No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KELLY RENEE GISSENDANER

Petitioner,

v.

KATHLEEN KENNEDY, Warden,
Lee Arrendale State Prison,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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-CAPITAL CASE-
QUESTIONS PRESENTED

1. Have societal standards of decency evolved to the point that the Eighth and Fourteenth Amendments now prohibit the execution of a capital defendant who did not physically participate in the murder of her victim?

2. May a capital defendant's personal attributes and character so completely transform that the death penalty is no longer a proportionate response to her personal moral culpability under the Eighth and Fourteenth Amendments?

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Cl Ex. [exhibit number]	Petitioner's Exhibit in support of her petition for executive clemency before the Georgia Board of Pardons and Paroles

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Ms. Gissendaner respectfully petitions this Court to review the decision of the Supreme Court of Georgia denying review of a final judgment rendered by the Superior Court of Habersham County, Georgia, and to require adherence to the strictures of the Eighth and Fourteenth Amendments to the United States Constitutions and this Court's decisions in *Gregg v. Georgia,* 428 U.S. 153 (1976), *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987); *Atkins v. Virginia,* 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); and *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

I. JURISDICTION AND LOWER COURT OPINION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The final judgment and decree rendered by Supreme Court of Georgia on March 2, 2015, denying Petitioner's Application for a Certificate of Probable Cause to Appeal the decision of the Superior Court of Habersham County is filed as Appendix A hereto. The unpublished opinion of the Superior Court of Habersham County, Georgia, dismissing the Petition for a Writ of Habeas Corpus, entered on March 1, 2015, appears as Appendix B. The decision of the Supreme Court of Georgia affirming Petitioner's conviction and sentence of death appears as Appendix C.

II. CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution:

> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. AMENDMENT VIII;

The Fourteenth Amendment to the United States Constitution:

> [N]o State shall…deprive any person of life [or] liberty…without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. AMENDMENT XIV.

III. STATUTORY PROVISIONS INVOLVED

The Official Code of Georgia Annotated § 9-14-42(a) (2011):

> Any person imprisoned by virtue of a sentence imposed by a state court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of this state may institute a proceeding under this article.

The Official Code of Georgia Annotated § 9-14-51 (2011):

> All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

IV. STATEMENT OF THE CASE

A. Introduction

Since the 1976 reinstatement of the death penalty, the state of Georgia has **never** executed someone who was not present when the murder occurred. Nationally, only ten people have been executed under such circumstances since the reinstatement of the death penalty in 1976.[1] In most of those cases, the actual killer received a death sentence or died prior to execution.[2] Ms. Gissendaner would be only the fifth person in the nation in nearly forty years to face execution for a murder in which she did not physically participate and for which the actual killer did not receive a death sentence.[3]

Because a national consensus has developed against the execution of offenders who did not physically murder their victims, Ms. Gissendaner's execution would not comport with the "evolving standards of decency that mark

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[1] *See* Death Penalty Information Center, *Those Executed Who Did Not Directly Kill the Victim: Contract Killings* (2015), *available at* http://www.deathpenaltyinfo.org/those-executed-who-did-not-directly-kill-victim.

[2] *See id.*

[3] *See id.*

the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). Such standards are the barometer by which society judges whether a punishment is cruel and unusual within the meaning of the Eighth Amendment. *Id.*

The Eighth Amendment further prohibits Ms. Gissendaner's execution as a result of her remarkable personal characteristics. The Eighth Amendment requires that the death penalty, "this most irrevocable of sanctions[,] [ ] be reserved for a small number of extreme cases," *Gregg v . Georgia* , 428 U.S. 153, 182 (1976) – that is, for the "worst of the worst" offenders. *Roper v. Simmons,* 543 U.S. 551, 568 (2005). Over the past sixteen years, Ms. Gissendaner has embarked upon a dramatic personal transformation of character. There is now ample evidence that she is determined to be of service and value to others even from her maximum security prison cell. Ms. Gissendaner is no longer a person so depraved that the death penalty is the appropriate response to her personal moral culpability.

B. Procedural History

On April 30, 1997, a grand jury in Gwinnett County, Georgia, issued a two count indictment charging Petitioner Kelly Gissendaner and a codefendant, Gregory Owen, with malice murder and felony murder. The victim was Petitioner's husband, Douglas Gissendaner. Owen accepted a plea offer to life in prison with a contract not to seek parole for twenty-five years and testified against Petitioner. Petitioner went to trial in November 1998, was convicted of malice murder and felony murder and was sentenced to death.

Petitioner appealed. The Georgia Supreme Court affirmed her conviction and sentence on July 5, 2000. *Gissendaner v. State*, 272 Ga. 704, 532 S.E.2d 677 (2000). Her motion for reconsideration was denied on July 28, 2000. Petitioner's timely filed petition for a writ of certiorari in this Court was also denied. *Gissendaner v. Georgia*, 531 U.S. 1196 (2001).

In December 2001, Petitioner filed a petition for writ of habeas corpus pursuant to O.C.G.A. § 9-14-1, et seq., in the Superior Court of DeKalb County, Georgia. The court denied relief on February 16, 2007. A timely filed application for a certificate of probable cause to appeal with the Georgia Supreme Court. That application was denied on November 3, 2008. *Gissendaner v. Williams*, Case No. S07E1490.

Ms. Gissendaner filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Georgia on January 9, 2009. She requested discovery and an evidentiary hearing. The district court denied both requests. The court denied Ms. Gissendaner's petition for writ of habeas corpus on March 21, 2012. *Gissendaner v. Seabolt*, Case No. 1:09-cv-69-TWT, 2012 WL 983930. She filed a motion for reconsideration, which the district court also denied.

On November 19, 2013, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of habeas relief. *Gissendaner v. Seabolt*, 735 F.3d 1311 (11th Cir. 2013). On January 21, 2014, Ms. Gissendaner's timely-filed Petition for Rehearing and Rehearing En Banc was denied. Ms.

Gissendaner petitioned this Court for a writ of certiorari on June 20, 2014. That petition was denied on October 6, 2014. *Gissendaner v. Seabolt*, 135 S.Ct. 159 (October 6, 2014).

On February 9, 2015, the Superior Court of Gwinnett County issued a warrant for Petitioner's execution during a time period beginning on February 25, 2015 and ending on March 4, 2015. Following a hearing, the Georgia Board of Pardons and Paroles denied Ms. Gissendaner's petition for executive clemency on February 25, 2015.

On Thursday, February 26, 2015, Ms. Gissendaner filed a petition for writ of habeas corpus in the Superior Court of Habersham County alleging that her execution would violate the Eighth and Fourteenth Amendments, and corresponding provisions of the Georgia Constitution. On February 27, 2015, Respondent filed a motion to dismiss the petition, and Petitioner filed her response thereto. On March 1, 2015, the Superior Court dismissed the petition. *See* Attachment B. Petitioner immediately filed a Notice of Appeal, and filed an Application for a Certificate of Probable Cause to Appeal the decision of the Superior Court of Habersham County. This morning, March 2, 2015, that Application was denied without opinion. *See* Attachment A, *Gissendaner v. Kennedy,* Case No. S15W0914.

Ms. Gissendaner's execution is currently scheduled to proceed at 7:00 PM this evening, March 2, 2015. A Motion for a Stay of Ms. Gissendaner's execution accompanies this filing.

C. The Crime

On February 7, 1997, Petitioner's boyfriend, Gregory Owen, killed her husband, Douglas Morgan Gissendaner, in a remote section of the woods in north Georgia. The evidence is unambiguous: Gregory Owen, not Petitioner, murdered Doug Gissendaner. Petitioner's role consisted of proposing the crime and providing Owen with an opportunity to carry it out. TT. 2273-75. On the night of the murder, she dropped Owen off at the home she shared with her husband. *Id*. at 2278. She then left the house and went out with friends for the night. *Id*.

Greg Owen planned and carried out the murder. The brutality with which Owen accosted, kidnapped and killed Doug Gissendaner was left to Owen's discretion. Petitioner did not know key details of Owen's plan, such as the involvement of a third party. HT at 24-28; 288-89. Owen knew that he would require assistance in abducting and killing Doug Gissendaner; Mr. Gissendaner was larger than Owen, and he was a military veteran who had engaged in active combat during the Gulf War. Owen needed an accomplice, so he recruited one. *Id.* Owen arranged for the accomplice to meet him after Petitioner had left and to depart before she returned.

Owen then lay in wait for Mr. Gissendaner for several hours. When Mr. Gissendaner arrived home, Owen, with the assistance of his accomplice, held a knife to Mr. Gissendaner's neck, forced him into a car, and directed him to drive to a remote location off of Luke Edwards Road. Id. at 228-85. When they arrived, Owen marched Mr. Gissendaner into the woods. Id. at 2292. After walking

approximately 300 – 500 feet, Owen instructed Mr. Gissendaner to stop. At any point during the course of this multi-hour plot, Greg Owen could have extricated himself. Instead, he plowed forward.

Owen took Mr. Gissendaner's watch and wedding band so that it would look like he had been robbed. *Id*. at 2294-95. Owen made Mr. Gissendaner kneel on the ground. He hit Mr. Gissendaner with the night stick in the back of the head, incapacitating him. *Id*. at 2297. Mr. Gissendaner fell forward onto the ground. Owen put the nightstick back in his pants and "took the knife and I stabbed him" in his neck "maybe eight or ten times." *Id*. at 2298-99. Mr. Gissendaner made no sounds after being stabbed, so Owen believed he was dead.

Petitioner later returned home and paged Owen with a numeric signal before driving to the area where Owen had murdered her husband. Owen burned Mr. Gissendaner's car with kerosene, then he and Petitioner returned to their respective homes. Owen threw the nightstick and knife, the jeans he was wearing, and Doug's jewelry into the trash. *Id*. at 2309-11.

D. Petitioner's Metamorphosis

Greg Owen testified against Petitioner at her Gwinnett County trial in November of 1998. Kelly Gissendaner was convicted and sentenced to death for her role in her husband's murder. The District Attorney argued that the case proved her to be a "desperate, evil woman." TT. at 2721. By all accounts, she entered prison a bitter and self-involved person.

In the 17 intervening years, however, Petitioner has undergone a dramatic transformation, working hard on the difficult process of becoming a model prisoner and an asset to the prison community, a good mother, a faithful Christian, and a person of service to those around her. She is now uniformly described by those who know her as a compassionate and deeply remorseful woman.

The best descriptions of Petitioner's transformation come from those who watched it happen: officers, administrators, pastors and prison volunteers. Chaplain Susan Bishop met Petitioner in November 1998, just after her arrival at Metro State Prison, and continues to provide chaplaincy care to Petitioner today:

> When Ms. Gissendaner first entered the prison system she was a very closed and self-centered person with little insight. I have seen her evolve into a person who is very concerned about others. She is very remorseful about her crime and the impact that it has had on others. She accepts full responsibility for her role in this crime.
>
> I have witnessed Ms. Gissendaner undergo a deep and sincere spiritual transformation. Having been a Chaplain in the prison setting for over thirty years, I have seen much "jailhouse religion." The spiritual transformation and depth of faith that Ms. Gissendaner demonstrates and practices is a deep and sincere expression of a personal relationship with God. It is not a superficial religious experience.

Cl. Ex. 7.

Reverend Sally Purvis, Petitioner's pastoral counselor from July 1999 to the present, also saw Petitioner's personal and spiritual growth firsthand:

> When I first met Kelly, she was an angry woman. I am not breaking pastoral confidence to say that she grew up in an angry and often violent environment since that is public record. And she had absorbed much of her upbringing.

> …She gradually took responsibility…and she started to look hard at what she had done. She realized over time that her real work wasn't to challenge a system but to look hard at her own soul and make peace – with God, with the world, and with herself.

Cl. Ex. 21.

Former Dean of the Candler School of Theology and Chair of the Georgia Prison Ministries, James L. Waits, first encountered Kelly in 2003. Waits wrote:

> … she has availed herself of all opportunities provided by the [prison] Chaplaincy, including its services of worship, teenage probation groups, clinical pastoral programs, and theological study. Within the prison, she has become a model influence on other inmates as they struggle to find their identity in the face of their offenses. She is profoundly remorseful for her role in the crime for which she was convicted. …
>
> I believe we can see in Kelly Gissendaner a truly redeemed person. If our faith teaches anything, it is that such persons, including ourselves, may hope for the chance to prove the reliability of our changed ways. Kelly has already exhibited an exemplary change in her life….

Cl. Ex. 18.

Many corrections officers, administrators, and volunteers have spoken about the positive influence Petitioner has on other inmates, especially those who are troubled and in need. Both officers and inmates discuss how Petitioner has prevented suicides by ministering to those considering taking their lives and by alerting officers to those she believes might be in danger of carrying out a plan. Petitioner's actions keep the prison community safer and more secure. Despite her heightened security classification and difficult living situation, Petitioner has made an impression on the staff as a calm and respectful inmate, setting an

example for the inmates around her. As her former warden at Metro State Prison, Vanessa O'Donnell (2001-2004) discussed, the security protocol surrounding Petitioner's incarceration meant that she faced a unique isolation. O'Donnell said, "I found her polite and respectful, asking for little but a moment of time to escape the isolation she endured through those years." Cl. Ex. 6.

