed, it has become even more intense and powerful. The deep mutual love felt for one another by the children and their mother provides powerful evidence that Ms. Gissendaner is someone who is very concerned for her children and committed to maintaining this close family bond. The same can most assuredly not be said for Greg Owen.

Because the death penalty is a "punishment different from all other sanctions," Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976), there is a heightened need for reliability in the jury's decision to impose capital punishment. Woodson, 428 U.S. at 305 (1976). See also Gregg v. Georgia, 428 U.S. 153 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Eddings v. Oklahoma, 455 U.S. 104 (1982); Strickland v. Washington, 466 U.S. 668 (1984). To uphold the death sentence for Ms. Gissendaner, where the co-defendant in this case actually committed the murder, admitted to his own personal motivation for the crime (i.e., to have Ms. Gissendaner to himself), and received a life sentence with parole eligibility in exchange for his highly unreliable testimony against Ms. Gissendaner (having learned that he was not the only man in her life), is patently disproportionate and inappropriate. There will be no penological or other purpose that will be served by executing this woman. Ms. Gissendaner's sentence of death was imposed under the influence of prejudice and passion and is disproportionate to the crime and the defendant in this case. Therefore, pursuant to Article I, Section I, Paragraphs 1, 2, 11, 12, 14, and 17 of the Georgia Constitution, the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, O.C.G.A. Section 17-10-35, and other applicable law, Ms. Gissendaner's sentence of death must be vacated.

ATTACHMENT B

IN THE SUPREME COURT

STATE OF GEORGIA

KELLY RENEE GISSENDANER,

Appellant

No. S00P0289

v.

THE STATE OF GEORGIA,

Appellee.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT

I. THE TRIAL COURT DID PROHIBIT APPELLANT FROM ARGUING REASONABLE INFERENCE TO THE JURY. (Enumeration of Error No. 9).

The State contends in its supplemental brief that the trial court permitted Appellant's counsel during closing argument to argue reasonable inferences based upon the victim's military training, despite the trial court's ruling that Appellant could not argue such inferences (T. 2668-2669). The State's argument appears to be that despite the trial court erroneously sustaining the State's objection to Appellant arguing reasonable inferences at closing, the Appellant proceeded to argue the inferences nonetheless. The State contends in its supplemental brief that

> As Appellant argued exactly what she had wanted to argue, despite the fact that the State's objection to her 'evasion and escape training' argument was sustained, Appellant was not prohibited from arguing reasonable inferences to the jury.

The State's argument is completely illogical and incorrect.

First, how could the State presume to know "exactly what (Appellant) had wanted to argue"

in the murder of Doug Gissendaner. Given the critical importance of his testimony, the credibility of Gregory Owen and the believability of his testimony was the fulcrum around which the State's case turned, without which the State would not have a case. The trial court's prohibition of Appellant's argument of reasonable inferences as to what occurred on the night of the murder cannot be harmless error, as Appellant was thereby prohibited from attacking Owen's credibility through reasonable inferences suggested by the evidence. Anything that serves to undermine Greg Owen's testimony, even if merely incrementally, was critical to Ms. Gissendaner's case, and the trial court's sustainment of the State's objection can not be brushed as harmless error.

II MS. GISSENDANER'S DEATH SENTENCE IS A DISPROPORTIONATE PUNISHMENT AND WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE 1, SECTION 1, PARAGRAPHS 1, 2, 11, 12, 14, AND 17 OF THE CONSTITUTION OF THE STATE OF GEORGIA, AND GEORGIA LAW ON PROPORTIONALITY (Enumeration of Error No. 14)

A basic principle of sentencing is that the punishment should fit the crime. As early as 1910, the Supreme Court noted that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." Weems v. United States, 217 U.S. 349, 367 (1910). Implicit in the notion that the punishment should fit the crime is that the character and culpability of the offender should be considered along with the nature of the offense. See Lockett v.Ohio, 438 U.S. 586 (1978), Hitchcock v. Dugger, 481 U.S. 393 (1987). The recognition that there be a meaningful basis for distinguishing the cases of those few who were executed from the many who were not became the bedrock of proportionality review.

When the United States Supreme Court upheld the statute providing for the death penalty in Gregg v. Georgia, 428 U.S. 153 (1976), it did so on the premise that the procedural safeguards

introduced in capital statutes after 1972 addressed the fundamental inequities which led the Court to declare all state capital punishment schemes unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972). The perceived infirmity of the then existing capital statutes was that they provided capital sentencers with unbridled discretion, producing death sentencing patterns that could only be described as "wanton" or "freakish." Furman, 408 U.S. at 240-57 (Douglas, J., concurring); *id.* at 306-10 (Stewart., J. concurring); *id.* at 310-14 (White, J., concurring).

Although "proportionality" traditionally concerns whether a particular sentence is appropriate punishment for a particular crime, a comparative proportionality review presumes that the death sentence is not per se excessive or inappropriate punishment for the crime the defendant committed. See also Jarrell v. State, 234 Ga. 410, 424-25, 216 S.E.2d 258, 270 (1975); State v. Ramsey, 864 S.W.2d 320, 328 (Mo. banc 1993). This means that the reviewing court should focus on whether the death penalty in unacceptable in this particular case because similarly situated defendants convicted of factually similar crimes in the state have been awarded lesser sentences. The wording of O.C.G.A. § 17-10-35 (3) mandates comparative proportionality review.[1]

Chief Justice Benham, in his dissent on grounds of proportionality in Thomason v. State,

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1. Pursuant to O.C.G.A. § 17-10-35, before this Court can uphold Ms. Gissendaner's death sentence, it is required to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. In regard to the sentence of death, the following specific factors shall be determined by the Court:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) Whether . . . the evidence supports the jury's . . . finding of a statutory aggravating circumstance . . . ; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

underscored the care this Court should take in performing its statutorily-mandated task:

> Because we are the only Georgia appellate court to review death penalty cases and because the issue is one of enormous gravity, this weighty responsibility must be approached with special care in every case. Exacerbating the risk of a faulty proportionality analysis is the doctrine of stare decisis: if we lower the standard in a single case, that case becomes precedent for easier and easier imposition of the most extreme punishment available in criminal jurisprudence.

268 Ga. 298, 486 S.E.2d 861, 874 (1997) (Benham, J. dissenting). After Chief Justice Benham undertook his own proportionality analysis, he concluded with the following observation: "[t]he majority's affirmance of the sentence in this case lowers the standard to be applied to subsequent death penalty cases, and threatens to make routine the most serious penalty that can be imposed in this state." 486 S.E.2d at 875-876.

This court has a statutory duty to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." O.C.G.A § 17-10-35 (c)(3). "In performing the sentence comparison required by Code Ann. § 27-2537 (c)(3) [precursor to 17-10-35], this Court uses for comparison purposes not only similar cases in which death was imposed, *but similar cases in which death was not imposed.*" Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, 263 (1976), Douthit v. State, 239 Ga. 81, 235 S.E.2d 493, 499 (1977).

In order, therefore, to best approximate a judgment as to whether cases in which the death penalty is imposed are meaningfully distinguishable from similar cases in which it was not, the universe of cases used for comparison must include all those cases in which the death penalty *could have* been sought, including both cases in which juries returned life verdicts and cases in which prosecutors chose not to seek the death penalty. Similarly, to assure that the death penalty is being imposed in only the most heinous cases, the court must conduct as complete a comparison as

possible with those cases in which the death penalty *was not imposed*, either because a jury chose not to impose it or because it was not sought by a prosecutor. See Horton v. State, 249 Ga. 871, 295 S.E.2d 281, 289 n.9 (Ga. 1982), Castell v. State, 250 Ga. 776, 301 S.E.2d 234, 25 n.12 (Ga. 1983).

A. Ms. Gissendaner's death sentence is disproportionate because similarly situated defendants convicted of factually similar crimes have been awarded lesser sentences.

In the supplemental brief on behalf of the Appellee, the State proclaims that "appellants's death sentence is proportionate to other cases wherein the defendant caused or directed another to commit murder." Supplemental brief on behalf of the Appellee, p. 15. This assertion is simply wrong for it compares Ms. Gissendaner's sentence only to the few cases in which death sentences were imposed and fails to meaningfully distinguish her sentence from the many similar cases that resulted in life sentences. However, upon conducting a comprehensive proportionality review, it becomes clear that Ms. Gissendaner's death sentence is disproportionate to the penalty imposed in factually similar cases.

Appellee contends that Ms. Gissendaner was the "prime mover" in this case and therefore the sentence is proportionate. The only evidence supporting this claim, however, is the testimony of co-defendant Gregory Owen, who is currently serving a life sentence for admitting that he, alone, stabbed the victim in the neck and caused his death. There is no corroborating extrinsic evidence to support Owen's claim that appellant was the mastermind. Furthermore, the trial judge who heard all of the evidence in the case found that Ms. Gissendaner's role in the crime was "relatively minor." Trial Judge's Report, p. 4.

Second, Appellee suggests that Ms. Gissendaner killed her husband for the insurance money. Once again, there was no aggravating circumstance found that supports this claim and indeed the evidence showed that no insurance money was available.

However, even if the Court finds that appellant was the "prime mover," Ms. Gissendaner's death sentence is still disproportionate based on the universe of similar cases. Indeed, life sentences have usually been imposed upon the "prime mover" in factually similar crimes. This is true in cases that involve even more aggravated homicides, where the crime did indeed involve some financial transaction. This case, despite appellee's suggestion to the contrary is less aggravated than many of the cases discussed below, all of which ended in life sentences for the "prime mover."

In Blalock v. State, 250 Ga. 441, 298 S.E.2d 477 (1983), the defendant was charged with being a party to the murder and armed robbery of her ex-husband. The state sought the death penalty and the jury found her guilty on both counts and returned a sentence of life imprisonment on the murder; she received a concurrent life term for the armed robbery. Although, the victim and the defendant were divorced at the time of the killing, they continued to live together. It was established that their relationship had been turbulent one over the years and they had been divorced from each other before, and remarried prior tp the most recent divorce. The defendant contracted with two men to have her husband murdered for $2000. Blalock told her co-conspirators, who later gave statements implicating her, to make it look like a robbery gone awry. According to testimony at trial, the money taken from the robbery was to be a down payment on the contract, which would be fulfilled when the insurance proceeds were disbursed. It was established at trial that the actual "triggermen" agreed to testify for the state in exchange for life sentences.

Lowe v. State, 253 Ga. 308, 319 S.E.2d 834 (1984), is closely analogous to the case at bar. In this case the defendant arranged to have her boyfriend murder her husband. The boyfriend later testified against Mrs. Lowe at trial in exchange for a life sentence. Mrs. Lowe was subsequently convicted and sentenced to life in prison. One distinguishing feature in Lowe, however, is that Mrs. Lowe offered to pay her boyfriend $35,000 to commit the murder. On these facts, then, Lowe

involved an even more aggravated murder than the present case --that of a financial transaction-- yet Ms. Lowe received a life sentence for her role in the crime.

Similarly, the mastermind in Gambrel v. State, 260 Ga. 197, 391 S.E.2d 406 (1990), is more culpable than Ms. Gissendaner. . In that case, the defendant and her boyfriend, arranged the murder of the defendant's husband. Gambrel first asked her boyfriend to find a hitman, and when that proved unsuccessful, they decided that the boyfriend would commit the murder himself. After several failed attempts on Mr. Gambrel's life, the boyfriend finally shot Mr. Gambrel to death with a gun provided by Mrs. Gambrel. The boyfriend, the actual triggerman, testified against Mrs. Gambrel at trial and received a life sentence for his role in the crime. Ms. Gambrel was found guilty of malice murder and was sentenced to life imprisonment following a jury trial.

In Mayne v. State, 258 Ga. 36, 365 S.E.2d 270 (1988), another contract killing, the defendant arranged, along with two co-conspirators, to have her former husband killed for $5000. She solicited three men on two separate occasions before the murder was successfully completed. Ms. Mayne did not believe that the victim would be a good father to their son. The "mastermind" (Ms. Mayne) was convicted of malice murder and sentenced to life imprisonment following a jury trial.

The prime mover in Hardin v. State, 252 Ga. 99, 311 S.E.2d 462 (1984), was also sentenced to life in prison. Ms. Hardin first hired a man to kill her husband for $500, and when that plan failed, she enlisted the aid of her son. The co-defendant (her son) went to his stepfather's work site and murdered him with his mother's rifle. Ms. Hardin then hid the rifle in the basement of her home. Moreover, Ms. Hardin also urged a witness to lie to the police in exchange for giving him money. The co-defendant pled guilty to murder and testified against his mother. Ms. Hardin was found guilty of murder by a jury.

In Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979), Tommy and Gail Gunter, who are husband and wife, were sentenced to life in prison for hiring two men to kill Tommy's ex-wife, Betty Parsons. The actual killers, Danny Whitehead and Jimmy O'Dillon, broke into Betty Parsons home and shot her to death in front of her and Tommy's son. The motive for the murder was that Tommy was upset that he had to pay child support to Betty and threatened to kill her if she persisted in her efforts to have him continue paying child support.

In Kidwell v. State, 264 Ga. 427, 444 S.E.2d 789 (1994), the defendant and her son, Jeffrey Shields, were sentenced to life in prison for arranging, along with Shield's wife, Lori, the kidnapping and murder of Ms. Kidwell's ex-husband. Mrs. Kidwell was the sole beneficiary of Mr. Kidwell's $200,000 insurance policy. Lori Shields was granted immunity at trial in exchange for her testimony against Jeffrey Shields and Mrs. Kidwell. Again, both defendants were sentenced to life in prison for arranging the murder.

In Crowder v. State, 237 Ga. 141, 227 S.E.2d 230 (1976), the defendant received a life sentence for planning the axe murder of his wife. The plan was hatched with the aid of a prostitute, Ava Johnson, who agreed to find the hitman, and the actual killer, Claude Berry. Crowder agreed to pay $5,000 to $10,000 for the service. None of the parties was sentenced to death. Berry killed himself shortly afterward, and Johnson received a lesser sentence for proffering favorable testimony at trial.

A meaningful proportionality review must take into account the above cited cases. Cases in which similarly situated defendants convicted of factually similar crimes are sentenced to punishments less than the penalty of death. The court must consider cases that are far more deplorable than Ms. Gissendaner's but where a jury imposes a life sentence. The only possible conclusion after conducting a review and analyzing the cited cases is that Ms. Gissendaner's death

sentence is excessive and disproportionate and in violation of O.C.G.A. § 17-10-35 (c).

Appellee cites four cases, none of which are particularly convincing, to support its argument that the death sentence is proportionate. Wilson v. State, 271 Ga. 811, 525 S.E.2d 339 (1999); Mize v. State, 269 Ga. 646, 501 S.E.2d 219 (1998); Hill v. State, 237 Ga. 794, S.E.2d 737 (1976); Smith v. State, 270 Ga. 296, 509 S.E.2d 45 (1998). Each are distinguishable on the facts and are far less persuasive than the cases cited by Appellant.

Marion Wilson Jr. and Robert Earl Butts carjacked, robbed, and then murdered Corey Parks. The jury found a single aggravating circumstance: the murder was committed during the commission of an armed robbery. This Court, in conducting proportionality review, compared Wilson's case to other intentional killings committed during the commission of an armed robbery or a motor vehicle hijacking. There was no jury finding that Wilson or Butts was the "prime mover" and this Court did compare Wilson's case to other motor vehicle hijackings and found the penalty to be proportionate. The facts of Wilson are not at all similar to the facts of this particular case. Therefore, Wilson is irrelevant to a comparative proportionality review of appellant's case.

In Mize v. State, Mize was the ringleader of a loosely organized white supremacist group. Witnesses testified that Mize made all the decision for the group. Mize ordered one of his followers to murder a wayward member of the group. Mize admitted to "finishing" the victim off by shooting him in the head. The state's reliance on this case as a comparison to Ms. Gissendaner's is misplaced. First, this was essentially a retaliation murder unrelated to the domestic context. Second, Mize and his co-defendants were clearly in an agency relationship with evidence of Mize as the principal or "prime mover." Lastly, Mize clearly ordered the killing of the victim and admittedly helped to kill the victim.