Petitioner's former Deputy Warden of Care and Treatment at Lee Arrendale, Sheila Bracewell, observed:

> Prior to working for the Department of Corrections I worked as a peace officer for eight years so I came into contact with some very bad criminals. My instincts have always guided me on reading people and their intentions, bad or good. Kelly Gissendaner is one of the good ones.

Cl. Ex. 8.

These observations were made not just by those with highest authority, but by the correctional officers who supervised Petitioner on a daily basis. Betty Hodges, who served in the Department of Corrections for 25 years, knew Petitioner from the time she arrived at Metro State Prison in 1998 until Ms. Hodges's retirement in 2010: "I wish all inmates were like her. She was always respectful to me and never once caused me or any of the other officers I worked with any problems." Cl. Ex. 13. Petitioner "helped to make the range less disruptive and more tolerable." Id.

Petitioner's displays of compassion have ameliorated many of the problems corrections officers face daily, including inmates who are volatile, assaultive or

suicidal. Sergeant Davenport described Petitioner as "humble and respectful" rather than someone with "volatile, manipulative tendencies," explaining:

> I have been attacked by inmates, seen volatile situations quickly escalate, and know the damage that certain inmates can cause because of their violent unstable tendencies…Kelly Gissendaner is not one of those inmates. She is exactly the opposite. She is the type of inmate we need in our institutions…

Cl. Ex. 12.

Veteran corrections officer Karen Lopez explained:

> Working as an officer inside a prison is like being on the front lines. It can be very traumatizing. You never know what you are going to encounter day to day. There are always opportunities for violence or even death to occur. Ms. Gissendaner was not perfect, but her lapses were minor, and her help preventing suicides and otherwise helping staff with mentally ill inmates was extremely important. She has been an asset to the Department of Corrections while she has been in prison.

Cl. Ex. 15.

Lt. Marian Williams similarly spoke of how Petitioner's devotion to serving those around her "made the job safer," saying "Kelly Gissendaner is a peacemaker and has many times made the job safer for me and my staff." Cl. Ex. 14.

The other inmates who have been housed with Petitioner in recent years have attested to the positive and lasting impact that Petitioner had on their lives and the lives of other inmates. For example, Latasha Baker recounted:

> [W]hat has always stood out the most is how [Petitioner] treats the officers and other staff members. She is very respectful and always encourages everyone else to show the same respect. You would expect her to be bitter or maybe to blame everyone else. She is totally opposite. She sets a good example for everyone. It's very easy to give up when you're in this situation, but we always have Kelly to encourage us. She is always positive and pushes us to do right.

Cl. Ex. 58.

Lee Arrendale State Prison houses some prisoners who are under the age of 18; they are sometimes placed in segregated cells near Petitioner. One of those young women, Keisha Rhodes, described Petitioner's effect on her:

> I'm 18 years old. Kelly has really made a great impact on my life. She shows me a love that my mother didn't show me…She is a very good influence on my sister and the rest of the juveniles that's housed here.
>
> When I wanted to give up, she wouldn't let me, she treated me just like I was her own child. So I started calling her Mama Kelly, I would come up and see her we would talk about my goals and how to ignore or should I say get over the hard obstacles in my life. When I would see my Mama Kelly she always made me smile.…

Cl. Ex. 52.

One of the most profound ways in which Petitioner has chosen to use her unique perspective on prison life, and the lessons she has learned through her theological studies, is by speaking to troubled youth who visit the prison. Her role in these programs is entirely voluntary. Petitioner participates because she wants to make a difference in the children's lives. Cl. Ex. 32. Those who have witnessed her interactions with these students and the students themselves all attest to the difference her interaction is making.

Gretrell Watkins directs Prison Prevention Ministries (PPM), a youth ministry aimed at providing children with the tools and information necessary to change negative behavior and become productive members of society. Many of the children in the program have engaged in criminal behavior, and are potentially

headed for a life in prison. Petitioner speaks with these students about life in prison, the crime she committed, and the tragic decisions she made, which lets them see firsthand how they alone can change the paths of their lives. Cl. Ex. 32. As Watkins explained:

> The Corrections officers stated that Kelly didn't have to talk to the students but that she did so because she wanted to make a difference. And a difference she has made to the 1000+ students on 70+ tours made through the prison. We do one on one follow up with all of the kids who go on the prison tours and hear from them about the changes they are making and what impacted them. Hearing from Kelly on death row, who is telling them that they need to make good choices now, really made an impact on these kids and served as a wake-up call and turned many lives in the right direction.

Cl. Ex. 32.

Veteran police officer Marc Easley, who now teaches criminal justice at Dalton State College, has also has taken many students to speak with Petitioner. As a former police officer, Mr. Easley has interacted with many criminals and is accustomed to hearing excuses from them which avoided personal responsibility. Petitioner was different:

> Kelly wasn't angry, she wasn't in denial and she never once even hinted that her reason for being in prison was anything but of her own doing. Kelly, to what I am sure was the horror of her defense team, always accepted full responsibility for her actions. Never the fault of the police, her attorney, a Judge or jurist, and particularly not the fault of her victim, Kelly always admitted to and took responsibility for her crime…This was new ground for me.

Cl. Ex. 31. Because of her willingness to accept responsibility for her actions and speak frankly about her situation, Petitioner reached the children and helped them see the potential consequences of their actions.

Teachers and counselors who accompanied students on the tours attested to the sincerity of Petitioner's involvement with the students and the impact she has on them. Romona Goines, a teacher from Brown Middle School, remarked on the power of Petitioner's message:

> She encouraged them to have respect for themselves and reduce the breeding ground for becoming involved in future criminal activity. She emphasized the importance of respect for rules and the law. Kelly admitted that she didn't have all the answers, but in order for students to avoid being channeled into the prison system they needed to look towards what is needed to become successful in society and find ways to implement / get involved in systems to support that.

Cl. Ex. 37.

In addition, over the course of her incarceration, Petitioner has nurtured her faith through intensive theological study and reflection. She began more formal coursework nearly a decade ago when she was given the opportunity to participate in the Emmaus Bible College's correspondence program. Cl. Ex. 85. Between 2006 and 2009, Petitioner completed 13 correspondence courses. Id.

In 2009, the Atlanta Theological Association (a consortium of four theological schools and seminaries) founded the Certificate in Theological Studies (CTS) program at Metro State Prison in Atlanta with the goal of preparing incarcerated women to serve as lay leaders in prison and, if they earn their release, in their communities. The program is an intensive, year-long learning experience.

Petitioner earned her certificate in December 2010. Cl. Ex. 17, 85. She was selected as the student speaker at the graduation ceremony in October 2011. During her speech, Petitioner expounded on the theme of hope:

> The theology program has shown me that hope is still alive…no matter the label attached to me, I have the capacity and the unstoppable desire to accomplish something positive and have a lasting impact … Even prison cannot erase my hope or conviction that the future is not settled for me, or anyone … I have placed my hope in the God I now know, the God whose plans and promises are made known to me in the whole story of the life, death, and resurrection of Jesus Christ.

Graduation speech of Kelly Gissendaner, October 28, 2011.

In addition to utilizing her faith and her theological studies to help others, Petitioner has been a teacher to youth and young adults in need. She also has engaged in a lengthy, painful reconciliation process with her children, and is willing to do the same with others who have suffered greatly because of her criminal conduct. Ms. Gissendaner is simply no longer an offender so depraved that her execution is the only appropriate response to her personal moral culpability.

V. REASONS FOR GRANTING THE WRIT

A. The Eighth Amendment Now Prohibits The Execution of Offenders Who Did Not Participate In Killing Their Victims.

This Court has repeatedly ruled that murder alone is not constitutionally sufficient to warrant the use of the death penalty. "The culpability of the average murderer is insufficient to justify the most extreme sanction available to the State." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). Crimes for which the

offender is executed must fall within that narrow class of murders more horrid than others. *See Roper v. Simmons*, 543 U.S. 551 (2005). When the crime falls outside this core class of the most abhorrent murders, a death sentence cannot be carried out. *Enmund v. Florida,* 458 U.S. 782, 798 (1982).

The concept of which crimes fall into that "small number of extreme cases" is not static. Rather, it is fluid and dynamic; it changes and progresses as society evolves. As this Court noted in *Roper*, "we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society'" in order to "determine which punishments are so disproportionate as to be cruel and unusual." 543 U.S. at 560-61 (citing *Trop*, 356 U.S. at 100-101).

This inquiry necessitates that courts analyze the specific characteristics of the crime. "Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Graham v. Florida*, 560 U.S. 48, 59 (2010) (citing *Weems v. United States*, 217 U.S. 349, 367 (1910)). "As the Court explained in *Atkins*, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions." *Roper*, 543 U.S. at 560 (internal citations omitted). Many crimes fall into the class of severe or aggravated crimes, yet they never merit the imposition of a death sentence. *See, e.g., Enmund,* 458 U.S. at 784 (reversing death sentence as disproportionate even though Enmund was involved in a robbery-murder of an 86-year-old man and a 74-year-old woman); *Roper*, 543

U.S. at 556 (reversing Simmons's death sentence as unconstitutionally disproportionate after Simmons and an accomplice broke into a woman's home in the middle of the night, covered her eyes and mouth with duct tape, bound her hands, forced her into a minivan, drove to a state park, covered her head with a towel, marched her to a railroad track, tied her hands and feet together with electrical wire, wrapped her head in duct tape, and threw her off of a bridge); *Atkins,* 536 U.S. at 307 (reversing Atkins's death sentence as disproportionate after Atkins and an accomplice abducted Eric Nesbitt, robbed him of the money he possessed, drove him to an ATM machine in his truck and forced him to withdraw more money, drove him to an isolated location, and shot him eight times); *Kennedy v. Louisiana*, 433 U.S. 407 (2008) (finding the death penalty disproportionate for brutal rape of a child).

Because Kelly Gissendaner did not carry out the robbery, beating and brutal murder of Doug Gissendaner, her execution would be a constitutionally intolerable event. Society has now determined that Petitioner's crime does not fall in the class of offenses so "extreme" that society has deemed them the "most deserving of execution." *Id.* at 420.

This Court has repeatedly held that contemporary community standards inform any Eighth Amendment analysis, and a national consensus against executing a certain class of people is highly relevant to the determination of who should face the execution chamber. A link between "contemporary community values" and the criminal justice system must exist. *Gregg v . Georgia*, 428 U.S.

153, 190 (1976). Without such a connection, "the determination of punishment could hardly reflect the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 190 (citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 (1968) and *Trop*, 356 U.S. at 101).

Across the state and the nation, prosecutors, juries, judges and clemency boards have expressed the conscience of the community: people who did not directly kill their victims are not being executed for their crimes. These are not "the worst of the worst" offenses for which the death penalty is reserved.

Similarly-situated murder defendants no longer face execution in the United States. The criminal justice system attempts to sort more-culpable defendants from less-culpable defendants, executing only those who commit the most deliberate and heinous crimes. The legal process operates like a funnel, gradually winnowing out defendants who, by virtue of the facts of their crimes, do not deserve the death penalty. In cases where a non-trigger person defendant receives a disproportionately severe death sentence, that person's sentence is corrected over time**.**

1. Prosecutors rarely seek death against defendants who do not physically kill their victims

Prosecutors often elect not to seek the death penalty against defendants whose cases bear similarities to Ms. Gissendaner's, even when the crimes are significantly more aggravated. In fact, Georgia has **never** executed a person who was not present when the murder occurred.

For example, the State of Georgia did not seek the death penalty against

Laneika Thomas, who hired Jamel Miller to kill her husband, Larry Thomas. *Miller v. State*, 268 Ga. 1, 485 S.E.2d 752 (Ga. 1997). Thomas crafted an actual contract in which she agreed to pay Miller $1,500. *Id.* Miller shot Larry Thomas ten times in the back. *Id.*

Nor did the State seek death against Nora Broomall, who conspired with Cecil Booher to murder her husband in order to obtain life insurance. They agreed to make the crime look like a robbery by taking some of his possessions. *Broomall v. State*, 260 Ga. 220, 391 S.E.2d 918 (Ga. 1990).

2. Juries repeatedly refuse to impose death sentences against defendants who do not physically kill their victims.

People who are not present when their victims are killed are regularly sentenced to life, either by a jury or pursuant to a plea agreement. This holds true even when the non-killer's involvement is much more sinister or substantial than Ms. Gissendaner's.

For instance, in 1992, Fred Tokars arranged to have his wife, Sara Tokars, murdered. *U.S. v. Tokars*, 95 F.3d 1520 (11th. Cir. 1996). He planned the murder for about four months, offering to pay one of his drug-dealing associates $25,000 plus a portion of the proceeds of Sara's $1.75 million-dollar life insurance policy to murder her. *Id.* at 1528. Tokars's associate hired a third party, Curtis Rowar, to murder Sara Tokars. *Id.* Rowar shot Sara in front of her two children as they were returning from their Thanksgiving trip. *Id.* at 1528-29. Tokars was sentenced to life in prison. *Id.* at 1524.