Charles Harris Hill, along with James Brown and Gary Hill, broke into the victim's home

and then robbed and murdered him. Hill broke down the victim's door, Hill insisted to his co-defendant's that he wanted to harm the victim. Hill began beating the victim and tried to stab him. It is unclear if Hill or one of his co-defendant's killed the victim, the cause of death being a knife wound on the right side of the neck. This court found the death penalty to be proportionate under the facts of the case. The appendix compares Hill's sentence with similar cases which involve execution style murders or murders following invasion of the victim's home. The defendant was clearly involved in commission of the actual crime and was admittedly the instigator. It was Hill who convinced his co-defendant that the victim should be killed. Factually, Hill's case is not at all similar to Ms Gissendaner's. Indeed, it is far more aggravated and thus contributes little to a proper comparative proportionality review under the fact's of the case at hand.

Lastly, Appellee cites Smith v. State as a case for comparison for Ms. Gissendaner's sentence. There, the Appellants, a husband and wife, were charged with two counts of murder of appellant's ex-wife and her husband. Appellants plotted the death with the intent of redeeming insurance proceeds. This case is dissimilar to Ms. Gissendaner's. First, the offense of murder was committed for the purpose of receiving money. Second, there were multiple victims. Third, there was substantial evidence of a plan between the two appellants. This case is also irrelevant in the "universe" of cases that should be used in determining the proportionality of Ms. Gissendaner's sentence.

This Court has stated that "we view it to be our duty under the similarity standard to assure that no sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally." Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829 (1975). As the cases cited by Ms. Gissendaner demonstrate, the death penalty has not generally been imposed in cases similar to hers. Ms. Gissendaner's case is even less aggravated because there was no evidence that this was

a "contract killing" or that she committed the murder for monetary reasons. Furthermore, the prior cases cited indicate that the past practice among juries faced with similar factual situations has been to impose the sentence of life imprisonment. See Coley v. State, 231 Ga. 829, 835, 204 S.E.2d 612, 617 (1974).

B. Ms. Gissendaer's death sentence is not proportionate to the sentence imposed on her co-defendant.

In cases involving a co-defendant, the co-defendant's case is critical and most similar for comparison purposes. Common sense would conclude that in many cases where the co-defendant has already received a life sentence for the same offense then death would be a disproportionate sentence for the defendant. This Court's statutorily mandated proportionality review must include "special consideration of the sentences received by a co-defendant in the same crime." Allen v. State, 253 Ga. 390, 31 S.E.2d 710, 715 (1984), Carruthers v. State, 2000 WL 257773 at * 4 (March 6, 2000).[2] In the State's supplemental brief, Appellee suggests that Ms. Gissendaner's death sentence is proportionate to Gregory Owen (co-defendant) because Ms. Gissendaner is more "morally culpable." Supplemental Brief on Behalf of the Appellee by the Attorney General, p. 16.

Mr. Owen pled guilty to murder and received a sentence of life imprisonment with parole eligibility. Ms. Gissendaner, who neither committed the murder nor was even present at the scene, however, was sentenced to death. It was Mr. Owen who kidnapped the victim and took him into the woods in the middle of the night. By Mr. Owen's own admission it was he who told the victim to

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2. In Hall v. State, the defendant was convicted and sentenced to death for the felony murder of a liquor store clerk. The co-defendant and the triggerman received a life sentence following his conviction in a subsequent trial. The Georgia Supreme Court ruled that death was disproportionate because the co-defendant triggerman received a life sentence even though the same aggravating circumstance was presented to the jury in both cases. 241 Ga. 205, 244 S.E. 2d 833 (1978).

get on his knees and then hit him in the back of his head with a night stick. It was also, Mr. Owen who admitted to stabbing the victim in his neck, not once, but "maybe eight or ten times." (T. 2299). And the motive of Greg Owen was very simple -- he wanted Ms. Gissendaner all to himself. (T. 2341). In fact, in this case, co-defendant Owen's motive for eliminating the victim is just as strong as Ms. Gissendaner's.

Appellee suggests that Mr. Owen was merely a pawn and that Ms. Gissendaner was the more culpable party. Ms. Gissendaner suggests that stabbing a man in the neck "eight or ten times"does not justify the label of a "pawn." Quite simply, if Mr. Owen was deserving of life imprisonment for such an act then surely Ms. Gissendaner is also deserving of such a penalty.

C. Ms. Gissendaner does not deserve the ultimate penalty of death which is to be reserved only for the most heinous of murderers.

This Court is not limited to considering whether the sentence is disproportionate based on the crime alone: it must also consider the defendant.

This Court has recognized that the trial judge's report is a crucial source of information in conducting its review. See Stack v. State, 234 Ga. 19, 214 S.E.2d 514 (1975); Greene v. State, 240 Ga. 804, 242 S.E.2d 587 (1978). The trial judge's report in Ms. Gissendaner's case indicates factors that mitigate in favor of a punishment less than the death penalty. The Trial Judge found two specific mitigating factors: (1) The defendant has no significant history of prior criminal activity and (2) The defendant was an accomplice in a murder committed by another person and his [her] participation in the homicidal act was relatively minor. (emphasis supplied). Report of the Trial Judge of the Superior Court of Gwinnett County, Georgia, p.4.

This Court should also consider that Ms. Gissendaner is a good mother to her three children, that Ms. Gissendaner is loved and supported by friends and family members, and that Ms.

Gissendaner's children want and need her in their lives. Ms. Gissendaner's children would benefit from their mother's continued existence, and she can serve a constructive role in her childrens' lives if she is spared from the ultimate penalty of death.

This Court should decide in light of the totality of the circumstances, including evidence that Ms. Gissendaner ordered the killing or was the prime mover in the crime was based solely on the confessed triggerman's debatable testimony, that the penalty of death is too great. To uphold the death sentence for Ms. Gissendaner is patently disproportionate. There will be no penological or other purpose served by executing this woman.

ATTACHMENT C

ABG

IN THE SUPREME COURT

STATE OF GEORGIA

KELLY RENEE GISSENDANER, *Appellant* v. THE STATE OF GEORGIA, *Appellee.*	No. S00P0289

MOTION FOR RECONSIDERATION

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III. MS. GISSENDANER'S DEATH SENTENCE IS A DISPROPORTIONATE PUNISHMENT AND WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE 1, SECTION 1, PARAGRAPHS 1, 2, 11, 12, 14, AND 17 OF THE CONSTITUTION OF THE STATE OF GEORGIA, AND GEORGIA LAW ON PROPORTIONALITY

Ms. Gissendaner respectfully requests that this Court reconsider its ruling on the question of proportionality of the death sentence in this case. Proportionality review is a critical safeguard against the arbitrary and capricious imposition of death. See Evitts v. Lucey, 469 U.S. 387 (1985); Harmelin v. Michigan, 501 U.S. 957, 994 (1991). Pursuant to O.C.G.A. § 17-10-35 this Court is required to determine if the death sentence is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. "In performing the sentence comparison required by Code Ann. § 27-2537 (c)(3) [precursor to 17-10-35], this Court uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed." Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, 263 (1976), Douthit v State, 239 Ga. 81, 235 S.E.2d 493 (1977).

To assure that the death penalty is being imposed in only the most heinous cases, this Court must conduct as complete a comparison as possible with those cases in which the death penalty was not imposed, either because a jury chose not to impose it or because it was not sought by the prosecutor. See Horton v. State, 249 Ga. 871, 295 S.E.2d 281, 289 n.9 (1982), Castell v. State, 250 Ga. 776, 301 S.E.2d 234, 25 n.12 (1983). However, the cases listed in the appendix which this Court used for its proportionality review in this case all involved a sentence of death. Moreover, the cases cited by this Court, in its appendix are not the appropriate cases for consideration since all involve dissimilar crimes and dissimilar defendants for comparison.

Contrary to this Court's interpretation, Ms. Gissendaner was not arguing in her original brief

that the death sentence in this case was disproportionate merely because "... a specific defendant in an unrelated murder case received a sentence less then death...." Gissendaner v. State, supra at *12. Rather, she was correctly arguing, pursuant to Georgia law and this Court's precedent, that a complete and meaningful proportionality review must take into account not only other similar cases in which the death penalty was imposed, but must also look to similar cases where the death penalty was not imposed. See Douthit v State, 239 Ga. 81, 235 S.E.2d 493 (1977); Blake v. State, 239 Ga. 292, 236 S.E.2d 637, 644 (1977); Smith v. State, 236 Ga.12, 222 S.E.2d 308, 318 (1976). This Court was remiss in performing its statutorily- mandated duties by limiting its proportionality review to cases which solely involved death sentences. Gissendaner v. State, supra at *12. Not one of the 14 cases listed in the appendix involved a life sentence and therefore the Court failed to meaningfully distinguish Ms. Gissendaner's sentence from the many similar cases that resulted in life sentences.

Furthermore, this Court's statutorily mandated proportionality review must include "special consideration of the sentences received by a co-defendant in the same crime." Allen v. State, 253 Ga. 390, 31 S.E.2d 710, 715 (1984). This Court focuses its opinion on the fact that Ms. Gissendaner was the moving force behind the murder and hence this justifies the disparity between her sentence and that of her co-defendant. See Gissendaner v. State, supra at *13. However, the case this Court cites to support that conclusion involved a defendant who admitted to actually committing the murder. Waldrip v. State, 267 Ga. 739, 752-753, 482 S.E.2d 299 (1977). The defendant in Waldrip was the self proclaimed "moving force" and moreover his co-indictees who were present and were likely to have taken an active role in the murder were sentenced to life in prison. Id. In contrast , in this case the trial judge who heard all of the evidence in the case found that Ms. Gissendaner's role in the crime was "relatively minor." Trial Judge's Report, p. 4. The only evidence supporting

the idea that Ms. Gissandaner was the "prime mover" is the testimony of co-conspirator Gregory Owen, who is currently serving a life sentence for admitting that he, alone, repeatedly stabbed the victim in the neck causing his death.

The other cases cited in the appendix to support the Court's analysis are distinguishable from this case. For example, in DeYoung v State, 268 Ga. 780, 493 S.E.2d 157 (1997), the defendant was actually the "triggerman," the evidence clearly showed that the defendant was the "prime mover" and that he killed his mother, father and sister for money to start a new business. This Court notes in Carr v. State, 267 Ga. 547, 480 S.E.2d 583 (1997), that the fact that the defendant was the actual triggerman was important to upholding the death sentence despite the fact that the co-conspirator who was present for the murder and who actively participated in the kidnapping and urged the defendant to stab the victim received a life sentence. In Mize v State, 269 Ga. 646, 501 S.E.2d 219 (1998), the defendant who was the leader of a small racist organization was present for the murder and the evidence clearly showed that he ordered the killing and fired at least one of the shots.

In contrast, the evidence in this case does not prove that Ms. Gissendaner was the "prime mover" or that her motive was insurance money. The evidence does prove, however, that Ms. Gissendaner was not present for the murder or kidnapping, she did not participate in any torture or depravity, there was in fact no insurance money and that Mr. Owen had his own compelling motive for the killing- he wanted Ms. Gissendaner all to himself. In its proportionality review the Court failed to consider the line of similar cases in which the co-defendants or even prime movers were sentenced to life.

In Lowe v.State, 253 Ga. 308, 319 S.E.2d 834 (1984), the defendant offered to pay her boyfriend $35,000 to kill her husband. The boyfriend testified at trial in exchange for a life sentence

and Ms. Lowe was subsequently convicted and sentenced to life in prison. Lowe v. State involved an even more aggravated murder than the present case- that of a financial transaction- yet Ms. Lowe received a life sentence for her role in the crime. Id. Similarly, Ms. Hardin, who was clearly the "prime mover," hired a man to kill her husband for $500, and when that plan failed enlisted the aid of her son who did actually murder his stepfather, received a life sentence. Hardin v. State, 252 Ga. 99, 311 S.E.2d 462 (1984). See, also, State v. Stokes, 352 S.E.2d 653 (N.C. 1987) (setting aside death sentence where co-defendant, who was more deserving of death than defendant, had been sentenced to life during separate trial; Sumlin v. State, 617 S.W.2d 372 (Ark. 1981) (comparing death sentence to life sentence imposed on wife/codefendant for the same crime and vacating death sentence as disproportionate); Slater v. State, 316 So.2d 539 (Fla. 1975) (setting aside death sentence and imposing life sentences where co-defendant, the "triggerman," had been allowed to enter a plea of nolo contendere to murder charge and had been sentenced to life).

Equally important in this case is the fact that this Court in finding the "apparent depravity" of Ms. Gissendaner's character failed entirely to consider any mitigating factors in its analysis. Gissendaner v. State, supra at *13. Consideration of Ms. Gissendaner's good character as a devoted mother of three children with no prior felony record is mandated under the proportionality statute.

This Court's decision further justifies its position on the validity of Ms. Gissendaner's death sentence by noting that "Gissendaner appealed to the jury's sense of justice by making the same argument of proportionality she makes to this Court and that the jury rejected the argument by its verdict." Gissendaner at *13. Ms. Gissendaner asserts that this Court, not the jury, is the proper body to determine proportionality. The jury does not have the tools or the resources to make a determination of the proportionality of a defendant's sentence based on similar cases and similar defendants. Thus, the jury's rejection of Ms. Gissendaner's argument is entitled to no weight by this

Court.

Ms. Gissendaner therefore moves this Court to reconsider the issue of proportionality and in doing so to conduct a complete and meaningful review by comparing not only cases in which death was imposed, but similar cases in which death was not imposed.

IV DUE TO INTERVENING CIRCUMSTANCES, THE COURT SHOULD RECONSIDER ITS RULING THAT EXECUTION BY ELECTROCUTION IS NOT UNCONSTITUTIONAL.

In Enumeration of Error fifteen of her brief, Ms. Gissendaner presented a claim that imposition of the death penalty by electrocution violates the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Section I, Paragraphs I, XVII and XVIII of the Georgia Constitution. In its decision this Court rejected Appellant's claim stating "execution by electrocution is not unconstitutional." Gissendaner v. State, supra at*9. Chief Justice Benham and Justice Sears dissented to this holding.

This Court should reconsider its holding that execution by electrocution is unconstitutional due to the grant of the Application for Certificate of Probable Cause to Appeal in the capital habeas corpus case of Davis v. Head, Case No. S00A0993 (May 24, 2000),[1] and the Georgia Legislature's recent mandate that lethal injection shall be the sole method of execution for all crimes committed after May 1, 2000.[2] See O.C.G.A. §§ 17-10-33, 17-10-38, 17-10-41, & 17-10-44.

Since the United States Supreme Court's decision in In Re Kemmler, 136 U.S. 436 (1890),

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[1] In Davis, this Court granted CPC on the following question: "Whether Execution by Electrocution Constitutes Cruel and Unusual Punishment under the Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 1, Paragraph 17 of the Georgia Constitution?"

[2] In the alternative, this Court should reserve ruling on this claim until Davis is decided.

states have been given over 100 years to experiment with methods of conducting executions by electrocution. Untried when Kemmler was decided in 1890, electrocution subsequently came to be the only mode of execution used in more than half the States of the United States. That number now has dwindled from twenty-six to three, not by happenstance but through humanity. Not a single jurisdiction in the world outside of the United States practices judicial electrocution. The Georgia Legislature has recently spoken for the citizens of Georgia expressing their will to abandon the use of electrocution for all future capital offenses. In doing so, the Legislature has moved the national consensus of execution by electrocution one step closer to an absolute consensus. Moreover, it makes clear that there is a consensus in Georgia that contemporary standards of decency demand an abandonment of electrocution. In light of this pronouncement, the State of Georgia cannot continue to allow executions by electrocution. To do so will only further increase its visible brutality. This Court must prevent such a gratuitous affront to universal standards of contemporary decency.

In Fleming v. Zant, this Court held that "whether a particular punishment is cruel and unusual is not a static concept, but instead changes in recognition of the 'evolving standards of decency that mark the progress of the a maturing society.' 259 Ga. 687, 386 S.E.2d 339, 341 (1989)(quoting Penry v. Lynaugh, 109 S. Ct. 2934, 2953 (1989)). Fleming ended the execution of the mentally retarded in Georgia, holding that the practice was prohibited by the Georgia Constitution's guarantee against cruel and unusual punishment in light of a legislative pronouncement barring the execution of the mentally retarded in future capital cases. This Court's reasoning in Fleming directly applies to Ms. Gissendaner's challenge to the practice of execution by electrocution:

> To ascertain how society currently views a particular punishment, this Court, like the U.S. Supreme Court, considers objective evidence. Such evidence may include information gathered from polls or studies, data concerning actions of sentencing juries, etc. See,

> [Penry v. Lynaugh,] 109 S. Ct. at 2953. However, legislative enactments constitute the clearest and most objective evidence of how contemporary society views a particular punishment. Id. Those enactments may change from time to time and as they do those changes amount to evidence of the shifting or evolution of the societal consensus.

Id. at 341.

The legislative enactment abandoning execution by electrocution and replacing it with execution by lethal injection reflects a decision by the people of Georgia that execution by electrocution "makes no measurable contribution to accepted goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." Wyatt v. State, 259 Ga. 208, 209, 378 S.E.2d 690 (1989)(quoting Coker v. Georgia, 433 U.S. 584 (1977)). Presiding Justice Fletcher recently wrote:

> Fortunately, neither our concept of what is humane nor our concept of what is cruel and unusual punishment must remain locked in a vacuum. In this century we have witnessed rapid changes in methods of communication and transportation. Science has caused us to rethink most everything from our views on ethics and morals to our concept of space. Perhaps it is also time that Georgia rethinks its method of execution.

DeYoung v. State, 268 Ga. 780, 791-92, 493 S.E.2d 157, 168-69 (1997) (Fletcher, P.J., and Benham, C.J., concurring). The legislature has "rethought" Georgia's method of execution and expressed the will of the people on the issue of execution by electrocution. This Court must now fulfill its constitutional responsibility -- as it did in Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (1989) -- to "protect the dignity of society itself from the barbarity of exacting mindless vengeance"[3]

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[3] Ford v. Wainwright, 477 U.S. 399, 410 (1986).

by finishing what the legislature has begun and declaring execution by electrocution cruel and unusual punishment under the Georgia Constitution.

It is "time [for this Court to declare that] Georgia's current method of enforcing the death penalty and its attending consequences are [in]compatible with the dignity, morality, and decency of society's enlightened consciousness, and is [not] reflective of a humane system of justice." Wilson v. State, 271 Ga. 811, 525 S.E.2d 339, 352 (1999)(Sears, J., concurring in part and dissenting in part). This Court must reconsider its decision and declare that execution by electrocution is cruel and unusual punishment.

ATTACHMENT D

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

KELLY RENEE GISSENDANER Petitioner, v. VANESSA O'DONNEL, Warden METRO STATE PRISON, Respondent.	)	CIVIL ACTION NO. 01-CV 12008-10

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, KELLY RENEE GISSENDANER, through undersigned counsel, petitions this Court for a Writ of Habeas Corpus, pursuant to O.C.G.A. §§ 9-14-41 *et seq*. Petitioner is an indigent person currently under sentence of death. Respondent is the Warden of Metro State Prison in Dekalb County, Georgia. The allegations of this Petition are set forth as follows:

HISTORY OF PRIOR PROCEEDINGS

1. The name and location of the court that entered the judgments of conviction and sentences under attack are:

Superior Court of Gwinnett County
Lawrenceville, Georgia

2. The date of the judgment of conviction was November 18, 1998.

3. The date of the judgment of sentence was November 19, 1998.

4. Petitioner was sentenced to death.

5. At trial, Petitioner pled not guilty.

minimum fairness and reliability essential to capital cases in violation of her rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and analogous provisions of the Georgia Constitution. Accordingly, Petitioner's death sentence should be set aside.[158]

XXVII.

The lack of a uniform standard for seeking the death penalty across Georgia renders Petitioner's death sentence unconstitutional under the Supreme Court's decision in *Bush v. Gore*; the arbitrary abuse of discretion inherent in the Prosecution's decision to seek the death penalty thus violated Petitioner's rights to a fair and reliable determination of sentence as secured by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and analogous provisions of the Georgia Constitution.

426. This claim for relief is predicated on Article I, § 1, ¶¶ 1, 2, 3, 4, 5, 9, 14, 15, 16, 17, 18 of the Constitution of the State of Georgia, and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and federal and state case law interpreting each of these constitutional provisions, as well as any other law set forth throughout the body of this amended petition. The facts in support of this claim for relief are set forth as fully as possible herein. Nevertheless, the facts in support of this claim, as well as the contours of the claim itself, are necessarily incomplete due to, *inter alia*: a lack of access to materials, documents, files, information and/or evidence to which petitioner has a right under state and federal law; the deprivation of timely counsel appointed and paid by the State of Georgia; which have prevented undersigned volunteer counsel from fully and effectively investigating, developing and presenting all possible legal claims and all factual bases for such claims. Set

[158] To the extent that trial counsel failed to object at trial and/or appellate counsel failed to preserve this issue on appeal, they rendered ineffective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, § 1, ¶¶ 1, 2, 11, 12, 14 and 17 of the Georgia Constitution.

forth herein is a statement of the constitutional/legal claims of which Petitioner is aware at this time, and those facts which she knows or has reason to believe are true, despite the denial of sufficient time, resources, or access to the relevant materials, documents, files, information and/or evidence. Petitioner reserves the right to amend this claim, and/or add additional claims in a further amended petition, and/or amend the witness list, and/or seek additional discovery, and/or file additional affidavits, after she has been provided appointed and paid counsel, sufficient time for volunteer counsel to become familiar with the case, access to all relevant files, documents, information, material and/or evidence to which she is entitled under state and federal law, and after sufficient time to investigate and develop facts and witnesses in support of this and/or other claims that may arise once such counsel, time, and access have been provided.

427. Petitioner hereby incorporates into this claim for relief, by express reference, all other paragraphs contained in this amended petition and any further amended petitions to be filed by Petitioner, as well as all other pleadings filed in this case to date.

428. Petitioner hereby incorporates by express reference into the body of this claim all affidavits served at the time of filing this amended petition, as well as any to be served before, during or after the evidentiary hearing in this case.

429. Petitioner hereby incorporates by express reference into the body of this claim the testimony and/or statements and/or affidavits of all witnesses contained on the witness list served at the time this amended petition is being filed, and that of any other witnesses who may be added to such list at any later point in these proceedings.

430. Petitioner was denied the effective assistance of counsel, due process, a fair trial, equal protection, and a fair and reliable sentencing proceeding, by the lack of uniform sentencing

standards throughout the State of Georgia, in violation of her rights as guaranteed under Article I, § 1, ¶¶ 1, 2, 3, 4, 5, 9, 14, 15, 16, 17, 18 of the Constitution of the State of Georgia, and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and as such provisions are interpreted in all federal and state case law citing to, noting, or otherwise relevant to an interpretation of each of these constitutional provisions, as well as any other law set forth throughout the body of this amended petition.

431. But for these errors, the outcome would have been different at all stages of the pre-trial, trial, post-trial and appellate proceedings, also in violation of Petitioner's rights as guaranteed under Article I, § 1, ¶¶ 1, 2, 3, 4, 5, 9, 14, 15, 16, 17, 18 of the Constitution of the State of Georgia, and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and as such provisions are interpreted in all federal and state case law citing to, noting, or otherwise relevant to an interpretation of each of these constitutional provisions, as well as any other law set forth throughout the body of this amended petition.

432. Petitioner moved to preclude the prosecution from seeking the death penalty due to the standard-less and arbitrary manner in which it is sought in Gwinnett County and in the State of Georgia. The trial court quashed Petitioner's subpoena for evidence, thereby denying her a full and fair hearing. Moreover, it was established that no state standards are set forth either by the Attorney General or any other state body. The purported standards of the District Attorney's office in effect at the time are not standards at all.

433. These standards are framed solely in terms of "preferably" this, and "preferably" that, with absolutely no concrete manner in which to distinguish one case from another. The trial court viewed the issue solely as whether there were guidelines that could be said to have been

followed in *this* case in other words, whether there is any way in which the death sentence sought against Petitioner could possibly be rationalized.

434. The District Attorney's decision-making process fails even under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and analogous provisions of the Georgia Constitution. However, there can be no doubt that no meaningful standards exist to distinguish those cases where the prosecutor seeks a death sentence from those cases where the prosecutor does not. Because of the prosecution's lack of standards, Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and analogous provisions of the Georgia Constitution were violated and her death sentence must be set aside.

435. The Georgia death penalty process provides no uniform standard for determining in which cases the state will seek death sentences. The application of this unconstitutional standard to Ms. Gissendaner's case violated her rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and as such provisions are interpreted in all federal case law citing to, noting, or otherwise relevant to an interpretation of each of these constitutional provisions, as well as any other law set forth throughout the body of this Petition.

436. When fundamental rights are involved, the Equal Protection Clause of the Fourteenth Amendment requires that there be "uniform" and "specific" standards to prevent the arbitrary and disparate treatment of similarly situated people. *Bush v. Gore*, 531 U.S. 98 (2000).

437. In *Bush v. Gore*, the Supreme Court was confronted with an opinion by the Florida Supreme Court that did not set forth uniform standards in its opinion ordering a recount. The Supreme Court held that such a recount would not respect the "equal dignity owed to each

voter." *Id.* at 104.

438. The Georgia death penalty system concerns a right even more fundamental than the right to vote - the right to life. As was true in the Florida recount, Georgia's lack of statewide standards to guide prosecutors in determining which cases warrant seeking the death penalty inevitably leads to the disparate treatment of similarly situated people accused of potentially capital offenses.

439. Those principles require that the method of deciding which defendants may face the death penalty be subject to at least as much scrutiny as the process of counting votes.[159] The need for equality and non-arbitrariness when the State seeks to deprive a citizen of her life outweighs any benefits of unbridled prosecutorial discretion.

440. Since the right to life is fundamental, when a State implements a death penalty

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[159] While the Supreme Court stated that its holding in *Bush v. Gore* was limited to the facts of that case, the principles it announced are sound and must be subject to respect as precedent. The *per curium* opinion explained the narrow scope of its holding by distinguishing the somewhat unusual situation of a court-ordered statewide recount from an ordinary election. In ordinary elections, the Court said, the Equal Protection Clause does not prohibit counties from developing "different systems for implementing elections." *See Bush*, 531 U.S. at 109. One reason for this distinction is that once ballots have been cast, the "factfinder confronts a thing, not a person," and thus "[t]he search for intent can be confined by specific rules designed to ensure uniform treatment." *Id.* at 106. Also, individual counties may have "expertise" that justifies letting them choose their own methods of conducting elections. *Id.* at 109. Another explanation is that "local variety [in voting machines and procedures] can be justified by concerns about cost, the potential value of innovation, and so on" whereas a "different order of disparity" occurs when, after ballots have been cast, physically identical ballots are hand-counted according to different rules. *Id.* at 134 (Souter, J., dissenting).

These explanations, however, simply do not serve as an adequate basis for not applying the Bush Equal Protection rule to Georgia's death penalty system. Just as Florida counties can use different voting machines in their elections, Georgia circuits can certainly have separate prosecutors and can structure those prosecutors' offices differently; this allows the flexibility demanded by limited budgets and justified by local expertise, and takes into account the potential for innovation inherent in a system of local control. With regard to the Court's distinction between a "thing" and "person," although it is true that prosecutors charged with deciding when to seek the death penalty confront people and not things, this does not diminish the Equal Protection Clause's requirement of non-arbitrariness. While it might be easier to design standards about whether to count "hanging chads" as legal votes, it is certainly possible to write standards to guide prosecutors in deciding whom to prosecute. *See, e.g., United States Attorneys' Manual* §9-10.010 et. seq. (1995) (laying out "federal protocol" for capital cases); U.S. Dep't of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review* (2001), at http://www.usdoj.gov/dag/pubdoc/

system, it must establish mechanisms to ensure that the system values the lives of its citizens equally. In *Bush*, the Supreme Court noted that "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[160] By the same reasoning, since the Constitution has ensured the right to life and to the equal protection of the laws, a State may not, by arbitrary and disparate treatment, value one person's life over that of another.

441. The duty of this Court to protect against the arbitrary taking of Mr. Gissendaner's life is heightened by the fact that, unlike the right to vote,[161] the right to life is contained in the text of the Constitution: The Fifth and Fourteenth Amendments provide that neither the federal government nor the states shall deprive any person of "life, liberty, or property" without due process of law. U.S. Const. amend. V; amend. XIV, §1. Indeed, the United States Supreme Court has long recognized the fundamental nature of the right to life, particularly in the context of the death penalty.[162]

442. In addition, Georgia's lack of standards to ensure non-arbitrary imposition of the death sentence is sufficient in itself to establish an Equal Protection violation; a showing of

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deathpenaltystudy.htm

[160] *Bush*, 531 U.S. at 104-05.

[161] In *Bush v. Gore* the Supreme Court conceded that the right to vote is not contained in the text of the Constitution. *See id.* at 104 ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."). The Court, however, granted relief after holding that "[h]istory has now favored the voter," and since every state now chooses its electors through a statewide election, "the right to vote as the legislature has prescribed is fundamental." *See id.*

[162] *See Furman v. Georgia*, 408 U.S. 238, 359 (1972) ("because capital punishment deprives an individual of a fundamental right (i.e., the right to life), . . . the State needs a compelling interest to justify it") (citation omitted).

intentional discrimination against a protected class is not required.[163] Unlike these traditional Equal Protection claims of intentional discrimination against a protected class, claims like this one and the one in *Bush* are not based on an individual act of discrimination, but rather challenge a system in which uncontrolled official discretion makes arbitrary and unequal treatment inevitable.

443. Georgia has 159 counties, administratively grouped into 48 and now 49 circuits. (These circuits are further administratively grouped into 10 judicial districts.) Each circuit has an elected District Attorney, and it is this prosecutor who decides whether to seek the death penalty in any given case.

444. Unlike most states, Georgia has an exceptionally broad definition of murder. O.C.G.A. 16-5-1 (defining murder as causing the death of another with "malice aforethought, either express or implied or caus[ing] the death of another human being."). There is no crime of "capital murder" in Georgia as there is in other states, and Georgia does not have second and third degree murder. O.C.G.A. 17-10-30 (b) sets out ten aggravating factors, one of which must be found before the death penalty can be imposed, but those factors are so broad that they apply to virtually any murder. For example, any murder committed in the commission of another capital felony, aggravated battery, burglary or arson in the first degree is death eligible. O.C.G.A. 17-10-30 (b)(2). Any murder committed for the "purpose of receiving money or any other thing of monetary value" is death eligible. O.C.G.A. 17-10-30 (b)(4). And a catch-all provision, subsection (b)(7), allows imposition of the death penalty if the murder was

[163] *See Bush*, 531 U.S. at 106. While in traditional claims of discrimination against individuals, courts require evidence of discriminatory intent by a state actor in that particular case, *see, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279 (1987), in *Bush* the Court did not require any such showing.

"outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Thus, Georgia prosecutors can seek the death penalty in virtually any murder case. However, Georgia prosecutors do not seek death in the overwhelming number of eligible cases.

445. Georgia law provides no standards to guide the District Attorneys in their decisions as to when to seek the death penalty. Instead, the prosecutor in each circuit makes this decision on her or her own, according to unwritten and widely varying standards. The result is that whether a person charged with a capital crime will face the death penalty depends largely on arbitrary factors such as the county in which the crime occurred, the quality of the court-appointed lawyer for the accused, and, even more disturbingly, the race of the victim.[164]

446. For numerous reasons, the case for which Ms. Gissendaner was sentenced to death is far less aggravated than other cases in which death has been imposed, cases in which life imprisonment without the possibility parole has been imposed, cases in which life with the possibility of parole has been imposed, and even cases that have been resolved with convictions of manslaughter and sentences of terms of years have been imposed.