In addition, defendants who are physically present for the murder, but do

not themselves commit murder, tend to receive life sentences. Several cases are illustrative: Timothy Carr and Melissa Burgeson plotted and carried out the murder of a 17-year-old acquaintance, Keith Young. *See Carr v. State*, 267 Ga. 547, 480 S.E.2d 583 (1997). Carr, Burgeson, and Young attended a party together, after which Burgeson took Young's car keys and convinced him to allow her to drive him home. *Id.* at 548. She stopped the car on a dirt road, and when Young exited the vehicle, she "motioned to Carr to kill him." *Id.* Carr slashed Young's throat, and "[a]t Burgeson's urging, Carr stabbed the victim repeatedly and then beat him in the head with a baseball bat." *Id.* Carr and Burgeson fled to Tennessee, and the police arrested them following a high-speed chase. *Id.*

At trial, the prosecutor argued that Burgeson was the moving force behind the murders, and Carr was nothing but her puppet, just as they did in Ms. Gissendaner's case. However, Melissa Burgeson was sentenced to life.

Like Burgeson, John Brown was present when John Alderman murdered his wife, but did not physically complete the murder. Brown did not receive a death sentence. *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642 (1978). Alderman approached Brown about murdering his wife, Barbara, telling Brown that he would split the proceeds of her life insurance policy if Brown assisted with the murder. *Id.* at 497. When Brown arrived at Alderman's house, Brown hit Barbara Alderman with a wrench, and Alderman then tackled her. *Id.* The men strangled or suffocated her and after she passed out, Alderman dragged her body to the bathroom and drowned her in the bathtub. *Id.* Brown served 12 years in

prison.

David Cargill and his brother, Tommy Cargill, committed an armed robbery of a service station. *See Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986). In the course of the robbery, David shot and killed a service station employee and another man. *Id.* at 621. Tommy did not physically commit either murder, and he received a life sentence following a jury trial.

On April 12, 1982, Robert Jones, Timothy Jenkins, and Terry Mincey robbed a convenience store. *Mincey v. State*, 251 Ga. 255, 255-56, 304 S.E.2d 882 (1983). All three men carried weapons. *Id.* at 256. In the course of the robbery, Mincey shot two people; one died, and one survived. *Id.* Jones and Jenkins, who did not physically shoot either victim each received a life sentence. *Id.* at 266.

Rick Soto who, like Ms. Gissendaner, provoked his lover to kill his spouse, also received a life sentence following a jury trial. Soto and his girlfriend, Teresa Whittington, plotted the murder of Soto's wife, Cheryl. *See Whittington v. State*, 252 Ga. 168, 313 S.E.2d 73 (1984); *see also Soto v. State*, 252 Ga. 164, 312 S.E.2d 306 (1984). Soto provided the weapon, taught Teresa how to shoot, arranged the murder, and remained on the scene while Teresa shot and killed his wife. *See id.*

Rick Soto was significantly more culpable than Kelly Gissendaner. Soto provided the only weapon used in the crime and actually coached the killing, whereas Greg Owen obtained the knife with which he murdered Doug Gissendaner on his own. *Id.* at 170. Rick Soto was on the scene at the time of the murder, whereas Petitioner was far removed. *Id.* at 176. At trial, Soto was

sentenced to life in prison. *Id.* at 178**.**

3. The appellate process weeds out the rare death sentence imposed against a defendant who did not physically kill her victim.

When jury verdicts result in a death sentence for a defendant who was not present, the appellate and post-conviction processes seek to correct the imbalance. For example, Rebecca Smith (a/k/a Machetti) and her second husband John Smith (a/k/a Anthony Machetti) devised a plan to murder Rebecca's first husband, John Adkins, and his wife. *Smith v. State*, 236 Ga. 12, 222 S.E.2d 308 (Ga. 1976). At trial, the State asserted that the motive was to collect on insurance policies that Rebecca had taken out while she and John Adkins were married, for which she and her daughters were still the beneficiaries. *Id.* at 311. John and an accomplice lured the Adkinses to a secluded area of a housing development and shot them both at close range. *Id.* Rebecca was not present at the scene of the murder. *Id.*

Rebecca Smith/Machetti was nevertheless sentenced to death. *Id.* However, she received relief on appeal and was retried. At her retrial, she received two life sentences. Recently, she was released on parole**.**

4. The clemency process acts as a failsafe mechanism to prevent the execution of defendants who did not physically murder their victims.

Over the years that pass between the imposition of sentence and a prisoner's execution, the legal process winnows out those prisoners who did not directly participate in the murders of their victims, resulting in only the executions of those who committed the actual killing and preserving the central tenet of our death penalty system: that the ultimate punishment is reserved for

the worst of the worst.

When the legal process fails, however, clemency boards step in to balance the scales of culpability. Clemency is "the historic remedy for preventing miscarriage of justice where judicial process has been exhausted," *Harbison v. Bell*, 556 U.S. 180, 192 (2009), *quoting Herrara v. Collins,* 506 U.S. 390, 415 (1993)("far from regarding clemency as a matter of mercy alone, we have called it a 'fail safe' in our criminal justice system.")(footnote omitted). In the unlikely event that a prisoner who did not kill his or her victim reaches the clemency stage, he or she is highly likely to obtain relief. Nationally, 16 prisoners with disproportionate sentences have received sentence commutations in the modern death penalty era.[4]

The Georgia Board of Pardons and Paroles has commuted nine death sentences since *Gregg*. In four of those cases, the disproportionality of the sentence was one of the primary issues (if not *the* primary issue) before the board:

- Charles Harris Hill and two other men were involved in a burglary that went awry, resulting in a murder. *See* Adam Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 Mich. L. Rev. 1, 21 (2014) (hereafter "Gershowitz"). The actual killer pled guilty to murder, and he received a life sentence. *Id.* The Board of Pardons and Paroles commuted Hill's sentence. *Id.*

- In 1988, the board granted clemency to Freddie Davis, citing concerns about his role in the crime and his co-defendant's recantation.[5] Davis

[4] *See* Death Penalty Information Center, *Clemency* (2015), *available at* http://www.deathpenaltyinfo.org/clemency. In a 17th case, the state's board of pardons and paroles recommended clemency, but the governor failed to accept the recommendation.

[5] *Execution Halted in Georgia*, Associated Press (June 16, 1988), http://

had been convicted of rape and murder, but his co-defendant later admitted that Freddie had not been in the room when the victim was murdered. *Id.*

- Harold Williams received a commutation in 1991. Harold Williams and Dennis Williams had been convicted of murdering Harold's grandfather. *Williams v. State*, 250 Ga. 553, 300 S.E.2d 301 (1983). A spokesperson for the Board of Pardons and Paroles said that "there was ample evidence the codefendant…was the ringleader in the murder." Gershowitz at 33; *see also* Jingle Davis, *Ex-Marine's Death Sentence for Murder is Commuted*, Atlanta J.-Const., Mar. 23, 1991, at B5.

- Most recently, the board commuted Tommy Waldrip's death sentence. Tommy Waldrip, John Mark Waldrip, and Howard Livingston had all been convicted of the murder of Keith Evans.[6] The primary issue before the board was the disproportionality of Tommy Waldrip's sentence, given that he was not the impetus for the crime and that his son, John Mark, had killed Evans.[7] *Id.*

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www.apnewsarchive.com/1988/Execution-Halted-In-Georgia/id-9e90dce69c67f98623cc83529b dfffd3; *see also* Gershowitz at 34.

[6] *See* Rhonda Cook, *Waldrip's Death Sentence Commuted to Life Without Parole*, Atlanta J.-Const. (July 9, 2014), http://www.ajc.com/news/news/breaking-waldrips-death-sentence-commuted-to-life-/ngcRm/; *see also Georgia Death Row Inmate Granted Clemency 24 Hours Before Execution*, The Guardian (July 10, 2014), http://www.theguardian.com/world/2014/jul/10/georgia-death-row-inmate-granted-clemency-24-hours-before-execution.

[7] This clemency grant is of particular relevance as Waldrip's was among the cases relied upon by the Georgia Supreme Court in its 2000 statutorily-mandated proportionality review. *See, Gissendaner,* 272 Ga. at 719. The fact that Waldrip's case was winnowed from those death eligible cases as a result of his role as a non-triggerperson is yet further evidence of the evolution in societal standards of decency over the past fifteen years.

5. Ms. Gissendaner's execution would be an unconstitutional aberration

The criminal justice process resulted in a grossly disproportionate sentence for Kelly Gissendaner. She suggested the idea of killing her husband, yet played no part in physically carrying out the brutal murder. Each of the remedies for correcting her disproportionate sentence have failed. Ms. Gissendaner's impending execution is an anomaly not simply because she received a death sentence in spite of her lack of participation in the crime, but also because the legal system and executive clemency processes failed to cull her aberrant death sentence from those cases truly deserving of death. Given Ms. Gissendaner's role in her crime, her execution would not comport with the evolving standards of decency that track the progress of a civilized nation.

6. The habeas court erred in finding that this is the "same claim" previously rejected by the Georgia Supreme Court.

The Superior Court of Habersham County ("habeas court") granted Respondent's Motion to Dismiss the petition on the basis of two plain factual errors: (1) that Ms. Gissendaner's claim is the same claim raised and resolved during her 2000 direct appeal to the Georgia Supreme Court and therefore, that decision controlled, and (2) that Petitioner had cited no new law or evidence in support of her claim. Both of these determinations are facially incorrect.

While the habeas court was correct that the re-litigation of the "same issues" previously adjudicated on direct appeal is prohibited by Georgia law. *Head v. Carr*, 273 Ga. 613, 614 544 S.E.2d 409 (Ga. 2001), the court was factually

incorrect in finding that the current claim was previously adjudicated. Not only did Petitioner not raise her Eighth Amendment argument in prior litigation, it was not previously available and could not have been raised.

Unlike in prior litigation, Petitioner asserts that her impending execution, not her original jury determination as to sentence, is a disproportionate response to her crime. This is a claim that was both unavailable and unripe until each of her legal and executive remedies had been exhausted.

Second, and more to the point, Petitioner's current claim is based upon the considerable shift in societal standards of decency, the "evolving standards of decency that mark the progress of a maturing society" from which the Eighth Amendment must draw its meaning. *Trop,* 356 U.S. at 101. The inquiry must rely upon contemporary standards of decency, standards which, as shown *supra,* have changed since the time of Petitioner's direct appeal.

In contrast, the Georgia Supreme Court's statutorily-mandated proportionality review, *see* O.C.G.A. 17-10-35(c), focused upon the then-contemporaneously-imposed death sentences in other Georgia capital cases, as well as upon Ms. Gissendaner's relative culpability vis-à-vis her codefendant. *See Gissendaner v. State,* 272 Ga. 704, 718-19, 532 S.E.2d 677, 691 (2000). The societal standards of decency have evolved since the time of that review, and they now have reached the point that a death sentence is no longer imposed upon offenders who did not directly participate in the act of murder.[8]

[8] In fact, since the time of this Court's 2000 proportionality review, two of the

This intervening advancement in the law makes the claim appreciably different than that previously litigated. The habeas court's dismissal is based upon a plain misapprehension of Petitioner's constitutional claim, an error that should not be permitted to operate to deprive Petitioner of her Eighth Amendment rights. Further, this Court has instructed, "[s]hould doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." *Sanders v. United States*, 373 U.S. 1, 16 (1963). The instant claim is not the same claim previously adjudicated by the Georgia courts.

Furthermore, even if this Court were to find the doctrine of *res judicata* applicable to the current claim, the Court should grant certiorari and review the claim in order to prevent a miscarriage of justice. Because her execution would be disproportionate, Ms. Gissendaner is actually innocent of the death penalty. Her execution would be a miscarriage of justice. *Compare, Smith v. Murray,* 477 U.S. 527, 537 (1986). This Court has held that the imposition of the death penalty is unconstitutional and disproportionate if it is imposed in a case that is 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). In other words, the Court has recognized that there are certain cases in which the death penalty is simply not permissible. In those

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cases relied upon this Court have been overturned in habeas corpus proceedings or received executive clemency, further evidencing the intervening evolution in societal standards of decency. *See Romine v. v. Head*, 253 F.3d 1349 (11th Cir. 2001); Rhonda Cook, *Waldrip's Death Sentence Commuted to Life Without Parole*, Atlanta J.-Const. (July 9, 2014), http://www.ajc.com/news/news/breaking-waldrips-death-sentence-commuted-to-life-/ngcRm.

cases, the offender is actually innocent of the death penalty and cannot be punished capitally. *See Sawyer v. Whitley*, 505 U.S. 333, 340 (1992).

As outline above, history and statistics now demonstrate that criminal defendants who do not physically kill their victims and are not present for the murder are nearly always given a sentence less than death. In myriad other cases with similar—or worse—facts, the non-trigger person defendant received a sentence less than death. Because executing someone who is actually innocent of the death penalty would be a miscarriage of justice, Petitioner's proportionality claim is not barred as a result of any prior litigation.

7. The habeas court incorrectly found as fact that Petitioner "had not cited any new law or evidence" in support of her petition for writ of habeas corpus.

The habeas court held that Petitioner's claim is barred because "Petitioner has not cited any new law or evidence to overcome the procedural bar." *See* Attachment B, Order of the Superior Court of Habersham County, at 1. This too is a factual error. Petitioner proved before the habeas court that neither the factual nor the legal bases for this claim were previously available.

The underlying legal basis of Petitioner's Eighth Amendment claim was previously unavailable. The "evolving standards of decency" to which courts must look in order to "determine which punishments are so disproportionate as to be cruel and unusual" are not static. *Miller v. Alabama,* 132 S.Ct. 2455, 2463 (2012) (citing *Trop*, 356 U.S. at 100-101). Rather, punishments once considered proportionate can reach a point where they are imposed with such rarity that they may be held to be unconstitutionally cruel and unusual under the Eighth

Amendment. *Compare Stanford v. Kentucky,* 492 U.S. 361, 380 (1989)("discern[ing] neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age" and "concluding that such punishment does not offend the Eighth Amendment's prohibition"), with *Roper*, 543 U.S. at 560-61 (holding 16 years after the *Stanford* decision that the objective indicia of society's consensus had changed, and that the death penalty was no longer a proportionate sentence for juvenile offenders); *Penry v. Lynaugh,* 492 U.S. 302 (1989)(holding that the Eighth Amendment does not provide a blanket prohibition against the execution of intellectually disabled murderers); with *Atkins v. Virginia,* 536 U.S. 304 (2002) (holding just 13 years later that "[t]he practice [of executing intellectually disabled offenders], [] has become truly unusual, and it is fair to say that a national consensus has developed against it.")

The full panoply of cases that demonstrate society's clear directive that people who do not physically participate in their victims' murders should not be executed was not available until now. Just as in *Roper* and *Atkins*, over the fifteen (15) years between the time the Georgia Supreme Court first reviewed Ms. Gissendaner's death sentence and the date that the state sought her execution, it has become abundantly clear that society simply does not tolerate the execution of people who were not involved in the act of murder. This evolution in the law constitutes both an intervening change in the law and facts since the time of Petitioner's direct appeal. The habeas court erred in finding to the contrary.

The Georgia courts should have reached the merits of the instant claim and granted relief. A stay of execution, and grant of certiorari to review the Georgia Supreme Court's order, are appropriate.

B. Petitioner's Execution Would Be Unconstitutionally Cruel and Unusual Because Execution Is a Disproportionately Severe Sentence Given Petitioner's Unique Personal Characteristics.

Ms. Gissendaner's personal characteristics and moral culpability have changed so dramatically in the years following the imposition of her death sentence that the death penalty is no longer a proportionate response. The Eighth Amendment right to be free from excessive punishments flows from the "basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller v. Alabama,* 132 S.Ct. 2455, 2463 (2012) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)) (internal quotation marks omitted). The offender in the instant case, Ms. Gissendaner, is no longer among the "worst of the worst," those possessed of "extreme culpability" for whom the death penalty must be reserved. *Roper v. Simmons,* 543 U.S. 551, 568 (2005). "An irrevocable judgment about [an offender's] value and place in society," *Graham v. Florida*, 560 U.S. 48, 74 (2010), is "at odds with [a person's] capacity for change." *Id*. (finding that a life without parole sentence for juveniles is excessive because it "means denial of hope; it means that good behavior and character improvement are immaterial"). Ms. Gissendaner has not demonstrated evidence of "irretrievably depraved character" *Roper*, 543 U.S. at 570, warranting death.

In evaluating whether or not a death sentence is merited in a particular case, courts must not only examine societal standards of decency, but must also consider the characteristics of the individual defendant. The Eighth Amendment "requires the State to inquire into the relevant facets of 'the character and record of the individual offender.'" *Tison v. Arizona,* 481 U.S. 137, 149 (1987)(citing *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)); *see also Gregg*, 423 U.S. at 153 ("We have long recognized that…justice generally requires that there be taken into account the circumstances of the offense together with the character and propensities of the offender") (internal citations omitted)). For example, some defendants commit crimes that render them statutorily eligible for the death penalty, yet their individual characteristics prevent the imposition of such a harsh punishment. *See, e.g., Atkins,* 536 U.S. at 304 (banning the death penalty for defendants with intellectual disabilities); *Roper,* 543 at 551 (prohibiting a death sentence for those who committed capital crimes while under the age of 18).

"These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of…offenders," that is, "the worst offenders." *Id.* at 568-69. Petitioner is no longer that offender.

The Eighth Amendment requires that punishment serve a legitimate end. If a lesser punishment satisfies society's legitimate interests in retribution and deterrence, execution becomes nothing more than the "pointless and needless extinction of life" which is "patently excessive," violating the Eighth Amendment. *Furman v Georgia*, 408 U.S. 238, 312 (1974) (White, J. concurring). In the instant

case, a lesser sentence serves society's legitimate penal interest in punishing Petitioner, and affirmatively serves society's interest in safe correctional institutions. As Lt. Marian Williams explained, Petitioner "helped keep D building safer for my staff and other inmates. She also helped reduce liability exposure to the Georgia Department of Corrections by having a calming effect on violent and suicidal inmates." Cl. Ex. 14. These are not the attributes of "the worst of the worst" offender.

The habeas court held that this claim is not cognizable in these proceedings. The habeas court noted that Petitioner "incorporated what appears to be a portion of her clemency petition" into her petition for writ of habeas corpus and concluded that the Board of Pardons and Paroles alones holds the power to grant clemency, finding that it "had no authority to grant such relief." Order at 1-2. This is a gross misapprehension of the claim.

Petitioner's claim is firmly grounded in the Eighth Amendment. She did not seek executive clemency from the habeas court or the Georgia Supreme Court below; rather, she explicitly sought a writ of habeas corpus. That the factual basis of the constitutional violation she alleged substantially overlapped with the evidence that Petitioner brought before the Board of Pardons and Paroles is of no moment. In fact, the evidence underlying a legal claim is frequently also among the reasons justifying the exercise of executive clemency. To hold otherwise would require a death-sentenced prisoner to evaluate which forum was most likely to provide relief on the basis of evidence central to her culpability, corrupting the

central function of both the courts and the executive branch's power to exercise clemency.

The Georgia state courts misapprehended the nature of Petitioner's request for relief. The very purpose and function of habeas corpus is to redress constitutional violations like that scheduled to be inflicted upon Kelly Gissendaner this evening. Any contrary result would be perverse. Petitioner faces the most grave violation of her constitutional rights possible, a violation that has its genesis in her 1998 capital trial. These proceedings are the proper vehicle for vindicating her rights. The lower court erred. Petitioner respectfully requests that this Court stay her execution and grant the writ.

VI. CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that this Court stay her execution, issue a writ of certiorari to the Supreme Court of Georgia, reverse the decision of that court and vacate her sentence of death.

Respectfully submitted, this the 2nd day of March, 2015.

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Appendix A

SUPREME COURT OF GEORGIA
Case No. S15W0914

Atlanta March 2, 2015

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

KELLY RENEE GISSENDANER v. KATHLEEN KENNEDY, WARDEN

Upon consideration of Gissendaner's application for a certificate of probable cause to appeal the dismissal of her second state habeas petition, it is denied.

Gissendaner's motion for a stay of execution is also denied.

All the Justices concur, except Benham and Hunstein, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk 's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk

Appendix B

IN THE SUPERIOR COURT FOR THE COUNTY OF HABERSHAM

2015 FEB 27 PM 12: 54

STATE OF GEORGIA

Book Page Recorded
David C. Wall

KELLY RENEE GISSENDANER,	:	
Petitioner,	:	**Civil Action**
vs.	:	**File No. 2015-SU-CV-117RS**
KATHLEEN KENNEDY, Warden,	:	
Respondent.	:	

ORDER

On February 27, 2015, Petitioner filed in this Court a Petition for Writ of Habeas Corpus and Motion for Stay of Execution. Respondent filed a Motion to Dismiss the Petition and Response in Opposition to Motion for a Stay. Petitioner thereafter provided to the Court a Reply brief in response to the Motion to Dismiss. Having considered the arguments and citations of authority contained in the pleadings, the Court enters the following Order.

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).

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 grant 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.

It is further ORDERED, that these proceedings be immediately transmitted by the Clerk of this Court to the Clerk of the Supreme Court of Georgia. In order that the Petitioner's Reply Brief, not yet filed of record, but considered by the Court, may be included in the record for transmittal to the Supreme Court, the Court has designated that a copy of such reply be filed and entered of record.

SO ORDERED this 31st day of March, 2015.

Russell W. Smith, Chief Judge
Superior Courts
Mountain Judicial Circuit

Cc: to Counsel via email
Susan C. Casey, Esq.
Mary E. Wells, Esq,
Sabrina Graham, Esq.

Appendix C

Supreme Court of Georgia.
GISSENDANER
v.
The **STATE**.

No. S00P0289.
July 5, 2000.
Reconsideration Denied July 28, 2000.

Defendant was convicted in the Superior Court, Gwinnett County, Homer M. Stark, Senior Judge, of malice murder and was sentenced to death. Defendant appealed. The Supreme Court, Thompson, J., held that: (1) sufficient evidence supported conviction; (2) finding that defendant was not entitled to change of venue on grounds of pretrial publicity or actual bias on part of jurors was supported by evidence; (3) defendant was not entitled to excuse jurors for cause based on their views on death penalty; (4) allegedly improper personal attacks upon defense counsel did not warrant reversal of death sentence; (5) death sentence was not disproportionate to sentences imposed in similar cases; and (6) death sentence was not disproportionate to sentence imposed on co-conspirator.

Affirmed.

Fletcher, P.J., concurred in part and concurred in judgment in part.

Benham, C.J., filed dissenting opinion in which Sears, J., joined.

West Headnotes

[1] Homicide 203 1180

203 Homicide
203IX Evidence
203IX(G) Weight and Sufficiency
203k1176 Commission of or Participation in Act by Accused; Identity
203k1180 k. Participation in Crime Committed by Another. Most Cited Cases
(Formerly 203k234(5))

Conviction for malice murder was supported by testimony of defendant's boyfriend that defendant initially suggested that they murder her husband and rejected his suggestion that she simply divorce him, that defendant gave boyfriend murder weapons, drove him to her home, and left him inside home to wait for her husband, that boyfriend forced husband to drive to a remote location, forced him to walk into the woods and kneel, and then killed him by hitting him with nightstick and stabbing him repeatedly, by testimony of boyfriend's sister that defendant told her that she intended to use husband's credit to get a house and then "get rid of him," and by telephone records that showed that defendant made 47 telephone calls to boyfriend and paged him 18 times in days leading up to murder. O.C.G.A. § 17-10-30(b)(2, 6).

[2] Criminal Law 110 134(4)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k129 Application
110k134 Affidavits and Other Proofs
110k134(4) k. Weight and Effect of Opposing Affidavits or Other Evidence. Most Cited Cases

Finding that capital murder defendant was not entitled to change of venue on grounds of pretrial publicity or actual bias on part of jurors was supported by evidence that 14 of 111 jurors questioned during voir dire were excused for cause based upon their exposure to pretrial publicity that was potentially damaging to defendant.

[3] Criminal Law 110 126(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue

110k123 Grounds for Change
110k126 Local Prejudice
110k126(1) k. In General. Most Cited Cases

A capital defendant seeking a change of venue must show that the trial setting was inherently prejudicial as a result of pretrial publicity or show actual bias on the part of the individual jurors.

[4] Criminal Law 110 126(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k123 Grounds for Change
110k126 Local Prejudice
110k126(1) k. In General. Most Cited Cases

The decisive factor in determining whether a change of venue is required in capital case is the effect of pretrial publicity on the ability of prospective jurors to be objective.

[5] Jury 230 103(14)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k98 Formation and Expression of Opinion as to Cause
230k103 Influence of Opinion on Verdict
230k103(11) Opinion Founded on Rumor or Newspaper Reports
230k103(14) k. Opinion Which Will Yield to Evidence. Most Cited Cases

Capital murder defendant was not entitled to excuse juror for cause based on juror having seen newspaper article that reported on defendant's upcoming trial and that included fact that statement made by defendant had been suppressed, where juror stated during voir dire that she had just skipped through the article, that she could not remember details from article, and that she would set aside any prior knowledge of case and consider only evidence presented at trial.

[6] Jury 230 99.1

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k98 Formation and Expression of Opinion as to Cause
230k99.1 k. Knowledge of Matters in General. Most Cited Cases

A prospective juror need not be totally ignorant of the facts and issues involved in a criminal proceeding in order to be qualified to serve.

[7] Jury 230 108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment Prescribed for Offense. Most Cited Cases

Capital murder defendant was not entitled to excuse juror for cause based on juror's views on death penalty, though juror's initial responses to questioning during voir dire evinced a preference for death penalty in cases of premeditated murder, where juror also stated he was willing to consider any mitigating evidence and to consider all authorized sentencing options.