447. Cases more aggravated or as aggravated as Ms. Gissendaner's in which sentences of life without parole, life with parole, or a lesser sentence was imposed include, but are not limited to, the following:

1. Sidney Dorsey was convicted of ordering the execution-style murder of Sheriff-elect Derwin Brown in order to prevent an investigation of corruption at

[164] *See McCleskey v. Kemp*, 481 U.S. 279 (1987) (allowing Georgia to carry out executions even though a person is four times more likely to be sentenced to death if the victim was white than if the victim was African-American).

the DeKalb County Sheriff's Office during Dorsey's tenure, and 11 counts of racketeering and other corruption. Nonetheless, the District Attorney for the Stone Mountain Judicial Circuit did not seek the death penalty. *See* Don Plummer, *DA Rules Out Death Penalty in Brown Killing*, Atlanta Journal-Constitution, Feb. 28, 2002, at D1.

2. Phillip Hayes strangled his victim, the mother of his child, to death. He then coerced a friend to help him as he burned her body beyond recognition, wrapped the charred remains together with a cinder block in a comforter, tied it together with electrical cord and threw it into a lake. He told his accomplice that he had "handled his personal business" that, two months previously, he had beaten her so badly her condition had required hospitalization. The district attorney did not seek the death penalty in that case and Hayes was sentenced to life in prison for malice murder and twelve months, to be served concurrently, for family violence battery. *Hayes v. State*, 173, 174, 562 S.E. 2d 498, 500 (2002).

3. Paul Wilson murdered his former girlfriend when she came to their house to retrieve her belongings and Christmas gifts so she could return to her former husband. Blood spatters on the walls and doors of the house show Wilson struck her on the head at least four times while she was seated on the floor with her hands bound with electrical cord. This trauma fractured her skull and resulted in her death. Her friends, concerned for her safety, had warned her against going to the house alone. The district attorney did not seek the death penalty in that case. Wilson was sentenced to life in prison without the possibility of parole for malice

murder, ten years for false imprisonment, and another twenty-four months for related crimes, to be served consecutively. *See Wilson v. State*, 275 Ga. 53, 562 S.E.2d 164 (2002).

4. Khamphay Somchith and his victim had lived together for about four years and had one son. He had moved out eight months before the murder. On the day before he shot the victim, he purchased a gun. On the day of the shooting, he took their child out for a while, then came back to the apartment and shot the victim once in the chest, piercing her heart, once through the arm she had thrown up in the futile effort to protect herself and into her lung, once down her lip and through her chin, and once more, a contact shot through her left temple. Earlier that month, he had stabbed her in the chest and, in a separate incident he had attacked her new boyfriend with a crowbar. He was sentenced to life in prison for her murder. *See Somchith v. State*, 272 Ga. 261, 527 S.E.2d 546 (2000).

5. Andrew Tyrone Miller murdered his wife after she kicked him out of the house for having affairs with other women in their bed while she was at work. On the day of the murder, he came to the house, packed up her clothes, and the two of them left in her car. Her body was found in the driver's seat of her car on a rural dirt road. Mr. Miller had shot her in the head, neck, chest and abdomen with a 9mm pistol. In a previous incident, Mr. Miller had broken into the house, strewn her clothes about, and shot at her. He was sentenced to life in prison for malice murder and five years each, to run consecutively, for other related crimes, including possession of a firearm by a convicted felon. *See Miller v. State*, 275

Ga. 32, 561 S.E.2d 810 (2002).

6. Wilbur Smith murdered his live-in girlfriend after she took her three children and left him. He stalked her, hid behind some bushes when she went to stay with a friend and, when she came out into the yard, began shooting at her. As she screamed and ran back into the house, he followed her, still shooting. She died of a gunshot wound to the heart. He was found guilty of malice murder and sentenced to life in prison. *See Smith v. State*, 267 Ga. 88, 475 S.E.2d 613 (1996).

7. Toney Massengale beat his girlfriend in the face and strangled her causing her death by asphyxiation. Using a telephone cord and an extension cord, he tied her body into a fetal position and buried it in a shallow grave. He was found guilty of malice murder and sentenced to life in prison. *See Massengale v. State*, 264 Ga. 51, 441 S.E.2d 238 (1994).

8. Matthew Wessner had threatened to kill his ex-wife and her lover many times before he finally shot and killed them both. The Wessners were married ten years and had two children. Mrs. Wessner's relationship with the second victim began during the marriage and was instrumental in causing the Wessner's divorce. Mr. Wessner broke into his ex-wife's apartment while she and her lover were sitting on the couch in the living room talking. She tried to hide in the closet in her bedroom but he pulled her out. As she pleaded for her life, he shot her twice, killing her. He then shot her lover twice in the back of the head and once in the body, killing him. He was sentenced to two concurrent life sentences for the murders. *See Wessner v. State*, 236 Ga. 162, 223 S.E.2d 141 (1976), *overruled on*

other grounds, *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981).

9. From the day of their separation until the day he killed her, Jackie Jay Roller threatened and harassed his ex-wife. Finally, he stopped her car in the supermarket parking lot she always cut through on her way to work. Witnesses saw them standing outside their vehicles, parked side by side, shouting at each other. A witness heard the victim cry out "please don't do that." After Roller's truck drove off, the victim was found dead in a pool of blood on the ground, shot in the back. He was found guilty of felony murder and possession of a firearm by a convicted felon and sentenced to life in prison plus five years, consecutively. *See Roller v. State*, 265 Ga. 213, 453 S.E.2d 740 (1995).

10. Clarence Smith and his girlfriend had dated for two years. Three months after they broke up, she began dating another man. Two weeks before the murder, Smith threatened to kill them both. On the morning of the murder, he broke into the apartment where his victims were sleeping. He shot the boyfriend eleven times with a 9mm pistol, killing him. He then hit his former girlfriend in the head with the pistol, leaving a wound requiring 10 stitches to close and kicked her in the side, requiring three stitches. When she escaped by running to her sister's apartment, he left. The police found him hiding in a shed behind another ex-girlfriend's house. He was found guilty of malice murder and sentenced to life imprisonment plus ten years for aggravated assault, to be served consecutively. *See Smith v. State*, 270 Ga. 123, 508 S.E.2d 173 (1998).

11. Emmanuel Fletcher murdered his former girlfriend's new boyfriend. Mr.

Fletcher had dated his ex-girlfriend for a couple of years. After they broke up, she began dating a man she met at her place of employment. Mr. Fletcher continued to telephone her and profess his love. He threatened the new boyfriend and even went to their workplace and insisted their boss keep them apart at work or he would kill the new boyfriend. On the day of the murder, the couple was sitting on the victim's sister's front steps. Mr. Fletcher approached and began hitting his victim with his fists before fatally stabbing her. He inflicted numerous stab wounds, even after the victim was on the ground, including two stab wounds in the heart, one in the aorta and one in each lung. Mr. Fletcher was sentenced to life in prison for malice murder. *See Fletcher v. State*, 273 Ga. 737, 545 S.E.2d 921 (2001).

12. William Culled Cash and his wife had been married, divorced, remarried, and separated in the course of two years. He murdered her during a period when they were separated and she had filed for divorce. He threatened to kill her when she began seeing another man. She filed a complaint against him for trespass. He bought a gun and told her co-workers he would kill her. The next day, he broke into her house and killed her with a single gunshot wound. He was sentenced to life in prison for the murder and an additional twenty years for burglary. *See Cash v. State*, 258 Ga. 460, 368 S.E.2d 756 (1988).

The arbitrary and disparate imposition of the death sentence on Petitioner is clearly evident when one compares her case to the cases of persons executed by the State of Georgia since the death penalty was reinstated in 1973.

ATTACHMENT E

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

KELLY RENEE GISSENDANER, Petitioner, v. THALRONE WILLIAMS, Warden, Metro State Prison, Respondent.	)	Habeas Corpus Case No. 01-CV-12008

PETITIONER'S POST-HEARING BRIEF

Comes now the Petitioner, Kelly Renee Gissendaner, who, through undersigned counsel, submits this post-hearing brief in support of her petition for a writ of habeas corpus.[1] This brief concentrates on the evidence adduced at the evidentiary hearings held in this matter on December 13-14, 2004, and focuses in particular on State misconduct, the false testimony of the state's key witness – co-defendant Gregory Bruce Owen – and the ineffective assistance of Ms. Gissendaner's trial counsel.

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[1] References and exhibits in this brief will be cited as follows:

T. ___ = Trial Proceedings
Sent. T. ___ = Sentencing
HT ___ = Habeas Hearing Transcript
PX ___ at HT ____ = Petitioner's Exhibit No. and page location
PX ___ at HT (___) = Petitioner's Sealed Exhibit No. and internal document page number
RX ___ at HT ____ = Respondent's Exhibit No. and page location

Claim III
Petitioner's Sentence of Death is Disproportionate

In light of the new evidence before this Court, Ms. Gisssendaner's sentence of death is clearly unconstitutionally disproportionate to the life sentence of her co-defendant Owen. This issue was presented to the jury at trail and to the Supreme Court of Georgia on direct appeal. We now know that much of the evidence relied upon by both the jury and the Supreme Court was false. As a result of the combined affects of perjured testimony, State misconduct and ineffective assistance of counsel, this Court should reassess the proportionality claim. In light of the true facts, Owen is clearly more culpable or at least as culpable as Ms. Gissendaner. The disparity in punishment is no longer constitutionally justifiable.

IV. CONCLUSION

WHEREFORE, Petitioner Kelly Renee Gissendaner prays that this Court grant the writ of habeas corpus, vacating her conviction and/or sentence of death, and grant any other such relief as this Court deems appropriate.

Respectfully submitted,

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COUNSEL FOR MS. GISSENDANER

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document on this day U.S. mail to counsel for Respondent at the following address:

Sabrina Graham

Assistant Attorney General

132 State Judicial Building

40 Capitol Square, S.W.

Atlanta, Georgia 30334-1300

This the 3rd October, 2005.

Thomas Dunn/TCP

Counsel for Ms. Gissendaner

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

KELLY RENEE GISSENDANER, Petitioner, v. THALRONE WILLIAMS, Warden, Metro State Prison, Respondent.	)	Habeas Corpus Case No. 01-CV-12008

PETITIONER'S REPLY BRIEF

Comes now the Petitioner, Kelly Renee Gissendaner, who, through undersigned counsel, submits this Reply to Respondent's Post-Hearing Brief (RPHB). This reply focuses upon Respondent's misrepresentation of the evidence, as well as the inapposite and incorrect legal arguments propounded in his brief.

I. State Misconduct Deprived Petitioner of a Fair Capital Trial and Sentencing Proceeding

On the eve of trial, the prosecution team interviewed Owen one last time before he testified against Ms. Gissendaner. PX 53 at HT 1584 (October 21, 1998, interview of Owen by the prosecution team). The State wrongfully withheld material exculpatory evidence contained in the prosecution team's contemporaneous notes of this interview of Owen. PX 49 at HT 712 and PX 50 at HT 725. The State affirmatively represented – without qualification – that Owen

III. Res Judicata Does Not Bar Petitioner's Proportionality Claim.

Respondent incorrectly asserts that Petitioner's claim that her sentence is unconstitutionally disproportionate is barred by the doctrine of *res judicata* because it was presented on direct appeal to the Georgia Supreme Court.[7] The doctrine of *res judicata* ordinarily prevents a court from addressing an issue that previously has been adjudicated. However, in *Walker v. Penn*, 271 Ga. 609, 523 S.E.2d 325 (1999), the Georgia Supreme Court made clear that *res judicata* is not an absolute bar where review of the claim is necessary to avoid a miscarriage of justice: "While an issue actually litigated and decided on direct appeal is precluded from being relitigated on habeas corpus, a narrow exception has been carved where petitioner can show that the writ is necessary to avoid a miscarriage of justice." *Walker,* 523 S.E.2d at 326. As such, this Court is free to consider the merits of even those claims addressed on direct appeal to the extent necessary to avoid a miscarriage of justice.

In Ms. Gissendaner's case, review of her proportionality claim is necessary to avoid a miscarriage of justice given the extreme sanction involved, death, and the

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[7] Although Respondent's assertion that Ms. Gissendaner's claim regarding her death sentence being disproportionate reads more like a proposed order than an argument in a brief, Petitioner will assume that he meant it as the latter.

disproportionate nature of Petitioner's sentence. Petitioner did not participate in the actual killing of her husband. Her co-defendant, Greg Owen, carried out this crime with the aid of another person unknown to Ms. Gissendaner. Owen pled guilty and was sentenced to life imprisonment, with a contract not to seek parole for 25 years, in exchange for his testimony against Ms. Gissendaner. Ms. Gissendaner suffers from organic brain damage such that her ability to "mastermind" the murder of Doug Gissendaner, as the state alleged, was impaired. Accordingly, executing Petitioner would constitute a gross miscarriage of justice for purposes of the Court's *res judicata* analysis under *Walker*.

This Court and the United States Supreme Court have held that the imposition of the death penalty is unconstitutional and disproportionate if it is imposed in a case contained in a class of cases that so rarely get the death penalty that the capital sentence is freakish or wanton. *See e.g. Coker v. Georgia*, 433 U.S. 584 (1977); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974). Courts have recognized that there are certain cases in which the death penalty is simply not warranted or permissible. If a sentence is disproportionate, then the offender is actually innocent of the death penalty and cannot lawfully be subjected to capital punishment. *See Sawyer v. Whitley*, 112 S. Ct. 2514, 2522 (1992). The unique nature of the crime committed and the attributes of Ms. Gissendaner render her

death sentence disproportionate. Georgia criminal defendants more culpable than Petitioner are routinely given a sentence less than death. In numerous other cases with similar or worse facts, the defendant received a sentence less than death.[8] By proving her proportionality claim, Petitioner demonstrates that she is actually innocent of the death penalty. Because executing someone who is actually innocent of the death penalty would be a miscarriage of justice, Petitioner's proportionality claim is not barred by the doctrine of *res judicata*.

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[8] *See e.g. Robinson v. State*, 278 Ga. 31, 597 S.E.2d 386 (2004) (grocery store gunshot murder preceded by two robberies); *Carero v. State*, 277 Ga. 867, 596 S.E.2d 619 (2004) (grocery store gunshot murder preceded by two robberies) (co-defendant of *Robinson*); *Castleberry v. State*, 274 Ga. 290, 553 S.E.2d 606 (2001) (gunshot murder of service station owner during robbery); *Worthem v. State*, 270 Ga. 469, 509 S.E.2d 922 (1999) (gunshot murder of convenience store employee); *Rushin v. State*, 269 Ga. 599, 502 S.E.2d 454 (1998) (Thanksgiving day gunshot murder of convenience store employee); *Tolver v. State*, 269 Ga. 530, 500 S.E.2d 563 (1998) (less culpable participant in gunshot murder of convenience store clerk); *White v. State*, 278 Ga. 355, 602 S.E.2d 594 (2004) (gunshot murder of store owner during robbery); *Ivey v. State*, 277 Ga. 875, 596 S.E.2d 612 (2004) (gunshot murder of fast food restaurant employee); *Bibbs v. State*, 275 Ga. 659, 571 S.E.2d 770 (2002) (gunshot murder of hand-gun owner); *Rouse v. State*, 275 Ga. 605, 571 S.E.2d 353 (2002) (gunshot murder of store manager); *Tesfaye v. State*, 275 Ga. 439, 569 S.E.2d 849 (2002) (gunshot murder of liquor store employee accompanied by kidnaping); *Gosdin v. State*, 272 Ga. 205, 528 S.E.2d 230 (2000) (gunshot murder of army surplus store cashier by neo-Nazi); *Turtle v. State*, 271 Ga. 440, 520 S.E.2d 211 (1999) (gunshot murder of pawn shop owner); *Quijano v. State*, 271 Ga. 181, 516 S.E.2d 81 (1999) (gunshot murder of jewelry store employee); *Carr v. State*, 279 Ga. 271, 612 S.E.2d 292 (2005) (gunshot murder of laundromat coin servicemen); *Wilson v. State*, 276 Ga. 674, 581 S.E.2d 534 (2003) (gunshot murder of car rental store manager); *Johnson v. State*, 275 Ga. 538, 570 S.E.2d 289 (2002) (gunshot murder of liquor store employee); *Bryant v. State*, 270 Ga. 266, 507 S.E.2d 451 (1998) (gunshot murder of convenience store employee); *Matthews v. State*, 268 Ga. 798, 493 S.E.2d 136 (1997) (gunshot murder of general store employee). In short, there are dozens, if not hundreds, of cases in which criminal defendants who committed similar or even far more heinous crimes received a sentence less than death. For further examples, see Petitioner's post-hearing opening brief at pp. 123-126.