[8] Jury 230 108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment Prescribed for Offense. Most Cited Cases

Capital murder defendant was not entitled to excuse juror for cause based on juror expressing an inclination toward death penalty in murder cases, where juror qualified her expressed inclination by stating that she knew there were different cases and stated repeatedly that she would consider all sen-

tencing options and that she was capable of voting in favor of sentence less than death.

[9] Jury 230 108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment Prescribed for Offense. Most Cited Cases
A juror who expresses a leaning toward the death penalty is not necessarily unsuited for ser- vice.

[10] Jury 230 107

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k107 k. Weight and Effect of Evidence. Most Cited Cases
Capital murder defendant was not entitled to excuse juror for cause based on juror's acknowledgment that he might be led to lean toward a determination of guilt or innocence based upon some of the evidence presented at trial but before all of the evidence had been presented, where juror specifically stated that he would reserve final judgment until called upon for his verdict.

[11] Jury 230 108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment Prescribed for Offense. Most Cited Cases
Juror was properly disqualified based on her statement that she did not know if she could impose death penalty and based upon her becoming emotionally distraught during questioning regarding the death penalty.

[12] Jury 230 131(13)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(13) k. Mode of Examination. Most Cited Cases
Capital murder defendant was not entitled to question potential jurors as to their willingness to impose death penalty under specific hypothetical circumstances.

[13] Jury 230 131(8)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(8) k. Personal Opinions and Conscientious Scruples. Most Cited Cases
Capital murder defendant was not entitled to question potential jurors concerning the perceived credibility of law enforcement officers as compared with ordinary citizens.

[14] Jury 230 131(2)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(2) k. Discretion of Court. Most Cited Cases
The scope of voir dire is largely left to the trial court's discretion.

[15] Grand Jury 193 2.5

193 Grand Jury
193k2.5 k. Constitution in General; Representa-

tion of Community. Most Cited Cases

Jury 230 ⚿33(1.10)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(1.2) Particular Groups, Inclusion or Exclusion
230k33(1.10) k. In General. Most Cited Cases

Forced balancing employed by county in ensuring that percentages of African-Americans and caucasians on grand and traverse jury pools were proportional to their percentages of the population based on last national census was not unlawful.

[16] Criminal Law 110 ⚿419(6)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(6) k. Statements of Persons Since Deceased. Most Cited Cases

Finding that statement made by murder victim to co-worker did not fall under necessity exception to hearsay rule and, thus, that it was not admissible, was supported by testimony of co-worker that victim made statement after nonchalantly walking in from his lunch break and that the victim did not look afraid or anything when he made statement. O.C.G.A. § 24-3-1(b).

[17] Criminal Law 110 ⚿419(1)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(1) k. In General. Most Cited Cases

Hearsay must be necessary and must be accompanied by particular guarantees of trustworthiness in order to be admissible under the necessity exception. O.C.G.A. § 24-3-1(b).

[18] Criminal Law 110 ⚿419(1)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(1) k. In General. Most Cited Cases

When determining whether to admit hearsay under necessity exception, a trial court should view the proffered hearsay within the totality of the circumstances of its origin, and, because the factors that speak to the reliability of hearsay statements will vary depending on the nature of the statements, the determination of trustworthiness is inescapably subjective. O.C.G.A. § 24-3-1(b).

[19] Criminal Law 110 ⚿1153.10

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.10 k. Hearsay. Most Cited Cases
(Formerly 110k1153(1))

Determination that hearsay is admissible under necessity exception is evaluated on appeal under an abuse of discretion standard. O.C.G.A. § 24-3-1(b).

[20] Criminal Law 110 ⚿438(6)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publica- tions
110k438 Photographs and Other Pictures
110k438(5) Depiction of Injuries or Dead Bodies
110k438(6) k. Purpose of Admission. Most Cited Cases

Photographs showing the condition and location of the victim's body are admissible where alterations to the body are due to the combined forces of the murderer and the elements.

[21] Criminal Law 110 651(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k651 View and Inspection
110k651(1) k. In General. Most Cited Cases

Capital murder defendant was not entitled to have jury view crime scene, where law enforcement officers testified that road conditions leading to scene were unsafe and defendant was allowed to introduce numerous photographs of crime scene that she was able to use in support of her theory of defense.

[22] Criminal Law 110 1171.3

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.3 k. Comments on Evidence or Witnesses, or Matters Not Sustained by Evidence. Most Cited Cases

Any error in sustaining state's objection to defense counsel's argument that it was reasonable to infer from murder victim's military background that he was trained as to how to defend himself in woods was harmless, in capital murder trial, where defense counsel had already set out pertinent aspect of evidence relating to victim's military service and training, jury was not instructed to disregard anything counsel had said, trial court stated that jury could draw reasonable inferences, and defense counsel was allowed to argue that victim could not have been murdered by defendant's boyfriend alone.

[23] Criminal Law 110 2103

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2102 Inferences from and Effect of Evidence
110k2103 k. In General. Most Cited Cases
(Formerly 110k720(6))

Counsel are permitted to argue reasonable inferences from the evidence presented at trial.

[24] Criminal Law 110 1171.1(6)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(6) k. Appeals to Sympathy or Prejudice; Argument as to Punishment. Most Cited Cases

Criminal Law 110 2153

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2145 Appeals to Sympathy or Prejudice
110k2153 k. Attacks on Opposing Counsel. Most Cited Cases
(Formerly 110k723(1))

Prosecutor's statements during closing argument of guilt stage of capital murder trial that defense counsel had done a tremendous violence to truth during defense's closing argument, though distasteful, did not warrant reversal of conviction.

[25] Criminal Law 110 1980

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)1 In General
110k1980 k. In General. Most Cited Cases
(Formerly 110k700(1))

Criminal Law 110 ⚿2050

110 Criminal Law
110XXXI Counsel
110XXXI(E) Duties and Obligations of Defense Attorneys
110k2050 k. In General. Most Cited Cases
(Formerly 110k701)

Counsel should adhere to the highest standards of professionalism and proper courtroom decorum.

[26] Criminal Law 110 ⚿1171.1(6)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(6) k. Appeals to Sympathy or Prejudice; Argument as to Punishment. Most Cited Cases

Allegedly improper personal attacks upon defense counsel made by prosecutor during closing argument did not in reasonable probability change jury's exercise of discretion in choosing between life imprisonment or death and, thus, did not warrant reversal of death sentence imposed on grounds that it was imposed under influence of passion, prejudice, or any other arbitrary factor. O.C.G.A. § 17-10-35(c)(1).

[27] Criminal Law 110 ⚿1037.1(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(2) k. Particular Statements, Arguments, and Comments. Most Cited Cases

When determining whether death sentence was imposed under influence of passion, prejudice, or any other arbitrary factor, the Supreme Court considers whether any allegedly improper arguments that were not objected to at trial in reasonable probability changed the jury's exercise of discretion in choosing between life imprisonment or death. O.C.G.A. § 17-10-35(c)(1).

[28] Criminal Law 110 ⚿1037.1(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(2) k. Particular Statements, Arguments, and Comments. Most Cited Cases

Allegedly improper reference to defendant as evil during prosecutor's closing argument, absent objection, did not in reasonable probability change jury's exercise of discretion in choosing between life imprisonment or death and, thus, did not warrant reversal of death sentence imposed on grounds that it was imposed under influence of passion, prejudice, or any other arbitrary factor. O.C.G.A. § 17-10-35(c)(1).

[29] Criminal Law 110 ⚿2098(2)

110 Criminal Law
110XXXI Counsel

110XXXI(F) Arguments and Statements by Counsel
110k2093 Comments on Evidence or Witnesses
110k2098 Credibility and Character of Witnesses; Bolstering
110k2098(2) k. Credibility of Accused. Most Cited Cases
(Formerly 110k720(5))

Prosecutor's statement during closing argument that defendant's presentation of witnesses resembled "somebody drowning, grasping at straws" was not improper bolstering of credibility of state's witnesses.

[30] Sentencing and Punishment 350H 1767

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1767 k. Documentary Evidence. Most Cited Cases

Exclusion of letters written by defendant's children to defendant on hearsay grounds was proper, though defendant sought to admit letters as mitigating evidence of children's love for defendant, in penalty phase of capital murder trial, where children's grandmother was permitted to testify that children had written letters to defendant while she was in jail and children were available to testify.

[31] Sentencing and Punishment 350H 1757

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1757 k. Evidence in Mitigation in General. Most Cited Cases

Rule that trial courts should exercise broad discretion in admitting any mitigating evidence during the sentencing phases of death penalty trials does not require the wholesale admission of all evidence contended to be mitigating without respect to its reliability and the rules of evidence.

[32] Sentencing and Punishment 350H 1757

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1757 k. Evidence in Mitigation in General. Most Cited Cases

Evidence that is inadmissible under the rules of evidence need only be admitted during penalty phase of capital murder trial when the potentially-mitigating influence of the evidence outweighs the harm resulting from the violation of the evidence rule.

[33] Criminal Law 110 661

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k661 k. Necessity and Scope of Proof. Most Cited Cases

Because the evidence rules exist for the purpose of winnowing out unreliable evidence, a trial court, in determining the admissibility of proffered evidence, must consider whether substantial reasons exist to assume its reliability.

[34] Sentencing and Punishment 350H 1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and Conduct of Counsel. Most Cited Cases
(Formerly 110k723(1))

Prosecutor could argue during penalty phase of capital murder trial that ultimate responsibility for any sentence defendant might receive rested on her.

[35] Sentencing and Punishment 350H 1780(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) k. Instructions. Most Cited Cases

Capital murder defendant was not entitled to instruct jury during penalty phase that findings regarding mitigating circumstances need not be unanimous or how mitigating circumstances should be weighed, where trial court instructed jury that it was not necessary to find any mitigating circumstances in order to return a sentence less than death.

[36] Sentencing and Punishment 350H 1796

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(H) Execution of Sentence of Death
350Hk1796 k. Mode of Execution. Most Cited Cases

Execution by electrocution is not cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

[37] Sentencing and Punishment 350H 1668

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1666 Nature or Degree of Offense
350Hk1668 k. Murder. Most Cited Cases

Application of death penalty statute to defendant convicted of malice murder based on presence of aggravating circumstances was not unconstitutional.

[38] Sentencing and Punishment 350H 1624

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1624 k. Provision Authorizing Death Penalty. Most Cited Cases

Georgia's death penalty statute is not unconstitutional.

[39] Sentencing and Punishment 350H 1627

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1627 k. Review. Most Cited Cases

Supreme Court's review of death sentences is neither unconstitutional nor inadequate under Georgia statutory law.

[40] Jury 230 33(2.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(2) Competence for Trial of Cause
230k33(2.15) k. View of Capital Punishment. Most Cited Cases

Qualification of jurors based upon their willingness to consider the death penalty as a sentencing option does not deny capital defendants their right to an impartial jury drawn from a representative cross-section of the community and is not otherwise unconstitutional.

[41] Sentencing and Punishment 350H 1627

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1627 k. Review. Most Cited Cases

The Unified Appeal Procedure exists to protect

the rights of capital defendants and is not unconstitutional.

[42] Sentencing and Punishment 350H 1788(6)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) k. Proportionality. Most Cited Cases

Supreme Court's proportionality review of all death sentences includes a special vigilance for categories of cases that have so consistently ended with sentences less than death that the death penalty in any one case would be clearly disproportionate. O.C.G.A. § 17-10-35(c)(3).

[43] Sentencing and Punishment 350H 1788(6)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) k. Proportionality. Most Cited Cases

Supreme Court's proportionality review of death sentence imposed concerns whether the death penalty is excessive per se or if the death penalty is only rarely imposed or substantially out of line for the type of crime involved and not whether there ever have been sentences less than death imposed for similar crimes. O.C.G.A. § 17-10-35(c)(3).

[44] Sentencing and Punishment 350H 1788(6)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) k. Proportionality. Most Cited Cases

On proportionality review of death sentence, an argument that a specific defendant in an unrelated murder case received a sentence less than death, while not irrelevant, cannot alone compel a finding of unlawful disproportionality. O.C.G.A. § 17-10-35(c)(3).

[45] Sentencing and Punishment 350H 1788(6)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) k. Proportionality. Most Cited Cases

In proportionality review of death sentence, Supreme Court views a particular crime against the backdrop of all similar cases in Georgia in determining if a given sentence is excessive per se or substantially out of line. O.C.G.A. § 17-10-35(c)(3).

[46] Sentencing and Punishment 350H 1788(6)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) k. Proportionality. Most Cited Cases

When applicable, Supreme Court's proportionality review of death sentences includes special consideration of the sentences received by co-defendants in the same crime. O.C.G.A. § 17-10-35(c)(3).

[47] Sentencing and Punishment 350H 1788(6)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) k. Proportionality. Most Cited Cases

Supreme Court is directed by statute to consider the defendant in weighing the proportionality of a death sentence, and, therefore, the special individual characteristics of an appellant are appropriate for consideration. O.C.G.A. § 17-10-35(c)(3).

[48] Sentencing and Punishment 350H 1788(6)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) k. Proportionality. Most Cited Cases

Supreme Court's consideration of the defendant on proportionality review of death sentence requires a review of the aggravating factors presented at trial, including both past conduct and conduct after the crime. O.C.G.A. § 17-10-35(c)(3).

[49] Sentencing and Punishment 350H 1661

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1661 k. Determinations Based on Multiple Factors. Most Cited Cases

Death sentence imposed on defendant for felony murder of her husband was not disproportionate to sentences imposed in similar cases involving careful devising of a plan to kill, killing for purpose of receiving something of monetary value, kidnapping with bodily injury, or causing another to kill. O.C.G.A. § 17-10-35(c)(3).

[50] Sentencing and Punishment 350H 1655

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1655 k. Sentence or Disposition of Co-Participant or Codefendant. Most Cited Cases

Death sentence imposed on defendant for felony murder of her husband was not disproportionate to sentence imposed on her co-conspirator boyfriend, where defendant was moving force behind murder and even insisted upon murder when co-conspirator suggested divorce instead, defendant repeatedly raised option of murder in conversations with co-conspirator, defendant planned murder, defendant stood primarily to gain financially from murder, murder was planned against her close family member, and defendant devised a plan to suborn perjury and to do violence against witnesses, unlike co-conspirator who confessed his guilt and cooperated with authorities. O.C.G.A. § 17-10-35(c)(3).

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***704** THOMPSON, Justice.

Kelly Renee Gissendaner was convicted of the malice murder of her husband, Douglas ****682** Morgan Gissendaner.[FN1] The jury fixed Gissendaner's

sentence at death, finding as statutory aggravating circumstances that the murder was committed during the commission of kidnapping with bodily injury, a capital felony, and that Gissendaner caused or directed another to commit the murder. OCGA § 17-10-30(b)(2) and (6). For the reasons set forth below, we affirm both the conviction and the death sentence.

> FN1. The murder occurred on February 7, 1997. Gissendaner was indicted on April 30, 1997, by the Gwinnett County Grand Jury for malice murder and felony murder. The State filed written notice of its intent to seek the death penalty on May 6, 1997. Gissendaner's trial began on November 2, 1998, and the jury found her guilty of malice murder and felony murder on November 18, 1998. The felony murder conviction was vacated by operation of law. *Malcolm v. State,* 263 Ga. 369(4), 434 S.E.2d 479 (1993); OCGA § 16-1-7. On November 19, 1998, the jury fixed Gissendaner's sentence at death. Gissendaner filed a motion for a new trial on December 16, 1998, which she amended on August 18, 1999, and which was denied on August 27, 1999. Gissendaner filed a notice of appeal on September 24, 1999. This appeal was docketed on November 9, 1999, and orally argued on February 29, 2000.

[1] 1. 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.

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 ***705** 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 ****683** 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.

Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Gissendaner was guilty of the crimes of which she was convicted and that statutory aggravating circumstances existed. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); OCGA § 17-10-30 (b)(2) and (6).

***706** *Pretrial Proceedings*

[2] 2. Gissendaner contends that the trial court erred in denying her motion for a change of venue. The trial court reserved its ruling until after voir dire had been completed and then denied the motion. We find that the trial court acted properly within its discretion in denying the motion. *Tolver v. State,* 269 Ga. 530, 532-533(4), 500 S.E.2d 563 (1998) (recognizing trial court's discretion in considering a motion for a change of venue).

[3] A capital defendant seeking a change of venue must show that the trial setting was inherently prejudicial as a result of pretrial publicity or show actual bias on the part of the individual jurors. *Jenkins v. State,* 269 Ga. 282, 286(3), 498 S.E.2d 502 (1998); *Jones v. State,* 267 Ga. 592, 594(1)(a), 481 S.E.2d 821 (1997); *Jones v. State,* 261 Ga. 665, 666(2), 409 S.E.2d 642 (1991) (holding a change of venue is required when a "defendant can make a substantive showing of the likelihood of prejudice by reason of extensive publicity").

[4] The trial court acted properly in reserving its ruling on Gissendaner's motion for a change of venue until voir dire had been conducted because "[t]he decisive factor in determining whether a change of venue is required is 'the effect of the publicity on the ability of prospective jurors to be objective.' " *Wilson v. State,* 271 Ga. 811, 822(19), 525 S.E.2d 339 (1999) (quoting *Freeman v. State,* 268 Ga. 185, 186-187(2), 486 S.E.2d 348 (1997)). During voir dire, it became apparent that a large portion of the pretrial publicity had occurred long before the case was ready for trial. See *Freeman v. State,* 268 Ga. at 186-187(2), 486 S.E.2d 348; see also *Thornton v. State,* 264 Ga. 563, 574(17), 449 S.E.2d 98 (1994). Furthermore, this early publicity did not implicate Gissendaner in her husband's death. As law enforcement authorities developed their evidence, the publicity became unfavorable to Gissendaner, but we note that the coverage was mostly accurate and largely involved aspects of the case that were not to be disputed at trial. See *Barnes v. State,* 269 Ga. 345, 347(2), 496 S.E.2d 674 (1998). Nevertheless, we must acknowledge, as did the trial court, that some of the later publicity was potentially damaging to Gissendaner and that its effect upon the jury pool warrants careful consideration. We most carefully consider the publicity surrounding this Court's ruling on interim review that an inculpatory statement by Gissendaner should be suppressed. *Gissendaner v. State,* 269 Ga. 495, 500 S.E.2d 577 (1998); see *Tolver,* 269 Ga. at 533(4), 500 S.E.2d 563; see also *Tyree v. State,* 262 Ga. 395, 395-397(1), 418 S.E.2d 16 (1992). Upon our review of the newspaper and television coverage documented in the record, we conclude that it was neither so extensive and inflammatory nor so reflective of "an atmosphere of hostility" as to require a change of venue. *Cromartie v. State,* 270 Ga. 780, 782(2), 514 S.E.2d 205 (1999).

***707** The trial court excused the following 13

jurors upon Gissendaner's motion based primarily upon their exposure to pretrial publicity: Waldrip; Myers; Krug; Jones; Chapman; Chappell; Henderson; Bullock; Teehan; Moreno; Hill; Hoffman; and Jackson. The trial court excused juror Foster based upon two defense arguments, one being the juror's exposure to pretrial publicity. Gissendaner argues that her challenges for cause concerning jurors Johnston and Mason were improperly denied, but we find that the trial court did not err in qualifying these jurors because their exposure to pretrial publicity was limited and their memories of what they had been exposed to were vague. Thus, 14 jurors of the 111 jurors questioned during voir dire were excused for cause based upon their exposure to pretrial publicity. We conclude that the number of excusals,****684** particularly in light of the exacting standard applied by the trial court in reaching its decision to excuse certain jurors, is not indicative of the kind of inherently prejudicial environment requiring a change of venue. See *Tharpe v. State,* 262 Ga. 110, 111(5), 416 S.E.2d 78 (1992); compare *Jones v. State,* 261 Ga. at 665-666(1), 409 S.E.2d 642.

3. We find that the trial court did not err in refusing to strike for cause the jurors discussed in Gissendaner's appeal.

[5] (a) Shortly before voir dire began, juror Mason had seen a newspaper article reporting on Gissendaner's upcoming trial, including the fact that a statement made by Gissendaner had been suppressed. However, Ms. Mason stated that she had "just skipped through" the article and could not remember details from it. She did vaguely recall something about "whether rights were read," but she had no recollection of the substance of Gissendaner's suppressed statement or anything else prejudicial to Gissendaner. Furthermore, she stated clearly that she would set aside any prior knowledge of the case and consider only the evidence presented at trial.

[6] A prospective juror need not be "totally ignorant of the facts and issues involved" in a criminal proceeding in order to be qualified to serve. *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Because Ms. Mason had very limited knowledge about Gissendaner's case, because it appears she was not prejudiced against Gissendaner, and particularly because she could not specifically recall any information that was to be excluded from evidence at trial, we conclude that the trial court properly qualified her to serve. See *DeYoung v. State,* 268 Ga. 780, 784(4)(b), 493 S.E.2d 157 (1997).

[7] (b) Gissendaner contends that the trial court erred in denying her motion to excuse juror Vandenakker for cause based upon his views on the death penalty. Mr. Vandenakker's responses initially evinced a preference for the death penalty in cases of "premeditated murder." However, his responses seeming to favor the death penalty were elicited by defense counsel's attempt to direct the juror's attention ***708** to a particular species of malice murder, namely malice murder where significant premeditation has occurred. In fact, defense counsel was properly admonished for doing so. See *Carr v. State,* 267 Ga. 547, 554(6)(a), 480 S.E.2d 583 (1997) ("[I]t is improper to require the juror to enumerate hypothetical circumstances in which she might or might not vote to impose the death penalty."). Furthermore, Mr. Vandenakker indicated a willingness to consider all three sentencing options in light of mitigation evidence: "I would have to wait to hear [evidence in the sentencing phase] before I determined if it was a death penalty or life in prison or life in prison without parole." Because the juror was willing to consider any mitigating evidence and to consider all authorized sentencing options, we find that the trial court did not abuse its discretion in determining that his views on capital punishment would not " 'prevent or substantially impair ... his duties as a juror in accordance with his instructions and his oath.' " *Greene v. State,* 268 Ga. 47, 48-50, 485 S.E.2d 741 (1997) (quoting *Wainwright v. Witt,* 469 U.S. 412, 424(II), 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)).

[8][9] (c) Gissendaner contends that the trial court improperly denied her motion to disqualify juror Schie. Contrary to Gissendaner's argument on appeal, a juror who expresses a leaning toward the death penalty is not necessarily unsuited for service. *Mize v. State,* 269 Ga. 646, 652(6)(d), 501 S.E.2d 219 (1998). Although juror Schie expressed an inclination toward the death penalty in murder cases, she qualified her expressed inclination by stating, "But I know there's different cases." She also stated repeatedly that she would consider all three sentencing options and that she was capable of voting in favor of a sentence less than death. The trial court did not abuse its discretion in qualifying this juror. *Greene v. State,* 268 Ga. at 48-50, 485 S.E.2d 741.

Likewise, our review of the record indicates that neither juror Still's nor juror Love's views on capital punishment disqualified them for service. Although they both admitted some leaning toward the death penalty,****685** they both also stated clearly and repeatedly that they would consider all three sentencing options and that they were capable of voting in favor of a sentence less than death.

[10] (d) Juror Winn acknowledged that he might, as surely all jurors might, be led to lean toward a determination of guilt or innocence based upon some of the evidence presented at trial but before all of the evidence had been presented. He stated: "I might come to some initial thought. I could see that happening, something might be said that would trigger a strong feeling one way or the other before the whole thing is over. That's entirely possible." Not only do we not find this acknowledgment troubling standing alone, we further note that the juror specifically stated that he would reserve final judgment ***709** until called upon for his verdict, although, in an admirable display of forthrightness, still acknowledging that "it could coincidentally be the same decision I thought of earlier." The trial court did not abuse its discretion in denying Gissendaner's motion to excuse this juror for cause.

(e) The record does not support Gissendaner's assertion that juror Beavers was predisposed toward the death penalty. Furthermore, Ms. Beavers stated clearly that she would consider all evidence and all three sentencing options and that she was capable of imposing a sentence less than death. We also find that Ms. Beavers's limited knowledge of the case drawn from her vague recollection of news reports did not require her disqualification. *Irvin v. Dowd,* 366 U.S. at 722, 81 S.Ct. 1639.

[11] (f) The trial court did not err in disqualifying juror Strong based upon her statement to the trial court, after some equivocation under questioning by counsel, that she did not know if she could impose the death penalty and based upon her becoming emotionally distraught during questioning on the topic. The trial court did not abuse its discretion in excusing this juror. *Greene v. State,* 268 Ga. at 48-50, 485 S.E.2d 741; *Wainwright v. Witt,* 469 U.S. at 424, 105 S.Ct. 844.

[12][13][14] 4. Upon reviewing the record, we conclude that the trial court did not improperly restrict Gissendaner's questioning on voir dire in general or with regard to the following jurors specifically discussed on appeal: Still; Beavers; Hampton; Strong; Mathis; Chappell; Smith; Derda; and Rumble. The trial court permitted a thorough examination of each of the jurors and properly sustained meritorious objections. "The scope of voir dire is largely left to the trial court's discretion, and the voir dire in this case was broad enough to ascertain the fairness and impartiality of the prospective jurors." *Barnes v. State,* 269 Ga. at 351-352(10), 496 S.E.2d 674. The trial court was correct in preventing defense counsel from questioning jurors as to their willingness to impose the death penalty under specified hypothetical circumstances. *Carr v. State,* 267 Ga. at 554(6)(a), 480 S.E.2d 583. The trial court did not err in restricting counsel's questions concerning the perceived credibility of law enforcement officers as compared with ordinary citizens. *Henderson v. State,* 251 Ga. 398, 400(1), 306 S.E.2d 645 (1983). Nor did the trial court err in

limiting repetitive, misleading, and irrelevant questions. Id. at 401, 306 S.E.2d 645.