Furthermore, the doctrine of *res judicata* only applies to the adjudication of the "same issues." *Head v. Carr,* 273 Ga. 613 (Ga. 2001). Petitioner's habeas corpus petition does not raise the "same issues" as previously raised because the availability of an abundance of mitigating evidence in petitioner's case was not available for the Court's review on direct appeal.[9] Even if this Court finds the issues to be the "same," the Georgia Supreme Court has indicated that there may be circumstances in which a second proportionality review would be appropriate. *See Fleming v. Zant,* 259 Ga. 687, 688, 396, S.E.2d 339, 340 (1989). Ms. Gissendaner's case presents exactly such a case. Georgia statutory law requires the Court to consider "both the crime *and the defendant*" when reviewing the proportionality of a death sentence. O.C.G.A. § 17-10-35 (2005) (emphasis added). In Petitioner's case, the Court arbitrarily imposed the sentence of death generally for the nature of the crime committed. However, Petitioner further contends that a sentence of death in this case is even more disproportionate because the Supreme Court could not and did not evaluate all of the evidence relevant to Petitioner's sentencing. The Court was unable to review the new critical evidence related to Petitioner's history of sexual abuse and her resulting mental

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[9] Petitioner similarly argues that the claims enumerated in section I of Respondent's brief also are not barred by the *res judicata* doctrine, and Petitioner does not abandon these claims or concede that they are barred.

illness and brain damage, among other things.[10] Thus, the Court could not compare Petitioner's case to cases similar in terms of both the nature of the crime and the defendant as required by statute.

Because the Supreme Court was unaware of Petitioner's relevant background, its review of Petitioner's proportionality claim on direct appeal was insufficient. Duty and justice require this Court to review the proportionality claim while considering all of the newly presented, relevant information. Under these circumstances, upholding the death sentence in Petitioner's case would be arbitrary and capricious and thus would violate Petitioner's constitutional rights.

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[10] New evidence generally is any evidence not adduced at trial. *See, e.g., Gomez v. Jaimet*, 350 F.3d 673, 679 (7th Cir.2003) ("new" evidence does not need to be newly available, just newly presented); *Griffin v. Johnson*, 350 F.3d 956,963 (9th Cir. 2003) (same); *Garcia v. Portda*, 334 F. Supp. 2d 446,454 (S.D.N.Y. 2004) (same).

ATTACHMENT F

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

KELLY RENEE GISSENDANER,	*	
	*	CIVIL ACTION NO. 01 CV 12008-10
Petitioner,	*	
v.	*	
	*	CAPITAL HABEAS CORPUS
THALRONE WILLIAMS, Warden, Metro State Prison,	*	
	*	
	*	
Respondent.	*	

FINAL ORDER

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PURSUANT TO O.C.G.A. § 9-14-49

COMES NOW before the Court the Petitioner's Amended Petition for Writ of Habeas Corpus as to her conviction and sentence in the Superior Court of Gwinnett County. Having considered the Petitioner's Amended Petition for Writ of Habeas Corpus (the "Amended Petition"), the Respondent's Amended Answer, relevant portions of the trial record, evidence admitted at the hearing on the merits, and the arguments of counsel, the Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49 and denies the petition for writ of habeas corpus as to the conviction.

improper arguments to the jury, this claim was raised and rejected on direct appeal in Gissendaner v. State, 272 Ga. at 712-15(10) (13). To the extent that this claim addresses the failure to disclose juror misconduct and misconduct by the trial court, these claims were not raised on direct appeal, and the Court finds these aspects of the claim procedurally defaulted. Petitioner has failed to show cause and actual prejudice of a miscarriage of justice sufficient to overcome the procedural default. To the extent this claim concerns the alleged withholding of statements by co-defendant Greg Owen from Petitioner's trials counsel, the circumstances surrounding the making of such statements, and the introduction by the state of the allegedly false testimony of Owen, this claim is properly before the Court and is addressed in section III.D.1.

In Ground ¶ 26, Petitioner alleges the application of the Unified Appeal Procedure as unconstitutional on its face and as applied to Petitioner.

Finding As To Ground ¶ 26: This claim was raised and rejected on direct appeal in Gissendaner v. State, 272 Ga. at 716(18).

In Ground ¶ 27, Petitioner alleges the death penalty in Georgia is imposed arbitrarily and disparately.

Finding As To Ground ¶ 27: This claim was raised and rejected on direct appeal in Gissendaner v. State, 272 Ga. at 719(20).

In Ground ¶ 29, Petitioner alleges that the "trial court erred in permitting the prosecution to introduce substantial inflammatory and prejudicial so-called 'victim impact' testimony."

ATTACHMENT G

IN THE SUPREME COURT OF GEORGIA

KELLY RENEE GISSENDANER, Petitioner, v. THALRONE WILLIAMS, Warden, Metro State Prison, Respondent.	CAPITAL HABEAS CORPUS DeKalb Co. Superior Court Case No. 01-CV-12008

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

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case.

IV. Res Judicata does not bar petitioner's proportionality claim.

The habeas court erred in finding Ms. Gissendaner's proportionality claim to be procedurally barred because it was presented on direct appeal to the Georgia Supreme Court. Res judicata ordinarily prevents a court from addressing an issue previously adjudicated. In Walker v. Penn, 271 Ga. 609 (1999), however, this Court found that res judicata is not an absolute bar where review is necessary to avoid a miscarriage of justice: "While an issue actually litigated and decided on direct appeal is precluded from being relitigated on habeas corpus, a narrow exception has been carved where petitioner can show that the writ is necessary to avoid a miscarriage of justice." Walker, 523 S.E.2d at 326.

In Ms. Gissendaner's case, review of her proportionality claim is necessary to avoid a miscarriage of justice given the extreme sanction involved, death, and the disproportionate nature of Petitioner's sentence. Petitioner did not participate in the actual killing of her husband. Her co-defendant, Greg Owen, carried out this crime with the aid of another person unknown to Ms. Gissendaner. Owen pled guilty and was sentenced to life imprisonment, with a contract not to seek parole for 25 years, in exchange for his testimony against Ms. Gissendaner. Ms. Gissendaner suffers from organic brain damage such that her ability to "mastermind" the murder of Doug Gissendaner, as the state alleged, was impaired.

Accordingly, executing Petitioner would constitute a gross miscarriage of justice for purposes under Walker.

This Court and the United States Supreme Court have held that the imposition of the death penalty is unconstitutional and disproportionate if it is imposed in a class of cases that so rarely get the death penalty that the capital sentence is freakish or wanton. See Coker v. Georgia, 433 U.S. 584 (1977); Gregg v. State, 233 Ga. 117 (1974). Courts have recognized that there are certain cases in which the death penalty is not warranted or permissible. If a sentence is disproportionate, then the offender is actually innocent of the death penalty and cannot lawfully be subjected to capital punishment. See Sawyer v. Whitley, 112 S. Ct. 2514, 2522 (1992). The unique nature of the crime committed and the attributes of Ms. Gissendaner render her death sentence disproportionate. Georgia criminal defendants more culpable than Ms. Gissendaner routinely are given sentences less than death.

By proving her proportionality claim, Ms. Gissendaner demonstrates that she is actually innocent of the death penalty; executing someone in such circumstance would be a miscarriage of justice. This claim is not barred by the doctrine of res judicata, which only applies to the adjudication of the "same issues." Head v. Carr, 273 Ga. 613 (Ga. 2001). Petitioner's habeas corpus petition does not raise the "same issues" as previously raised because an abundance of both

fact and mitigating evidence was not available for this Court's review on direct appeal. Even if this Court finds the issues to be the "same," the Court has indicated that there may be circumstances warranting a second proportionality review. Fleming v. Zant, 259 Ga. 687, 688 (1989). Ms. Gissendaner presents exactly such a case. Georgia statutory law requires the Court to consider "both the crime and the defendant" when reviewing the proportionality of a death sentence. O.C.G.A. § 17-10-35 (2005) (emphasis added). Ms. Gissendaner's sentence of death is arbitrary and disproportionate because the Supreme Court could not and did not evaluate the new, critical evidence of Greg Owen's false testimony, and Ms. Gissendaner's history of sexual abuse and the resulting mental illness and brain damage, among other things. The Court's statutory review of Petitioner's proportionality claim on direct appeal therefore was insufficient. Duty and justice require this Court to review the proportionality claim considering the newly presented, relevant information. Under these circumstances, upholding the death sentence in Petitioner's case would be arbitrary and capricious in violation of Ms. Gissendaner's constitutional rights.

V. Other claims.

In the interest of brevity and in adhering to the 60 page limit imposed upon the instant application, Ms. Gissendaner has only addressed the most egregious errors made in her case. The absence of briefing on any issue raised in her

ATTACHMENT H

IN THE SUPREME COURT OF GEORGIA

KELLY RENEE GISSENDANER, Petitioner, v. THALRONE WILLIAMS, Warden, Metro State Prison, Respondent.	)	CAPITAL HABEAS CORPUS Case No. S07E1490

MOTION FOR RECONSIDERATION

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MOTION FOR RECONSIDERATION

KELLY RENEE GISSENDANER, by and through undersigned counsel, and pursuant to Rule 27 of this Court, respectfully requests that this Court reconsider its decision denying her application for a Certificate of Probable Cause (CPC) to appeal the habeas corpus court's denial of relief. Reconsideration is necessary because this Court's order denying CPC to appeal ignored fundamental aspects of Ms. Gissendaner's case and distorted governing principles of law. A copy of this Court's opinion denying CPC is attached hereto as Appendix A. The state habeas order denying relief is attached as Appendix B. In support of this motion, Ms. Gissendaner shows and states the following:

Ms. Gissendaner's sentence is unconstitutionally disproportionate and arbitrarily imposed in violation of her state and federal constitutional rights and established Supreme Court precedent.

When the United States Supreme Court initially banned the use of the death penalty in 1972, primary among its reasons was the arbitrariness of its application. Furman v. Georgia, 408 U.S. 238 (1972). Without clarity about the consistency of the application of capital punishment, the death penalty became untenable and was subject to "wanton[]" and "freakish[]" imposition, according to Justice Potter Stewart. Furman, at 310 (Stewart, J., concurring). Justice Stewart also found that the death sentences at issue were "cruel and unusual in the same way that being

struck by lightning is cruel and unusual." Id. at 309.

The Supreme Court later upheld Georgia's new death penalty scheme since it aimed at eliminating arbitrariness through narrowing factors that limited application of capital punishment to only the most aggravated homicides, and since it came with the promise of careful proportionality review by Georgia's Supreme Court. Gregg v. Georgia, 428 U.S. 153, 196-98 (1976). The latter is required under Georgia law; the Supreme Court must "review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases." Id. at198; O.C.G.A. § 17-10-35(a).

In Zant v. Stephens, the United States Supreme Court again emphasized the necessity of proportionality review to "protect against the wanton and freakish imposition of the death penalty":

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and assure proportionality. ... As we noted in *Gregg,* we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances.

462 U.S. 862,876; 890 (1983)(internal citations omitted). The court also discussed the need for effective proportionality review to include a comparison of cases in which both death and life sentences were imposed. Id. at 889 n.26, 880 n.19.

Unfortunately, however, the promise of such review has lapsed. Proportionality review by this Court has deteriorated and is no longer reliable. This Court has failed to ensure proper review of cases, instead performing only perfunctory and meaningless oversight when such review merits the most careful and precise scrutiny. As a result, capital process in Georgia remains arbitrary and capricious in violation of the Eighth Amendment and other state and federal constitutional guarantees. The same arbitrariness recognized in Furman lives on today in the state of Georgia. Individuals convicted of substantially similar crimes are not accorded substantially similar punishment. The defining principle of Furman remains good law: a death penalty system that yields arbitrary results is unconstitutional.

Justice John Paul Stevens recently addressed this issue squarely in describing the Georgia Supreme Court's review process:

> Rather than perform a thorough proportionality review to mitigate the heightened risks of arbitrariness and discrimination in this case, the Georgia Supreme Court carried out an utterly perfunctory review. Its undertaking consisted of a single paragraph, only the final sentence of which considered whether imposition of the death penalty in this case was proportionate as compared to the sentences imposed for similar offenses. And even then the

> court stated its review in the most conclusory terms: "The cases cited in the Appendix support our conclusion that [petitioner's] punishment is not disproportionate in that each involved a deliberate plan to kill and killing for the purpose of receiving something of monetary value." Id., at 782, 653 S. E. 2d, at 447–448. The appendix consists of a string citation of 21 cases in which the jury imposed a death sentence; it makes no reference to the facts of those cases or to the aggravating circumstances found by the jury.

Walker v. Georgia, 2008 WL 2847268, 2 (U.S. Ga. 2008) (Statement of Stevens, J., respecting the denial of the petition for writ of certiorari).

Justice Stevens went on to admonish the Georgia Supreme Court for failing to expand its proportionality inquiry to include cases in which either the jury imposed a life sentence or the state did not even seek death, since "[c]ases in both of these categories are eminently relevant to the question whether a death sentence in a given case is proportionate to the offense." Id. at 3 (citation omitted). Justice Stevens further concluded: "The Georgia Supreme Court's failure to acknowledge these or any other cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations." Id. (citation omitted).

The same sort of perfunctory review described by Justice Stevens characterized this Court's proportionality review in Ms. Gissendaner's case. In total, the Court cited 14 cases (two of which involved the same defendant for the same crime) in support of its holding that the death sentence was not

disproportionate. Shockingly, of these 13 cases, one death sentence already had been overturned in habeas corpus proceedings, and another was overturned in habeas corpus proceedings less than a year later. See Tyler v. Kemp, 755 F.2d 741 (11th Cir.), *cert. denied*, 474 U.S. 1026 (1985) (overturning death sentence after finding defense counsel ineffective for failing to present mitigation evidence); Romine v. Head, 253 F.3d 1349 (11th Cir. 2001), *cert. denied*, 535 U.S. 1011 (2002).

Moreover, in another of the cases cited, Smith v. State, 236 Ga. 12 (1976), a husband and wife were convicted and sentenced to death for the murders of the wife's ex-husband and his new wife. While both defendants' death sentences were affirmed on appeal, only Mr. Smith's sentence was carried out. His wife, Rebecca Smith Machetti, was granted sentencing relief in federal habeas corpus proceedings based on violations of her Sixth and Fourteenth Amendment rights to an impartial jury. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983). The same claim was pled by Mr. Smith in a successor habeas petition was deemed waived, and he was executed in 1983. Smith v. Zant, 250 Ga. 645 (1983).

Of the remaining 10 cases, four involved the killing of two or more people (as did the Smith case), and therefore they are clearly distinguishable. And of the

six cases left, all involved very different factual and legal scenarios such that they are clearly distinguishable as well. In none of the cases was the defendant sentenced to anything other than death.

For a time following Gregg, the Georgia Supreme Court considered cases resulting in life sentences when conducting proportionality review, and the United States Supreme Court duly noted this practice. See Gregg, 429 U.S. at 205 n.56 (noting that the Supreme Court of Georgia "does consider appealed murder cases where a life sentence has been imposed" in conducting its proportionality review); Zant, 462 U.S. at 889 n.19 (quoting the Supreme Court of Georgia's statement in Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, 263 (1976) that "[i]n performing the [statutorily mandated proportionality review], this court uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed.").

If the Georgia Supreme Court now undertakes such review in Ms. Gissendaner's case, the Court will find numerous cases which were either more aggravated or as aggravated, in which sentences of life without parole, life with parole, or a lesser sentence was imposed. Such cases include, but are not limited to, the following:

1. Sidney Dorsey was convicted of ordering the execution-style murder of Sheriff-elect Derwin Brown to prevent an investigation of corruption at the DeKalb County Sheriff's Office during Dorsey's tenure, and 11 counts of racketeering and other corruption. Nonetheless, the District Attorney for the Stone Mountain Judicial Circuit did not seek the death penalty. See Don Plummer, *DA Rules Out Death Penalty in Brown Killing*, Atlanta Journal-Constitution, Feb. 28, 2002, at D1.

2. Phillip Hayes strangled his victim, the mother of his child, to death. He then coerced a friend to help him as he burned her body beyond recognition, wrapped the charred remains together with a cinder block in a comforter, tied it together with electrical cord and threw it into a lake. He told his accomplice that he had "handled his personal business" that, two months previously, he had beaten her so badly her condition had required hospitalization. The district attorney did not seek the death penalty in that case and Hayes was sentenced to life in prison for malice murder and twelve months, to be served concurrently, for family violence battery. Hayes v. State, 173, 174, 562 S.E. 2d 498, 500 (2002).

3. Paul Wilson murdered his former girlfriend when she came to their house to retrieve her belongings and Christmas gifts so she could return to her former husband. Blood spatters on the walls and doors of the house show Wilson

struck her on the head at least four times while she was seated on the floor with her hands bound with electrical cord. This trauma fractured her skull and resulted in her death. Her friends, concerned for her safety, had warned her against going to the house alone. The district attorney did not seek the death penalty in that case. Wilson was sentenced to life in prison without the possibility of parole for malice murder, ten years for false imprisonment, and another twenty-four months for related crimes, to be served consecutively. See Wilson v. State, 275 Ga. 53 (2002).

4. Khamphay Somchith and his victim had lived together for about four years and had one son. He had moved out eight months before the murder. On the day before he shot the victim, he purchased a gun. On the day of the shooting, he took their child out for a while, then came back to the apartment and shot the victim once in the chest, piercing her heart; once through the arm she had thrown up in the futile effort to protect herself and into her lung; once down her lip and through her chin; and once more, a contact shot through her left temple. Earlier that month, he had stabbed her in the chest and, in a separate incident he had attacked her new boyfriend with a crowbar. He was sentenced to life in prison for her murder. See Somchith v. State, 272 Ga. 261, 527 S.E.2d 546 (2000).

5. Andrew Tyrone Miller murdered his wife after she kicked him out of the house for having affairs with other women in their bed while she was at work.

On the day of the murder, he came to the house, packed up her clothes, and the two of them left in her car. Her body was found in the driver's seat of her car on a rural dirt road. Mr. Miller had shot her in the head, neck, chest, and abdomen with a 9 millimeter pistol. In a previous incident, Mr. Miller had broken into the house, strewn her clothes about, and shot at her. He was sentenced to life in prison for malice murder and five years each, to run consecutively, for other related crimes, including possession of a firearm by a convicted felon. See Miller v. State, 275 Ga. 32 (2002).

6. Wilbur Smith murdered his live-in girlfriend after she took her three children and left him. He stalked her, hid behind some bushes when she went to stay with a friend and, when she came out into the yard, began shooting at her. As she screamed and ran back into the house, he followed her, still shooting. She died of a gunshot wound to the heart. He was found guilty of malice murder and sentenced to life in prison. See Smith v. State, 267 Ga. 88 (1996).

7. Toney Massengale beat his girlfriend in the face and strangled her causing her death by asphyxiation. Using a telephone cord and an extension cord, he tied her body into a fetal position and buried it in a shallow grave. He was found guilty of malice murder and sentenced to life in prison. See Massengale v. State, 264 Ga. 51 (1994).

8. Matthew Wessner had threatened to kill his ex-wife and her lover many times before he finally shot and killed them both. The Wessners were married ten years and had two children. Mrs. Wessner's relationship with the second victim began during the marriage and was instrumental in causing the Wessner's divorce. Mr. Wessner broke into his ex-wife's apartment while she and her lover were sitting on the couch in the living room talking. She tried to hide in the closet in her bedroom but he pulled her out. As she pleaded for her life, he shot her twice, killing her. He then shot her lover twice in the back of the head and once in the body, killing him. He was sentenced to two concurrent life sentences for the murders. See Wessner v. State, 236 Ga. 162 (1976), *overruled on other grounds*, Jordan v. State, 247 Ga. 328 (1981).

9. From the day of their separation until the day he killed her, Jackie Jay Roller threatened and harassed his ex-wife. Finally, he stopped her car in the supermarket parking lot she always cut through on her way to work. Witnesses saw them standing outside their vehicles, parked side by side, shouting at each other. A witness heard the victim cry out "please don't do that." After Roller's truck drove off, the victim was found dead in a pool of blood on the ground, shot in the back. He was found guilty of felony murder and possession of a firearm by a convicted

felon and sentenced to life in prison plus five years, consecutively. See Roller v. State, 265 Ga. 213 (1995).

10. Clarence Smith and his girlfriend had dated for two years. Three months after they broke up, she began dating another man. Two weeks before the murder, Smith threatened to kill them both. On the morning of the murder, he broke into the apartment where his victims were sleeping. He shot the boyfriend eleven times with a 9 millimeter pistol, killing him. He then hit his former girlfriend in the head with the pistol, leaving a wound requiring 10 stitches to close and kicked her in the side, requiring three stitches. When she escaped by running to her sister's apartment, he left. The police found him hiding in a shed behind another ex-girlfriend's house. He was found guilty of malice murder and sentenced to life imprisonment plus ten years for aggravated assault, to be served consecutively. See Smith v. State, 270 Ga. 123 (1998).

11. Emmanuel Fletcher murdered his former girlfriend's new boyfriend. Mr. Fletcher had dated his ex-girlfriend for a couple of years. After they broke up, she began dating a man she met at her place of employment. Mr. Fletcher continued to telephone her and profess his love. He threatened the new boyfriend and even went to their workplace and insisted their boss keep them apart at work or he would kill the new boyfriend. On the day of the murder, the couple was sitting

on the victim's sister's front steps. Mr. Fletcher approached and began hitting his victim with his fists before fatally stabbing her. He inflicted numerous stab wounds, even after the victim was on the ground, including two stab wounds in the heart, one in the aorta and one in each lung. Mr. Fletcher was sentenced to life in prison for malice murder. See Fletcher v. State, 273 Ga. 737 (2001).

12. William Culled Cash and his wife had been married, divorced, remarried, and separated in the course of two years. He murdered her during a period when they were separated and she had filed for divorce. He threatened to kill her when she began seeing another man. She filed a complaint against him for trespass. He bought a gun and told her co-workers he would kill her. The next day, he broke into her house and killed her with a single gunshot wound. He was sentenced to life in prison for the murder and an additional twenty years for burglary. See Cash v. State, 258 Ga. 460 (1988).

The Court's failure to consider these cases is significant because each serves as powerful evidence of the disproportionate nature of Ms. Gissendaner's sentence. The lack of meaningful proportionality review by this Court merits reconsideration for one simple reason: it is the fair and just course of action. It is the right thing to do. The need for thorough and searching review is heightened by the essential facts of Ms. Gissendaner's case and the new information adduced in state habeas corpus proceedings. The state acknowledged that Ms. Gissendaner did not participate in

the actual killing of her husband. She was not there. The state's case against her was premised on the theory that she was the mastermind of her husband's murder and that co-defendant Gregory Owen was merely her "weapon." The State's evidence supporting this theory came almost exclusively from Owen, who clearly had a motive to shift responsibility away from himself and onto Ms. Gissendaner.

Owen now admits that key aspects of his testimony – and the State's theory – were false. With each pretrial statement that Owen gave, his role in the crime diminished and Ms. Gissendaner's increased. Owen's testimony painting Ms. Gissendaner as the mastermind was critical to the State's case given that the State never alleged that Ms. Gissendaner physically participated in the murder or otherwise forced or coerced Owen into committing murder.

Indeed, according to the State's theory, Ms. Gissendaner dropped Owen off at her home to lie in wait – alone – for Mr. Gissendaner to return. Mr. Gissendaner was not expected to return for several hours. At any point during that time, Mr. Owen simply could have left the house and gone elsewhere. He could have abandoned "her" plan that he kidnap Mr. Gissendaner at knife point and drive many miles, past numerous public places, to a secluded area in the woods. Owen could have declined to continue participating in "her" plan before he raised the knife and stabbed the man standing close enough for him to touch. Owen chose not to abandon anything, however. Instead, unbeknownst to Ms. Gissendaner, he

recruited someone else to assist him in *his* murderous plan. Owen admitted on the stand that he had a clear motive to kill Mr. Gissendaner – so that he could have Ms. Gissendaner to himself and set up house with her and her children. Owen knew that he would need help in abducting and killing Mr. Gissendaner, who was a Gulf War veteran and larger in size than Owen, so he brought another person into his scheme – never revealing this fact to Ms. Gissendaner. Importantly, he concealed his recruitment of the accomplice, and arranged for that person to meet him after Ms. Gissendaner was gone and before she returned. Owen chose to carry out *his own plan*, and he acknowledged as much. Owen pled guilty and was sentenced to life imprisonment, with a contract not to seek parole for 25 years, in exchange for his testimony against Ms. Gissendaner. She, of course, was sentenced to death. Gregory Owen was the true mastermind[1] -- and beneficiary -- of this plan.

The habeas court erroneously failed to review Ms. Gissendaner's proportionality claim in light of the new evidence adduced in habeas proceedings, finding it to be procedurally barred because it was presented on direct appeal to the Georgia Supreme Court. *Res judicata* ordinarily prevents a court from addressing an issue previously adjudicated. In Walker v. Penn, 271 Ga. 609 (1999), however, this Court discussed how *res judicata* is not an absolute bar where review is necessary to avoid a miscarriage of justice: "While an issue actually litigated and

1 This fact was corroborated by critical mitigation evidence adduced in habeas proceedings that Ms. Gissendaner suffers from organic brain damage that impairs her level of executive functioning. As such, her ability to

decided on direct appeal is precluded from being relitigated on habeas corpus, a narrow exception has been carved where petitioner can show that the writ is necessary to avoid a miscarriage of justice." Id. at 611 (citations omitted).

This Court and the United States Supreme Court have held that the imposition of the death penalty is unconstitutional and disproportionate if it is imposed in a class of cases that so rarely results in the death penalty that the capital sentence is freakish or wanton. See Coker v. Georgia, 433 U.S. 584 (1977); Gregg v. State, 233 Ga. 117 (1974). Courts have recognized that there are certain cases in which the death penalty is not warranted or permissible. If a sentence is disproportionate, then the offender is actually innocent of the death penalty and cannot lawfully be subjected to capital punishment. See Sawyer v. Whitley, 505 U.S. 333 (1992). The unique nature of the crime committed and the attributes of Ms. Gissendaner render her death sentence disproportionate. Georgia criminal defendants more culpable than Ms. Gissendaner routinely are given sentences less than death. By proving her proportionality claim, Ms. Gissendaner demonstrates that she is actually innocent of the death penalty; executing someone in such circumstance would be a miscarriage of justice.

In addition, Ms. Gissendaner's proportionality claim is not barred by the doctrine of *res judicata*, because it only applies to the adjudication of the "same

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"mastermind" the murder of Doug Gissendaner, as the state alleged, was impaired.

issues." Head v. Carr, 273 Ga. 613 (2001). Ms. Gissendaner's habeas corpus petition does not raise the "same issues" as previously raised because an abundance of both fact and mitigating evidence was not available for this Court's review on direct appeal. Even if this Court finds the issues to be the "same," the Court has indicated that there may be circumstances warranting a second proportionality review. Fleming v. Zant, 259 Ga. 687, 688 (1989). Ms. Gissendaner presents exactly such a case. Georgia statutory law requires the Court to consider "both the crime and the defendant" when reviewing the proportionality of a death sentence. O.C.G.A. § 17-10-35 (2005) (emphasis added). Ms. Gissendaner's sentence of death is arbitrary and disproportionate because the Supreme Court could not and did not evaluate, *inter alia*, the new, critical evidence of Greg Owen's false testimony, and Ms. Gissendaner's history of sexual abuse and the resulting mental illness and brain damage she suffered. Add to this that the Georgia Supreme Court's review cited cases which had been overturned, and that the review did not include cases in which a sentence of less than death was imposed, and it becomes abundantly clear that the Court's statutory review of Ms. Gissendaner's proportionality claim on direct appeal was insufficient.

Duty and justice require this Court to review the proportionality claim considering the newly presented, relevant information; to conduct such review using only legally viable caselaw involving substantially similar factual scenarios;

and to examine and compare her case to substantially similar cases in which defendants received a sentence other than death. Until such review is undertaken, Ms. Gissendaner's death sentence is arbitrary and capricious in violation of her rights guaranteed in the Georgia and United States Constitutions, and as interpreted in related state and federal caselaw.

Finally, Ms. Gissendaner's sentence is susceptible to arbitrariness for another significant reason: the Georgia death penalty process provides no uniform standard for prosecutors to follow in determining when to seek the death penalty. This lack of uniformity again results in the arbitrary and capricious application of capital punishment in Georgia, in violation of the Georgia and United States Constitutions, and related interpretations in state and federal caselaw. Such arbitrariness unfairly interjects into the capital process numerous opportunities for prosecution by whim and other legally irrelevant factors. The cases numbered 1-3 on pages 7-9, above, illustrate this point. Each case was based on facts which could have supported a death sentence under the law, but in each case, the prosecutors involved did not even seek the ultimate punishment.

When fundamental rights are involved, the Equal Protection Clause of the Fourteenth Amendment requires that there be "uniform" and "specific" standards to prevent the arbitrary and disparate treatment of similarly situated people. Bush v. Gore, 531 U.S. 98 (2000). In Bush v. Gore, the Supreme Court was confronted

with an opinion by the Florida Supreme Court that did not set forth uniform standards in its opinion ordering a recount. The Supreme Court held that such a recount would not respect the "equal dignity owed to each voter." Id. at 104.

The Georgia death penalty system concerns a right even more fundamental than the right to vote - the right to life. As was true in the Florida recount, Georgia's lack of statewide standards to guide prosecutors in determining which cases warrant seeking the death penalty inevitably leads to the disparate treatment of similarly situated people accused of potentially capital offenses. Those principles require that the method of deciding which defendants may face the death penalty be subject to at least as much scrutiny as the process of counting votes.[2]

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[2]While the Supreme Court stated that its holding in Bush v. Gore was limited to the facts of that case, the principles it announced are sound and must be subject to respect as precedent. The *per curium* opinion explained the narrow scope of its holding by distinguishing the somewhat unusual situation of a court-ordered statewide recount from an ordinary election. In ordinary elections, the Court said, the Equal Protection Clause does not prohibit counties from developing "different systems for implementing elections." See Bush, 531 U.S. at 109. One reason for this distinction is that once ballots have been cast, the "factfinder confronts a thing, not a person," and thus "[t]he search for intent can be confined by specific rules designed to ensure uniform treatment." Id. at 106. Also, individual counties may have "expertise" that justifies letting them choose their own methods of conducting elections. Id. at 109. Another explanation is that "local variety [in voting machines and procedures] can be justified by concerns about cost, the potential value of innovation, and so on" whereas a "different order of disparity" occurs when, after ballots have been cast, physically identical ballots are hand-counted according to different rules. Id. at 134 (Souter, J., dissenting).