[15] 5. Gissendaner contends that the jury pools from which her grand jury and traverse jury were selected were created in a racially-discriminatory manner. We disagree.

Gissendaner's expert witness testified before the trial court that African-Americans comprised 5.1 percent of the population of the county according to the 1990 census but only 3.8 percent of registered voters. The expert concluded that Caucasians were selected from the ***710** voter registration list for inclusion in the jury pool in less than proportional numbers by the process of forced balancing. The expert witness attempted to bolster her argument that Caucasians were excluded in selecting the jury pools by suggesting that the percentage of African-Americans in the population of the county had even decreased to 4.6 percent since the 1990 census.

****686** Members of the county's jury commission testified that the percentage of African-Americans in the jury pool was precisely the same as the percentage of African-Americans in the population in the county as determined by the 1990 census, and Gissendaner's expert testimony seemed to confirm their testimony. The method of forced balancing employed by the county in ensuring this proportionality was not unlawful. *Sears v. State,* 262 Ga. 805, 806(2), 426 S.E.2d 553 (1993). Gissendaner also failed to demonstrate the exclusion of any arguably-cognizable group subsumed under the category of "other" in the county's voter registration records, the source from which the jury pools were drawn. We find that the trial court did not err in concluding that Gissendaner had failed to make a prima facie case of discrimination in the selection of the jury pools from which her grand and traverse juries were drawn. See *Bowen v. State,* 244 Ga. 495, 500(I)(4), 260 S.E.2d 855 (1979).

Gissendaner, by recalculating figures appearing in an exhibit provided by her expert witness, now asserts on appeal that African-Americans actually comprised 7.4 percent of the registered voters in the county and, therefore, that it was African-Americans rather than Caucasian persons who were selected in less than proportional numbers. Without addressing the waiver issue involved in Gissendaner's reversal of argument, we conclude that, even assuming the validity of the figures set forth on appeal, the jury pools did not unlawfully exclude African-Americans. See Unified Appeal Procedure, Rule II(A)(6). [FN2]

FN2. Cases where notice that the State intends to seek the death penalty is given after January 27, 2000, shall be governed by the revised version of the Unified Appeal Procedure. The corresponding rule in the revised outline is Rule II(C)(6).

Trial Proceedings

[16] 6. The trial court did not err in excluding testimony by one of the victim's co-workers about a statement made by the victim.

[17][18][19] Hearsay must be necessary and must be accompanied by particular guarantees of trustworthiness in order to be admissible under the necessity exception. OCGA § 24-3-1(b); *Chapel v. State,* 270 Ga. 151, 154-156(4), 510 S.E.2d 802 (1998). A trial court should view the proffered hearsay within the totality of the circumstances of its origin, ***711** and, because the " [f]actors that speak to the reliability of [hearsay] statements will vary depending on the nature of the statements," the determination of trustworthiness is inescapably subjective. Id. at 155, 510 S.E.2d 802. Accordingly, that determination is evaluated on appeal under an abuse of discretion standard. *White v. White,* 262 Ga. 168, 169, 415 S.E.2d 467 (1992).

The trial court admitted one hearsay statement by the deceased victim where the statement had been made immediately after concluding a telephone call and where the victim appeared "really scared and jolted." In contrast, the excluded hearsay statement was made after the victim, re-

turning from his lunch break, "just nonchalantly walked in and was talking to [the witness]." The witness further stated during the defense's proffer that the declarant "didn't look afraid or nothing." Application of the necessity exception requires

> "a circumstantial guaranty of the trustworthiness of the offered evidence-that is, there must be something present [in the making of the statement] which the law considers a substitute for the oath of the declarant and his [or her] cross examination by the party against whom the hearsay is offered."

(Citations and emphasis omitted.) *Chrysler Motors Corp. v. Davis,* 226 Ga. 221, 224(1), 173 S.E.2d 691 (1970); see also *Abraha v. State,* 271 Ga. 309, 313(2), 518 S.E.2d 894 (1999). The trial court did not abuse its discretion in excluding this casually-rendered statement concerning matters over which cross-examination would be potentially important while admitting another similar statement made under circumstances more suggestive of trustworthiness.

[20] 7. The trial court did not err, as Gissendaner contends, in admitting photographs and a videotape depicting the victim's body as it was found at the crime scene and prior to autopsy. *Jackson v. State,* 270 Ga. 494, 498(8), 512 S.E.2d 241 (1999); *Jenkins v. State,* 269 Ga. at 293(20), 498 S.E.2d 502. ****687** "Photographs showing the condition and location of the victim's body are admissible where alterations to the body are due to the combined forces of the murderer and the elements." *Klinect v. State,* 269 Ga. 570, 574(4), 501 S.E.2d 810 (1998).

The photograph of the victim in life was also properly admitted. *Ledford v. State,* 264 Ga. 60, 66(14), 439 S.E.2d 917 (1994).

[21] 8. The trial court, after hearing testimony from law enforcement officers that road conditions leading to the scene were unsafe, did not abuse its discretion in denying Gissendaner's motion to have the jury view the crime scene. *Sutton v. State,* 237 Ga. 418, 419(3), 228 S.E.2d 815 (1976). Gissendaner was allowed to introduce numerous photographs of the crime scene that she was able to use in support of her ***712** theory of defense. See *Williams v. State,* 202 Ga.App. 728, 729(3), 415 S.E.2d 327 (1992).

[22] 9. Gissendaner argues that the trial court improperly limited her closing argument. Prior to an objection by the State, Gissendaner's counsel argued the following:

> [T]hrough the evidence, we have learned a lot about Doug Gissendaner. We know he was a healthy, strong individual. We know he outweighed Mr. Owen. We know he was tall. We know he worked as a mechanic, and we know that Doug Gissendaner had recently served in the United States Army. We know that in the United States Army he went through basic combat training. We know that he trained in combat arms. He was combat arms qualified. We know he was a tanker in the Army corps. We know he served in a combat theater in Desert Storm. And, therefore, we know that he had escape and evasion training.

The State then raised an objection, which the trial court sustained stating, "Counsel can only comment on what's in evidence." Defense counsel's argument was again interrupted by an objection after counsel stated the following: "I would suggest to you as a reasonable inference from his service in the army and from his having served in a combat theater he was trained in how to defend himself in the woods." The trial court sustained the objection and stated, as part of an instruction that is difficult to interpret definitively in print: "That's testimony. It's not permissible."

[23] Counsel certainly are permitted to argue reasonable inferences from the evidence presented at trial. *Simmons v. State,* 266 Ga. 223, 228(6)(b), 466 S.E.2d 205 (1996). We need not address whether the specific inferences objected to in this case were reasonable, however, because we con-

clude that, regardless of whether the trial court's rulings were correct, Gissendaner was not harmed by them. *Johnson v. State,* 238 Ga. 59, 60-61, 230 S.E.2d 869 (1976); *Dill v. State,* 222 Ga. 793, 794(1), 152 S.E.2d 741 (1966). Defense counsel had already set out the pertinent aspects of the evidence, the jury was not instructed to disregard anything counsel had said, the trial court clearly stated that "[t]he jury may draw reasonable inference[s]," and defense counsel was later allowed to argue vigorously the theory that the victim could not have been murdered by Owen alone. Under these circumstances, we conclude that Gissendaner has not suffered any harm, even assuming any error by the trial court.

10. We disagree with Gissendaner's contention that the State made improper arguments at the close of the guilt/innocence phase of her trial that require reversal of her conviction and death sentence.

[24]***713** (a) Early in his argument, the Senior Assistant District Attorney stated, "[W]hat you just heard from [defense counsel] has done a tremendous violence to the truth in this case." The prosecutor continued by further suggesting defense counsel's argument had failed to comport with the evidence and by referring to counsel's argument as "an insult to the truth." Defense counsel objected to the argument on the sole basis that it was a "personal attack."

[25] We are concerned that counsel should adhere to the highest standards of professionalism and proper courtroom decorum, see *Davis v. State,* 255 Ga. 598, 610(16), 340 S.E.2d 869 (1986); see also *Miller v. State,* 228 Ga.App. 754, 757(6), 492 S.E.2d 734 (1997), and, accordingly, we find distasteful any argument that unnecessarily impugns ****688** the integrity of opposing counsel, even if obliquely. However, in this case, we do not conclude that the trial court erred in failing to make a clear ruling in Gissendaner's favor upon her one objection. *Simmons v. State,* 266 Ga. at 228-229(6)(b), 466 S.E.2d 205 ("[T]his Court has long held that the permissible range of argument during final summation is 'very wide.' [Cits.]").

[26][27] (b) Gissendaner contends that other statements by the prosecutor constituted improper personal attacks upon defense counsel, but because no objections were raised to these allegedly-improper statements, Gissendaner's contention is waived insofar as it concerns the jury's determination of her guilt. *Miller v. State,* 267 Ga. 92(2), 475 S.E.2d 610 (1996); see *Whatley v. State,* 270 Ga. 296, 304-305, 509 S.E.2d 45 (1998) (Thompson, J., concurring specially). However, when the death penalty has been imposed, we must also consider whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. OCGA § 17-10-35(c)(1). In doing so, we consider whether any allegedly-improper arguments that were not objected to at trial in reasonable probability " 'changed the jury's exercise of discretion in choosing between life imprisonment or death.' " *Hicks v. State,* 256 Ga. 715, 730(23), 352 S.E.2d 762 (1987) (quoting *Ford v. State,* 255 Ga. 81, 94(8)(I)(2), 335 S.E.2d 567 (1985)); compare *Mullins v. State,* 270 Ga. 450, 450-451(2), 511 S.E.2d 165 (1999) ("This 'reasonable probability' test applies only in the context of appellate review of a criminal case in which the death penalty was imposed."). We conclude, even assuming the arguments contested by Gissendaner were improper, that the jury's exercise of discretion would not have been affected by them and, therefore, that her sentence should not be disturbed.

[28] (c) Gissendaner contends that her conviction should be reversed because the Senior Assistant District Attorney referred to her as "evil" in his closing argument. Because Gissendaner made no objection at trial, this issue is waived insofar as it concerns the jury's determination of her guilt. *Miller v. State,* 267 Ga. at 92(2), 475 S.E.2d 610; see ***714** *Whatley v. State,* 270 Ga. at 304-305, 509 S.E.2d 45 (Thompson, J., concurring specially). Even assuming the comment was improper, we conclude that there is no reasonable probability that the comment changed the jury's exercise of discre-

tion in fixing her sentence at death, and, accordingly, we conclude that her sentence should not be disturbed. See *Whatley v. State,* 270 Ga. at 304-305, 509 S.E.2d 45 (Thompson, J., concurring specially); see also *Simmons v. State,* 266 Ga. at 228(6)(b), 466 S.E.2d 205 (characterizing defendant as "mean" and a "wife-beater" not improper when supported by the evidence).

[29] (d) There is no merit to Gissendaner's argument that the State improperly sought to bolster the credibility of its witnesses by commenting that the defendant's presentation of witnesses resembled "somebody drowning, grasping at straws."

11. OCGA § 17-10-1.2 is not unconstitutional as written, and the trial court properly reviewed the State's victim impact testimony prior to trial and did not admit unduly inflammatory or prejudicial evidence. *Livingston v. State,* 264 Ga. 402, 402-405(1), 444 S.E.2d 748 (1994); *Jones v. State,* 267 Ga. at 595-596(2), 481 S.E.2d 821.

Sentencing Phase

[30] 12. During the sentencing phase of her trial, Gissendaner sought to admit into evidence several letters from her children in order to show the children's love for her. The trial court excluded the letters as hearsay but allowed the children's grandmother to testify that the children had written letters to their mother in jail.

[31][32][33] We have held that trial courts should exercise broad discretion in admitting any mitigating evidence during the sentencing phases of death penalty trials. *Barnes v. State* 269 Ga. at 357-361(27), 496 S.E.2d 674. But *Barnes* does not require the wholesale admission of all evidence contended to be mitigating without respect to its reliability and the rules of evidence. See *Smith v. State,* 270 Ga. 240, 249(12), 510 S.E.2d 1 (1998) ("[T]he hearsay rule is not suspended in the sentencing phase."). Evidence that is inadmissible under this State's rules of evidence****689** need only be admitted when the potentially-mitigating influence of the evidence outweighs the harm resulting from the violation of the evidence rule. *Collier v. State,* 244 Ga. 553, 566-568(11), 261 S.E.2d 364 (1979) (applying *Green v. Georgia,* 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979)). Because the evidence rules exist for the purpose of winnowing out unreliable evidence, a trial court, in determining the admissibility of proffered evidence, must consider whether "substantial reasons exist[ ] to assume its reliability." *Collier v. State,* 244 Ga. at 567, 261 S.E.2d 364.