These explanations, however, simply do not serve as an adequate basis for not applying the Bush Equal Protection rule to Georgia's death penalty system. Just as Florida counties can use different voting machines in their elections, Georgia circuits can certainly have separate prosecutors and can structure those prosecutors' offices differently; this allows the flexibility demanded by limited budgets and justified by local expertise, and takes into account the potential for innovation inherent in a system of local control. With regard to the Court's distinction between a "thing" and "person," although it is true that prosecutors charged with deciding when to seek the death penalty confront people and not things, this does not diminish the Equal Protection Clause's requirement of non-arbitrariness. While it might be easier to design standards about whether to count "hanging chads" as legal votes, it is certainly possible to write standards to guide prosecutors in deciding whom to prosecute. See, e.g., *United States Attorneys' Manual* §9-10.010 et. seq. (1995) (laying out "federal protocol" for capital cases); U.S. Dep't of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review* (2001), at http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm.

The need for equality and non-arbitrariness when the State seeks to deprive a citizen of her life outweighs any benefits of unbridled prosecutorial discretion.

Since the right to life is fundamental, when a State implements a death penalty system, it must establish mechanisms to ensure that the system values the lives of its citizens equally. In Bush, the Supreme Court noted that "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[3] By the same reasoning, since the United States Constitution has ensured the right to life and to the equal protection of the laws, a State may not, by arbitrary and disparate treatment, value one person's life over that of another.

The duty of this Court to protect against the arbitrary taking of Ms. Gissendaner's life is heightened by the fact that, unlike the right to vote,[4] the right to life is contained in the text of the Constitution: The Fifth and Fourteenth Amendments provide that neither the federal government nor the states shall deprive any person of "life, liberty, or property" without due process of law. U.S. Const. amend. V; amend. XIV, §1. Indeed, the United States Supreme Court has

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[3]Bush, 531 U.S. at 104-05.

[4]In Bush v. Gore, the Supreme Court conceded that the right to vote is not contained in the text of the Constitution. See id. at 104 ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."). The Court, however, granted relief after holding that "[h]istory has now favored the voter," and since every state now chooses its electors through a statewide election, "the right to vote as the legislature has prescribed is fundamental." See id.

long recognized the fundamental nature of the right to life, particularly in the context of the death penalty.[5]

In addition, Georgia's lack of standards to ensure non-arbitrary imposition of the death sentence is sufficient in itself to establish an Equal Protection violation; a showing of intentional discrimination against a protected class is not required.[6] Unlike traditional Equal Protection claims of intentional discrimination against a protected class, claims like this one and the one in Bush are not based on an individual act of discrimination, but rather they challenge a system in which uncontrolled official discretion makes arbitrary and unequal treatment inevitable.

Georgia has 159 counties, administratively grouped into 49 circuits. (These circuits are further administratively grouped into 10 judicial districts.) Each circuit has an elected District Attorney, and it is this prosecutor who decides whether to seek the death penalty in any given case. Unlike most states, Georgia has an exceptionally broad definition of murder. O.C.G.A. 16-5-1 (defining murder as causing the death of another with "malice aforethought, either express or implied or caus[ing] the death of another human being."). There is no crime of "capital murder" in Georgia as there is in other states, and Georgia does not have second

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[5]See Furman v. Georgia, 408 U.S. 238, 359 (1972) ("because capital punishment deprives an individual of a fundamental right (i.e., the right to life), . . . the State needs a compelling interest to justify it") (citation omitted).

[6]See Bush, 531 U.S. at 106. While in traditional claims of discrimination against individuals, courts require evidence of discriminatory intent by a state actor in that particular case, see, e.g., McCleskey v. Kemp, 481 U.S. 279 (1987), in Bush the Court did not require any such showing.

and third degree murder. The Georgia code sets out ten aggravating factors, one of which must be found before the death penalty can be imposed, but those factors are so broad that they apply to virtually any murder. O.C.G.A. 17-10-30 (b). For example, any murder committed in the commission of another capital felony, aggravated battery, burglary, or arson in the first degree is death eligible. O.C.G.A. 17-10-30 (b)(2). Any murder committed for the "purpose of receiving money or any other thing of monetary value" is death eligible. O.C.G.A. 17-10-30 (b)(4). And a catch-all provision, subsection (b)(7), allows imposition of the death penalty if the murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Thus, Georgia prosecutors can seek the death penalty in virtually any murder case. However, Georgia prosecutors do not seek death in the overwhelming number of eligible cases.

Georgia law provides no standards to guide the District Attorneys in their decisions as to when to seek the death penalty. Instead, the prosecutor in each circuit makes this decision on his or her own, according to unwritten and widely varying standards. The result is that whether a person charged with a capital crime will face the death penalty depends largely on arbitrary factors such as the county in

which the crime occurred, the quality of the court-appointed lawyer for the accused, and, even more disturbingly, the race of the victim.[7]

For the reasons discussed herein, the case for which Ms. Gissendaner was sentenced to death is far less aggravated than other cases in which death has been imposed, cases in which life imprisonment without the possibility parole has been imposed, cases in which life with the possibility of parole has been imposed, and even cases that have been resolved with convictions of manslaughter and sentences of terms of years have been imposed. It therefore is evident that the death sentence was sought and imposed in Ms. Gissendaner's case in an arbitrary and disparate manner, in violation of her state and federal constitutional rights. Under the United States Supreme Court's reasoning in Bush v. Gore, such arbitrary deprivation of a fundamental constitutional right is untenable and requires this Court's intervention.

[7] See McCleskey v. Kemp, 481 U.S. 279 (1987) (allowing Georgia to carry out executions even though a person is

CONCLUSION

For the foregoing reasons, and those contained in all of Ms. Gissendaner's briefing, motions, and pleadings, she respectfully requests that this Court reconsider its decision to deny her a Certificate of Probable Cause to appeal the denial of the Writ of Habeas Corpus and grant her application for review.

Respectfully submitted,

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four times more likely to be sentenced to death if the victim was white than if the victim was African-American).

ATTACHMENT I

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2013

KELLY RENEE GISSENDANER,
Petitioner,

-v.-

KATHY SEABOLDT, Warden
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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because the federal court denied her application for a certificate of appealability. The circuit court should have granted the COA because Petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

REASONS FOR GRANTING THE WRIT

III. THE CIRCUIT COURT SHOULD HAVE GRANTED A CERTIFICATE OF APPEALABILITY ON PETITIONER'S EIGHTH AMENDMENT PROPORTIONALITY CLAIM BECAUSE THE GEORGIA SUPREME COURT'S PROPORTIONALITY REVIEW FAILED TO PROTECT PETITIONER'S EIGHTH AMENDMENT RIGHTS

A. Introduction

Death, once administered, is final and irrevocable, and it remains our nation's ultimate punishment. It is "qualitatively different from any other sentence." (*Lockett v. Ohio*, 438 U.S. 586, 604 (1978)) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)) (internal quotations omitted). In order to ensure that the administration of death penalty is fair, and not infected by caprice or bias, state and federal law require the existence of built-in safeguards. One such safeguard is proportionality review: a thorough evaluation by a reviewing court (or courts) that guards against the arbitrary or unfair application of the death penalty.

B. The *Furman* Era

In *Furman v. Georgia,* 408 U.S. 238 (1972), this Court held that Georgia's death penalty statute violated the Eighth Amendment's prohibition

regarding cruel and unusual punishment. *Furman*, 408 U.S. at 239-40 (1972). The statute was struck down by five justices, each writing separately, making the *Furman* decision the longest collection of opinions the Court had ever written – underscoring this subject's critical importance for the Court. In striking down Georgia's statute, the *Furman* Court was particularly concerned with the unguided and unfettered discretion of the judge or jury and the resultant arbitrariness with which the death penalty was administered.[8] The impact of *Furman* could fairly be described as sweeping, resulting in the death penalty being put on hold throughout the United States.

While the *Furman* Court held that the death penalty as a method of punishment was not unconstitutional *per se*, *Id.* at 396-96 (Burger, C.J., dissenting), the Court was unequivocal that a statutory scheme which failed to narrow the types of murder cases that would be considered death-eligible did not comport with the Eighth and Fourteenth Amendments. *Id.* at 256-57. The Georgia statute that was the subject of this Court's scrutiny in *Furman* seemed to make virtually *any* murder potentially death-eligible, and, in practice, there was little predictability as to which types of cases were determined to be "death worthy." The Court in *Furman* held that the death penalty as then administered in Georgia was cruel and unusual "in the same way that being struck by lightning [was] cruel and unusual" *Furman*, 408 U.S.

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[8] In response to *Furman*, in 1973 and onwards, states began to enact new statutory schemes in line with what this Court had declared constitutional.

at 254-56 (Douglas, J., concurring) (quoting *Furman*, 408 U.S. at 309 (Stewart, J., concurring)).

In the wake of this Court's opinion in *Furman*, several states undertook the task of amending their death penalty statutes in order to pass constitutional muster. One way that states, including Georgia, sought to accomplish this was by incorporating proportionality review into their statutes. Such review requires states' highest courts to review all death sentences for arbitrariness and capriciousness. The constitutionality of the capital sentencing scheme approved by this Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), was premised in part on the incorporation of thorough and meaningful proportionality review as part of Georgia's statute. *See Gregg v. Georgia*, 428 U.S. 153 (1976), *Walker v. Georgia*, 129 S.Ct. 453 at 455 (2008) (Stevens, J., dissenting), *Zant v. Stephens*, 462 U.S. 862 (1983); and *see* O.C.G.A. § 17-10-35.

With no uniform federal system delineating the way in which comparative proportionality review should be conducted, the inquiry is left to the state courts. *See e.g.*, *Pulley v. Harris*, 465 U.S. 37 (1984); *Mills v. Singletary*, 161 F.3d 1273, 1282 n.9 (11th Cir. 1998) (quoting *Moore v. Balkom*, 716 F.2d 1511, 1518 (11th Cir. 1983)) (holding that a state supreme court's comparative sentence review is *not* reviewable by the federal courts because such a review would "thrust the federal judiciary into the substantive policy making area of the state.").

C. The Post-Furman Era: Gregg v. Georgia, 428 U.S. 153 (1976)

Georgia's efforts to remedy the problems identified in *Furman* were approved by this Court in *Gregg v. Georgia*, 428 U.S. 153 (1976). This Court's reasoning in *Gregg* accentuated the importance of proportionality review by the Georgia Supreme Court. This Court underscored in *Gregg* holding that the Georgia Supreme Court was required to:

> review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases

Id. at 153, 198; O.C.G.A. § 17-10-35(a). This Court's clear intention was to remove definitively the "unfettered discretion" of juries which allowed them to impose arbitrary and, oftentimes, discriminatory capital sentences. *Furman*, 404 U.S. at 254-56 (Douglas, J., concurring).

The Georgia Supreme Court was thus directed firstly to review the lower court proceedings for error, secondly, to ensure that "the death sentence is not imposed under the influence of passion, prejudice, or any other arbitrary factor," and thirdly to review whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." O.C.G.A. § 17-10-35(c)(1),(3).

Justice Stewart in *Gregg* found that thorough proportionality review was a critical part of the mandatory appellate review because it

> serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries do not impose the death sentence in a certain kind of case, the appellate review procedures assure that no defendant [...] will suffer a sentence of death.

Gregg, 428 U.S. at 206 (1976). Because comparative proportionality review would serve as an effective safeguard against "wanton" and "freakish" death sentences, this Court concluded that Georgia's statutory system did not violate the Constitution. *Id.* at 207.

The constitutionality of Georgia's death penalty sentencing scheme is therefore ultimately premised upon a thorough and meaningful proportionality review by the Georgia Supreme Court. *Gregg*, 428 U.S. at 205-06 (1976). Such review, if operated faithfully, substantially "eliminates the possibility that the person will be sentenced to die by the action of an aberrant jury." *Id.* at 206.

The Georgia Supreme Court itself summarized in *Colely v. State*, 204 S.E.2d 612, 616 (Ga. 1974) that its task was to examine whether "the death penalty is only rarely imposed for an act or substantially out of line for sentences imposed for other acts," and if that is the case, the sentence must "be set aside as excessive." *Id.*

D. Meaningful Proportionality Constitutes an Important Safeguard in Georgia

In the years that immediately followed the upheaval and revision of Georgia's death penalty scheme, the Georgia Supreme Court vacated several

death sentences as disproportionate after having conducted a thorough proportionality review where the court analyzed numerous cases, taking note of the circumstances of the crime, the characteristics of the defendant, and the sentences imposed in similar or nearly identical cases. *See e.g.*, *Ward v. State*, 236 S.E.2d 365 (Ga. 1977) (holding that a death sentence for murder was disproportionate when the defendant received a life sentence for the same crime in a previous trial); *Jarrell v. State*, 216 S.E.2d 258 (Ga. 1975) (holding that a death sentence was disproportionate for an armed robbery when comparable crimes received considerably lesser sentences); *Hunter v. State*, 202 S.E.2d 441 (Ga. 1973) (holding that the death sentence for armed robbery and murder should be commuted to life imprisonment); *Morgan v. State*, 201 S.E.2d 468 (Ga. 1973) (holding that the death sentence for the defendant's role in the murder of his own mother and father should be vacated and commuted to life imprisonment); *Kramer v. State*, 199 S.E.2d 805 (Ga. 1973) (holding that the defendant's death sentence should be commuted to life imprisonment where the defendant committed murder, armed robbery, and aggravated assault).

In those cases, the Georgia Supreme Court thus displayed an evenhanded willingness to reduce death sentences to lesser sentences owing to some procedural error at trial or where the sentence was disproportionate to the sentences imposed in similar cases with similar facts and similarly situated defendants. Moreover, the court regularly included for comparison

cases where both life and death sentences had been imposed. As late as 1982, the court even remarked that it was its usual practice to consider for comparison cases in which "the death penalty could have been sought but was not." *Horton v. State*, 295 S.E.2d 281, 289 n.9 (Ga. 1982).

In 1983, this Court in *Zant v. Stephens*, 462 U.S. 862 (1983), reaffirmed its holding in *Gregg* that Georgia's death-sentencing scheme was constitutional, but it clarified that its approval was based on the existence of two critical features: (1) the requirement that the jury find that at least one statutory aggravating circumstance occurred in the context of the murder and then identify the circumstance in writing, *Id.* at 876; and (2) that the Georgia Supreme Court review every death penalty proceeding and determine whether the sentence was arbitrary or disproportionate to sentences imposed in similar crimes. *Id.*

A year later, in *Pulley v. Harris*, 465 U.S. 37 (1984), this Court held that a state could not impose mandatory death sentences for certain crimes; rather, it must put forth some form of intelligible guidelines so that juries could evaluate which defendants deserved death and which deserved lesser sentences. *Pulley*, 465 U.S. at 53 (1984). One of the means contemplated by this Court through which states might meet this requirement was through proportionality review. *See Gregg*, 428 U.S. at 196-207 (citing proportionality review in upholding Georgia's death sentencing statute). Though the Court rejected the petitioner's claim in *Pulley* that every state that administered the

death penalty should be obligated to determine whether death was disproportionate to the punishment imposed on others for the same crime, *Pulley*, 465 U.S. at 43 (1984), the Court emphasized that "each distinct system must be examined on an individual basis." *Id.* at 45 (quoting *Gregg*, 428 U.S. at 195).

Georgia's capital sentencing scheme has been examined on an individual basis and upheld. *Gregg, supra*. Yet the Georgia scheme, unlike the statute challenged by the petitioner in *Pulley*, incorporates comparative proportionality review. *See* O.C.G.A. §§ 17-10-30, 17-10-35, and 17-10-37. These statutory provisions remain the safeguard against wantonly and freakishly imposed death sentences for Georgia defendants. The fact that comparative proportionality review was necessarily included was a central part of this Court's approval of the Georgia sentencing scheme generally. *Gregg*, 428 U.S. at 196-207 (citing proportionality review in upholding Georgia's death sentencing statute).

E. Petitioner was deprived of the meaningful review that this Court relied on in approving Georgia's death penalty statute in Gregg.

It has remained undisputed throughout this case that Gregory Owen – and not Kelly Gissendaner – was the person who killed the victim, Douglas Gissendaner. Likewise, Petitioner was not even present at the time Gregory Owen stabbed Douglas Gissendaner to death. Petitioner was involved in the planning of her husband's murder and arguably took steps to facilitate Mr.

Owen's carrying out of the crime. However, that Ms. Gissendaner was involved, even substantially, does not itself create a presumption that the death penalty is warranted or proportional.

Importantly, the prosecution in this case recognized this was far from a typical death penalty case as evidence by his willingness to offer Petitioner the same plea as he did to Petitioner's co-defendant: life with a contract not to seek parole for 25 years. Unfortunately, after consulting with her attorneys, who steadfastly maintained they did not believe she would get the death penalty, Petitioner rejected the plea offer, proceeding instead to trial.

Had the Georgia Supreme Court undertaken a meaningful proportionality review like that performed in other post-*Gregg* cases, there is a reasonable likelihood that Petitioner's death sentence would have been overturned on proportionality grounds.

F. The Georgia Supreme Court's Proportionality Review in Petitioner's Case Was Neither Meaningful, Nor Constitutional

1. Introduction

The Georgia Supreme Court's review of Petitioner's sentence was, at best, perfunctory, and contrary to the principles that produced this Court's approval of Georgia's death penalty scheme in *Gregg*. In the statutorily required appendix, the Georgia Supreme Court provided a list of cases that it had considered in evaluating the proportionality of the appellant's sentence; yet in each of the cases listed, the defendant had received a death sentence.

There was, therefore, no comparison with cases in which the defendant had received a lesser sentence. The inherent deficiency in such a review is plain: in order to determine whether the sentence for a homicide is proportional given the particular circumstances of the crime and given the characteristics of the defendant, a reviewing court must consider cases which resulted in a death sentence, those that resulted in a sentence of less than death, and those where the District Attorney declined to seek death.

The Georgia Supreme Court's failure to review cases where lesser sentences were imposed precluded the court from discovering the myriad cases far more aggravated than Petitioner's which resulted in sentences less than death. The degree to which this omission compromises the Court's proportionality review is evidenced by the fact that defendants not only similarly situated to Petitioner, but in fact much more culpable than she, have routinely received sentences of less than death. Indeed, in many of these cases, the state did not even seek the death penalty – a consideration the Georgia Supreme Court has claimed is important to its review, but that it neglected to take in Petitioner's case. *Horton v. State*, 295 S.E.2d 281, 289 (Ga. 1982).

2. Cases Similar to Petitioner's Routinely Result in Life Sentences

Had the Georgia Supreme Court included in their review similar cases where the death penalty was not imposed or where the District Attorney did not even seek the death penalty, the results would have revealed just how

disproportionate Petitioner's death sentence is. For example, in affirming Ms. Gissendaner's death sentence, the Georgia Supreme Court cited Petitioner's supposedly dominant role in the murder of a close family member (her husband) as an aggravating factor. However, the Court then proceeded to cite to cases that were far more aggravated than Petitioner's and were "similar" only insofar as a close family member was killed in each case. Had they conducted a meaningful review, the Court would have discovered cases with facts analogous to Petitioner's, but where the state did not seek death against the defendant.

In *Miller v. State*, 485 S.E.2d 752 (Ga. 1997), the state declined to seek the death penalty where defendant Lanekia Thomas hired Jamel Miller to kill her husband Larry Thomas. That case involved circumstances that were arguably similar to those in Petitioner's case, although the facts were far more aggravated. Thomas wrote out an actual contract in which she agreed to pay Miller $1,500 to kill her husband, who then shot Mr. Thomas ten times in the back. *Id.* The state did not seek death against either Miller or Ms. Thomas. Miller was sentenced to life in prison. *Id.* at 753 n.1.

The case of *Broomall v. State*, 391 S.E.2d 918 (Ga. 1990), is also similar to Petitioner's. Broomall conspired with Cecil Booher to kill her husband in order to get his life insurance, and to make the crime look like a robbery by taking some of his belongings. *Id.* at 920. The two co-defendants planned the crime together, with Broomall agreeing to pay Booher $25,000 from the life

insurance policy. The state did not seek the death penalty against either defendant.

These cases help demonstrate that Petitioner's sentence is disproportionate to other similarly situated defendants, and that the Georgia Supreme Court never included similar cases resulting in a life sentence as part of its review of Petitioner's case.

3. Cases More Aggravated than Petitioner's Case Also Resulted In Sentences Less Than Death

Defendants convicted of murdering a family member have repeatedly been sentenced to life in prison in circumstances far more aggravated than those in Petitioner's case.[9] In *Lewis v. State*, 335 S.E.2d 560 (Ga. 1985), a woman was found guilty of starving her infant daughter to death, as well as binding her with a belt and whipping her. Lewis received a life sentence. In *Lewandowski v. State*, 483 S.E.2d 582 (Ga. 1997), the defendant received a life sentence for stabbing his wife to death in front of their two children. The Georgia Supreme Court failed to consider either of these cases in its review of Petitioner's case.

The Georgia Supreme Court also emphasized the state's characterization of Petitioner as the "prime mover" as a basis for the case

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[9] All but one of the cases (*see* fn. 10) that Petitioner references in Sections III, (F) (2) and (3) of this petition were available at the time the Georgia Supreme Court performed its proportionality review. Since the time of Petitioner's direct appeal, the same pattern has persisted. However, Petitioner has omitted detailing such post-2000 cases for the sake of judicial economy.

being proportional. *Gissendaner v. State*, 532 S.E.2d 677, 691 (Ga. 2000). Yet, again, there are similar cases where the state did not seek death against the "prime mover" of the murders.

One such case is *Edmond v. State*, 267 Ga. 285, 476 S.E.2d 731 (1996), where the defendant directed his co-defendant to shoot a man he claimed had stolen from him. Edmond's actions resulted in a homicide (the death of the intended victim's mother), and yet the state did not seek the death against Edmond, the actual shooter.

Another example lies in *Burks v. State*, 491 S.E.2d 368 (Ga. 1997), where the defendant, Charlie Burks, initiated a fight in a dance hall that then moved outside. After a crowd formed, Burks instructed a friend to get a gun from his car and shoot the man with whom he had been fighting. At Burks's direction, his friend fired several shots into the crowd, killing one and wounding several other bystanders. The prosecution declined to seek the death penalty and Burks was sentenced by a jury to life in prison.[10]

Georgia's failure to factor in any "cases outside the limited universe of cases in which the defendant was sentenced to death create[d] an unacceptable

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[10] In another particularly aggravated case, which occurred the same year the Georgia Supreme Court was reviewing Petitioner's case, former sheriff Sidney Dorsey orchestrated the death of his successor in office. *Dorsey v. State*, 279 Ga. 534, 615 S.E.2d 512 (2005). In 2000, Derwin Brown defeated Dorsey in the election for Sheriff. Dorsey met with a former employee and solicited him – along with several others – to ambush and kill Brown before he took office. At Dorsey's instruction, Brown was shot 12 times as he was walking up his driveway. 279 Ga. at 536. The prosecution opted not to seek the death penalty against Dorsey, and a jury sentenced him to life in prison.

risk that it will overlook a sentence infected by impermissible considerations." *Walker v. Georgia*, cert. denied, 129 S.Ct. at 456 (2008) (Stevens, J., dissenting). This is because "a significant number of cases in which death was not imposed might well provide the most relevant evidence of arbitrariness before the court." *Walker v. Georgia*, 129 S.Ct. 453 at 455 (2008) (Stevens, J., dissenting with regard to denial of cert).

The circumscribed review that took place here deprived Petitioner of a meaningful review of her death sentence because, as the Georgia Supreme Court itself stated, "if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive." *Coley v. State*, 204 S.E.2d 612, 616 (Ga. 1974).

4. The Cases Relied Upon by the Georgia Supreme Court were significantly More Aggravated than Ms. Gissendaner's, and thus ill-suited for the court's comparative analysis.

Of the 13 cases cited by the Georgia Supreme Court in upholding Petitioner's death sentence as proportional, one death sentence already had been overturned in habeas corpus proceedings, and another was overturned in habeas corpus proceedings less than a year later. *See Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985), *cert denied*, 474 U.S. 1026 (1985) (overturning death sentence after finding defense counsel ineffective for failing to present mitigation evidence); *Romine v. Head*, 253 F.3d 1349 (11th Cir. 2001), *cert. denied*, 535 U.S. 1011 (2002).

Furthermore, in the case of *Smith v. State*, 222 S.E. 2d 308 (Ga. 1976), a husband and wife were convicted and sentenced to death for the murders of the wife's ex-husband and his new wife. While both defendants' death sentences were affirmed on appeal, only Mr. Smith's sentence was carried out. His wife, Rebecca Smith Machetti, was later granted sentencing relief. *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), cert. denied, 459 U.S. 1127 (1983).

Additionally, in all but two of the cases cited by the Court, the defendant was the actual murderer in the case. *See DeYoung v. State*, 493 S.E.2d 157 (Ga. 1997); *Carr v. State*, 480 S.E.2d 583 (Ga. 1997); *Crowe v. State*, 428 S.E.2d 799 (Ga. 1995); *Tharpe v. State*, 416 S.E.2d 78 (Ga. 1992); *Ferrell v. State*, 401 S.E.2d 741(Ga. 1991); *Ford v. State*, 360 S.E.2d 258 (Ga. 1987); *Romine v. State*, 350 S.E.2d 446 (Ga. 1980); *Tyler v. State*, 274 S.E.2d 549 (Ga. 1981); *Smith v. State*, 222 S.E.2d 308 (Ga. 1976) (where husband was the actual murderer). These cases are thus easily distinguishable from Petitioner's because, as previously detailed, it is undisputed that she did not physically carry out the murder. The Georgia Supreme Court's reliance on cases involving so-called "trigger persons" for comparison to Petitioner's case makes clear the Court did not seriously "consider the crime and the defendant" in their proportionality review.

Additionally, in five of the cases cited by the Georgia Supreme Court there were multiple victims, making those cases significantly more aggravated

and clearly distinguishable. *See DeYoung v. State*, 493 S.E.2d 157 (Ga. 1997); *Ferrell v. State*, 401 S.E.2d 741 (Ga. 1991); *Ford v. State*, 360 S.E.2d 258 (Ga. 1987); *Romine v. State*, 350 S.E.2d 446 (Ga. 1980); *Smith v. State*, 222 S.E.2d 308 (Ga. 1976). Finally, even with regard to the few cases cited where there was a single victim or where the defendant may not have been the "trigger person," the facts of those few remaining cases are far more aggravated than Petitioner's case. *See Wilson v. State*, 525 S.E.2d 339 (Ga. 1999) (Wilson claimed that his co-defendant was the shooter, but the evidence establishing which of the two men was the "trigger person" is far from definitive); *Mize v. State*, 501 S.E.2d 219 (Ga. 1998), (Defendant, leader of a white supremacist group was present when his underling, acting on his order, shot another member of their group, even handing him the final bullet to finish the job).

The Georgia Supreme Court also cited *Waldrip v. State*, 482 S.E.2d 299 (Ga. 1997) for the proposition that Petitioner's death sentence is not impermissibly disproportionate to that of her co-conspirator even though the co-indictee received a life sentence. In that case, however, there was evidence not only that Waldrip was present at the murder of a man who was planning to testify against Waldrip's son, but also that he may have participated in its commission as well, once again distinguishing it from Petitioner's. *Id.* at 305.

The Georgia Supreme Court also referenced *DeYoung v. State*, 493 S.E.2d 157 (Ga. 1997), to show as an aggravating circumstance that the murder was planned against her close family member. (Gissendaner v. State,

532 S.E. 2d 677, 691 (Ga. 2000). DeYoung stabbed his parents and 14 year old sister to death in their home. DeYoung's younger brother was also an intended victim but after being alerted by the screams of his sister, the brother escaped and fled to a neighbor's house. The defendant was the actual murderer of several victims; specifically three of his four immediate family members. On its face, *DeYoung* is a more aggravated case.

In addition to citing cases where both the crime and the defendant were, in fact, significantly more aggravated, the Georgia Supreme Court listed as similar two cases in which death was imposed based upon different statutory aggravators than those present in Petitioner's case. In *Tyler v. State*, 274 S.E.2d 549 (Ga. 1981) (a case where the death sentence was overturned, *see supra*; *Tyler v. Kemp*, 755 F.2d 741 (11th Cir.), *cert denied*, 474 U.S. 1026 (1985)) the jury sentenced the defendant to death based on O.C.G.A. §17-10-30 (b)(4) and (b)(7), two statutory aggravators not at issue in this case. Similarly in *Smith v. State*, S.E.2d 308 (Ga. 1976) (another case in which a death sentence was overturned, *see supra*), the death sentence was imposed based on O.C.G.A. §17-10-30 (b)(4).[11]

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[11] O.C.G.A. § 17-10-30(b)(4) states: "The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;" and (b)(7) states: "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim[.]"

It is untenable that the above-described crimes can be viewed as substantially similar to Petitioner's when the death sentence was imposed based on factors wholly distinct from those present in this case. In sum, the cases cited by the Georgia Supreme Court in its "appendix" on direct review cannot be relied upon as indicative that Ms. Gissendaner's sentence is proportionate to those of similarly-situated Georgia offenders.

5. The Proportionality Review Performed by the State Court in Petitioner's Case Fails to Comport with this Court's Eighth Amendment Jurisprudence

The sole instance of proportionality review of Petitioner's death sentence was performed on direct review by the Georgia Supreme Court. See Appendix 2. For the reasons outlined herein, Petitioner maintains that the Georgia Supreme Court's proportionality review was perfunctory and, further, if the case had received meaningful review, there is a reasonable probability that Petitioner would have been granted a new sentencing. While the breakdown of procedure doubtlessly fails to comport with Georgia law, the implications extend far beyond state law. Georgia's proportionality review is coextensive with what the Eighth and Fourteenth Amendments require, as this Court established in *Furman* and *Gregg*.

As this Court made clear, the Eighth Amendment is grounded in the concept that "a crime should be graduated and proportioned to the offense." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (internal citations omitted) (holding that the death penalty was a disproportionate punishment for the

rape of a child where no murder occurred in violation of the Eighth and Fourteenth Amendments). This principle has been echoed in a long line of Supreme Court precedent, and applied to a variety of contexts. *See Atkins v. Virginia*, 536 US. 304 (2002) (categorically barring the death penalty for murder when the defendant is intellectually disabled); *Roper v. Simmons*, 543 U.S. 551 (2005) (categorically barring death sentences for juveniles who commit murder on Eighth Amendment grounds); *Graham v. Florida*, 560 U.S. 48 (2010) (sentences of life without parole for juveniles who have not committed a homicide violates the Eighth Amendment).

G. Petitioner has been denied federal review Federal Constitutional Proportionality Claim

Following her state court proceedings,[12] Petitioner pursued her claims in federal court. Included among these, Petitioner sought federal review of her proportionality claim. Petitioner presented her proportionality claim in her 28 U.S.C. § 2254 petition for writ of habeas corpus, as well in her final merits brief to the district court (see Appendix 5). The district court refused to consider the merits of Petitioner's proportionality claim, relying on this Court's decision in *Pulley*, which stated there was no *per se* constitutional right to

[12] Following the Georgia Supreme Court's proportionality review as part of Petitioner's direct appeal proceedings, Petitioner raised the claim on both state and federal law grounds before the state habeas court. However, the state habeas court ruled that the claim was procedurally barred under the res judicata doctrine, having been raised and ruled upon earlier by the Georgia Supreme Court. See Appendix 3, Butts County Superior Court Order Denying Relief, at pp. 8-13.