The trial court in Gissendaner's case expressed a reasonable concern about the reliability of hearsay statements written by young ***715** children under unknown circumstances and influences. Additionally, the availability of the hearsay declarants to serve as witnesses at trial and the availability of their grandmother to testify that they had written to their mother both undermined Gissendaner's assertion that admission of the hearsay statements was critical to her defense. OCGA § 24-3-16, which governs the admissibility of the hearsay statements of children subjected to abuse, was not controlling in this murder case, and, furthermore, we find that the concerns to be addressed in assessing the reliability of children's hearsay testimony under that statute and its related case law were largely the same as those addressed by the trial court. Pretermitting the questions of whether the children's drawings contained in the letters were admissible or whether Gissendaner ever attempted to admit the drawings by themselves, we conclude that the drawings by themselves would have had no effect on the jury's deliberations. See *Todd v. State,* 261 Ga. 766, 767-768(2)(a), 410 S.E.2d 725 (1991).

In light of all of the foregoing, we conclude that the trial court did not err in excluding the disputed letters. *Davis v. State,* 263 Ga. 5, 9(14), 426 S.E.2d 844 (1993); *Isaacs v. State,* 259 Ga. 717, 736-737(37), 386 S.E.2d 316 (1989).

[34] 13. We find no merit in Gissendaner's contention that certain statements made by the Chief Assistant District Attorney in his closing argument during the sentencing phase were improper. The

prosecutor did not improperly emphasize the worth of the victim. See *Ward v. State,* 262 Ga. 293, 297(6)(g), 417 S.E.2d 130 (1992); *Moon v. State,* 258 Ga. 748, 760(35), 375 S.E.2d 442 (1988); *Davis v. State,* 255 Ga. at 606-607, n. 5, 340 S.E.2d 869. Our review of the record also indicates that the prosecutor did not argue things not supported by the evidence, denigrate the place of mercy in the jury's deliberations, or improperly appeal to the passions and prejudices of the jury. Finally, it was not improper for the prosecutor to argue in the manner complained of that ultimate responsibility for any sentence Gissendaner might receive rested on her. *Hance v. State,* 254 Ga. 575, 578(5), 332 S.E.2d 287 (1985). Because the arguments complained of were not improper, we conclude that no harm was suffered by Gissendaner, who did not object at trial. See *Todd v. State,* 261 Ga. at 767-768(2)(a), 410 S.E.2d 725.

[35] 14. The trial court's charge on the definition of mitigating circumstances was correct and would not have misled the jury. *Fugate v. State,* 263 Ga. 260, 262-264(5), 431 S.E.2d 104 (1993).

The trial court properly charged the jury by stating, "You shall also consider the facts and circumstances, if any, in extenuation and mitigation." See *Romine v. State,* 251 Ga. 208, 214-215(10)(a), 305 S.E.2d 93 (1983). The word "may" used later in the trial court's charge referred to whether the jury might consider particular facts and circumstances to be mitigating and not whether, if the jury did consider ***716** them mitigating, they should be considered.

It was not necessary for the trial court to charge the jury that findings regarding mitigating circumstances need not be unanimous or on how mitigating circumstances should be weighed, because the trial court properly charged the jury that it was not necessary to find *any* mitigating circumstances in order to return a sentence less than death. *Palmer v. State,* 271 Ga. 234, 238(6), 517 S.E.2d 502 (1999); *McClain v. State,* 267 Ga. 378, 386(6), 477 S.E.2d 814 (1996).

The trial court did not err in failing to charge the jury on the consequences of a ****690** deadlock. *Jenkins v. State,* 269 Ga. at 296(26), 498 S.E.2d 502; *Burgess v. State,* 264 Ga. 777, 789(35), 450 S.E.2d 680 (1994).

Constitutional Questions

[36] 15. Execution by electrocution is not cruel and unusual punishment. *DeYoung v. State,* 268 Ga. at 786(6), 493 S.E.2d 157; *Wellons v. State,* 266 Ga. 77, 91(32), 463 S.E.2d 868 (1995).

[37][38][39] 16. Georgia's death penalty statute is not unconstitutional, and Gissendaner has failed to show that application of the statute in her case is unconstitutional. *McCleskey v. Kemp,* 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Zant v. Stephens,* 462 U.S. 862, 873-880(I), 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Crowe v. State,* 265 Ga. 582, 595(24), 458 S.E.2d 799 (1995). This Court's review of death sentences is neither unconstitutional nor inadequate under Georgia statutory law. *McMichen v. State,* 265 Ga. 598, 611(25), 458 S.E.2d 833 (1995); *Felker v. State,* 252 Ga. 351, 381(14), 314 S.E.2d 621 (1984).

[40] 17. Qualification of jurors based upon their willingness to consider the death penalty as a sentencing option does not deny capital defendants their right to an impartial jury drawn from a representative cross-section of the community and is not otherwise unconstitutional. *DeYoung v. State,* 268 Ga. at 790(11), 493 S.E.2d 157; *Wainwright v. Witt,* 469 U.S. at 418-426(II), 105 S.Ct. 844.

[41] 18. The Unified Appeal Procedure exists to protect the rights of capital defendants and is not unconstitutional. *Jackson v. State,* 270 Ga. at 498-499(10), 512 S.E.2d 241.

Sentence Review

19. Gissendaner contends that the death sentence she received is "disproportionate to the penalty imposed in similar cases, considering both the

crime and the defendant." OCGA § 17-10-35(c)(3). Upon a review of the record and of similar cases in Georgia, we conclude that it is not.

[42][43][44][45][46] (a) Our review of all death sentences includes a special vigilance for categories of cases that have so consistently ended with sentences ***717** less than death that the death penalty in any one case would be clearly disproportionate. *Gregg v. State,* 233 Ga. 117, 126-128(6), 210 S.E.2d 659 (1974) (finding the death penalty for armed robbery disproportionate because "rarely imposed" for that crime); *Floyd v. State,* 233 Ga. 280, 285(V), 210 S.E.2d 810 (1974) (same); *Jarrell v. State,* 234 Ga. 410, 424-425(3)(c), 216 S.E.2d 258 (1975) (same); *Corn v. State,* 240 Ga. 130, 141(III)(2)(c), 240 S.E.2d 694 (1977) (same); *Coley v. State,* 231 Ga. 829, 834-836(I), (II), 204 S.E.2d 612 (1974) (finding the death penalty for rape of an adult not resulting in death disproportionate to "the past practice among juries" and holding that "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"); see also *Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (concerning proportionality review of a death sentence under the United States Constitution). However, our review concerns whether the death penalty " is excessive per se" or if the death penalty is "only rarely imposed ... or substantially out of line" for the type of crime involved and not whether there *ever* have been sentences less than death imposed for similar crimes. *Horton v. State,* 249 Ga. 871, 879(12), 295 S.E.2d 281 (1982); *Coley v. State,* 231 Ga. at 834(I), 204 S.E.2d 612; *Moore v. State,* 233 Ga. 861, 866, 213 S.E.2d 829 (1975). Consequently, an argument, like one raised by Gissendaner, that a specific defendant in an unrelated murder case received a sentence less than death, while not irrelevant, cannot alone compel a finding of unlawful disproportionality. This Court views a particular crime against the backdrop of all similar cases in Georgia in determining if a given sentence is excessive per se or substantially out of line. When applicable, our " proportionality review of death sentences includes special consideration of the sentences received by co-defendants in the same crime." *Allen v. State,* 253 Ga. 390, 395(8), 321 S.E.2d 710 (1984) (citing *Hall v. State,* 241 Ga. 252, 258-260(8), 244 S.E.2d 833 (1978)).

****691** [47][48] We are also directed by OCGA § 17-10-35(c)(3) to consider "the defendant" in weighing the proportionality of a death sentence, and, therefore, the special individual characteristics of an appellant are appropriate for consideration. See *Corn v. State,* 240 Ga. at 141(III)(2)(c), 240 S.E.2d 694 (discussing "low mental level and social maladjustment"). Our consideration of "the defendant" also requires a review of the aggravating factors presented at trial, including both past conduct and conduct after the crime.

(b) In considering Gissendaner's role in the murder, we note several aggravating factors from the record. First, the record indicates that she was the moving force in the crime. Owen, her co-conspirator, testified that Gissendaner insisted her husband be murdered rather than divorced so that she would receive insurance money to pay off ***718** the mortgage on her home, although she learned after the murder that no such insurance policy was yet in force. Telephone records indicated that Gissendaner was with Owen when the two made plans for the murder from a bank of payphones and that Gissendaner called or paged Owen 65 times in the days leading up to the murder. On the night of the murder, Gissendaner drove Owen to her family's home, provided him with the murder weapons, and then left him inside the home to lie in wait for her husband while she left to establish an alibi. While out with her friends during the actual murder, Gissendaner resisted suggestions that the group reschedule their outing. When she returned, she immediately sent a numeric signal to Owen on his pager and then drove to the murder scene. Owen testified that she took a flashlight to inspect her husband's body to see that he was dead and assisted in burning her husband's automobile.

Gissendaner's conduct after the night of the

murder is also an appropriate concern for our sentence review, as it was an appropriate concern for the jury who sentenced her. Evidence at trial showed that Gissendaner, prior to her arrest, drove angrily toward a witness while declaring, "I ought to run the bitch over." While in jail, she wrote a letter and drew a map of her house in an effort to locate a person willing to accept money to commit perjury and to rob and beat witnesses.

[49] (c) We conclude that the deliberate, even insistent, manner in which Gissendaner pursued her husband's death, the fact that the murder was the unprovoked and calculated killing of a close family member, the fact that she arranged the murder to obtain money, and the fact that she attempted to avoid responsibility for her conduct by suborning perjury and orchestrating violence against witnesses all weigh heavily against her claim that the death penalty in her case is disproportionate. Our review of the sentences imposed in similar cases in Georgia reveals that the death sentence imposed in Gissendaner's case, considering both the gravity of her crime and the apparent depravity of her character, is not disproportionate. OCGA § 17-10-35(c)(3). The cases appearing in the Appendix support this conclusion in that each involved the careful devising of a plan to kill, killing for the purpose of receiving something of monetary value, kidnapping with bodily injury, or causing or directing another to kill.

[50] (d) Gissendaner also contends her death sentence is impermissibly disproportionate to the sentence received by her co-conspirator. The evidence showed that Gissendaner was the moving force behind the murder and even insisted upon murder when her co-conspirator suggested divorce instead. See *Waldrip v. State,* 267 Ga. 739, 752-753(25), 482 S.E.2d 299 (1997) (affirming death sentence when appellant is one among several persons likely to have been moving force, despite life sentence of co-indictees); compare ***719***Hall v. State,* 241 Ga. at 260(8), 244 S.E.2d 833. The evidence showed that she repeatedly raised the option of murder in conversations with her co-conspirator and that she planned the murder. She and not her co-conspirator stood primarily to gain financially from the murder. The murder was planned against *her* close family member. See *DeYoung v. State,* 268 Ga. 780, 493 S.E.2d 157. Unlike her co-conspirator, who cooperated with authorities and confessed his guilt, Gissendaner devised a plan to suborn perjury and to do violence against witnesses. ****692** Id.; compare *Moore v. State,* 233 Ga. at 865, 213 S.E.2d 829. We also note 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. In light of all these circumstances, we conclude that Gissendaner's sentence was not impermissibly disproportionate to Owen's. See *Carr v. State,* 267 Ga. at 559(11), 480 S.E.2d 583; see also *Crowe v. State,* 265 Ga. at 595(24), 458 S.E.2d 799; compare *Hall v. State,* 241 Ga. at 259-260(8), 244 S.E.2d 833.

20. We find that the sentence of death in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor. OCGA § 17-10-35(c)(1).

Judgment affirmed.

All the Justices concur, except FLETCHER, P.J., who concurs in judgment only as to Division 12; and BENHAM, C.J., and SEARS, J., who dissent as to Division 15.

APPENDIX

Wilson v. State, 271 Ga. 811, 525 S.E.2d 339 (1999); *Mize v. State,* 269 Ga. 646, 501 S.E.2d 219 (1998); *DeYoung v. State,* 268 Ga. 780, 493 S.E.2d 157 (1997); *Waldrip v. State,* 267 Ga. 739, 482 S.E.2d 299 (1997); *Carr v. State,* 267 Ga. 547, 480 S.E.2d 583 (1997); *Crowe v. State,* 265 Ga. 582, 458 S.E.2d 799 (1995); *Tharpe v. State,* 262 Ga. 110, 416 S.E.2d 78 (1992); *Ferrell v. State,* 261 Ga. 115, 401 S.E.2d 741 (1991); *Ford v. State,* 257 Ga. 461, 360 S.E.2d 258 (1987); *Romine v. State,* 256 Ga. 521, 350 S.E.2d 446 (1986); *Alderman v. State,* 254 Ga. 206, 327 S.E.2d 168 (1985); *Tyler v. State,*

247 Ga. 119, 274 S.E.2d 549 (1981); *Alderman v. State,* 241 Ga. 496, 246 S.E.2d 642 (1978); *Smith v. State,* 236 Ga. 12, 222 S.E.2d 308 (1976).

BENHAM, Chief Justice, dissenting.

While I concur with the majority's affirmance of appellant's adjudication of guilt, I respectfully dissent to Division 15 of the majority opinion and the sentence for the same reasons as stated by Justice Sears in her dissent in *Wilson v. State,* 271 Ga. 811, 525 S.E.2d 339 (1999).

I am authorized to state that Justice SEARS joins in this dissent.

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