

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

THE STATE OF OKLAHOMA,

Plaintiff,

vs.

TONDALO HALL et al.

Defendant/Petitioner.

Case No. CF-2004-6403

Judge:

BRIEF IN SUPPORT OF APPLICATION FOR POST-CONVICTION RELIEF

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BRIEF IN SUPPORT OF MS. HALL'S APPLICATION FOR POST-CONVICTION

RELIEF

Petitioner, Tondalo Rachele Hall, respectfully requests that this Court vacate her 2004 convictions and sentences for failing to prevent the abuse of her children, Robert and Ukiah Hall, at the hand of their father and Ms. Hall's abuser, Robert Braxton, Jr.. Ms. Hall endured the abuse of Mr. Braxton for years. She had begun implementing an escape strategy for herself and her children when the State intervened, convicting Ms. Hall by means of a blind plea and sentencing her to thirty years in prison for failing to stop her abuser. For committing the actual abuse, sufficient to break the bones of an infant and toddler, Mr. Braxton received ten years of probation with time served. During the course of prosecution, Ms. Hall was blamed and punished for the fear she felt toward the man who had strangled her and threatened her for years. The Court gave no mitigating consideration to the impact of domestic abuse nor did Ms. Hall's counsel seek to offer evidence of such. Instead of protection, Ms. Hall was given a blind plea she did not understand based upon facts insufficient to support her charge. The resulting convictions and sentences violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and represent systemic injustices within the Oklahoma criminal justice system. Ms. Hall, therefore, now petitions this Court for relief from her unconstitutional and unjust convictions and sentences.

ENTITLEMENT TO RELIEF

Ms. Hall requests relief under two sections of the Oklahoma Post-Conviction Procedure Act (PCPA), 22 O.S. § 1080. First, Ms. Hall requests relief under § 1080(d) of the PCPA based on evidence of intimate partner violence and its impact on Ms. Hall's culpability, not previously presented and heard, that require vacation of her sentences in the interest of justice. Second, Ms.

Hall requests relief under 22 O.S. § 1080(a) based upon (1) the failure of Ms. Hall’s counsel, Bill Smith, to adequately represent her in violation of the Sixth Amendment to the United States Constitution, (2) the absence of a knowing and voluntary guilty plea in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, (3) the facially disproportionate nature of Ms. Hall’s sentence for her derivative offense in relation to that of the actual perpetrator, Mr. Braxton, in violation of the Eighth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, (4) the State’s use of an unproven allegation of criminal conduct made and adjudicated without procedural due process to enhance Ms. Hall’s sentence in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and (5) the State’s failure to give any mitigating consideration or inquire into the impact of intimate partner violence on Ms. Hall’s degree of culpability in violation of the Eighth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and (6) the State’s disparate application of Permitting Child Abuse, 21 O.S. 843.5, on the basis of gender and race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Petitioner has once previously filed for post-conviction relief pro se. Oklahoma’s Post-conviction Procedure Act generally restricts what may be the basis of a subsequent application for post-conviction relief, but specifically and plainly authorizes consideration “when the court finds a ground for relief asserted which ‘for sufficient reason was not asserted or was raised inadequately in the prior application.’” *Woodruff v. State*, 1996 OK CR 5, ¶ 2 (citing *Rojem v. State*, 1992 OK CR 20, *Bryson v. State*, 1995 OK CR 57, and 22 O.S. §1086) (internal quotation marks omitted). Likewise, the Oklahoma Court of Criminal Appeals recognizes an additional

exception “when an intervening change in constitutional law impacts the judgment or sentence.” *Id.* The plain language of both exceptions require merely that one or more grounds for relief be subject thereto for the whole application to be considered. All of Ms. Hall’s present grounds for relief fit one or more of these exceptions.¹

Ms. Hall’s seven-page application form, filed in 2008, asserted that the following had been violated: “My right to withdraw my blind plea,” Exhibit 1 – Tondalo Hall’s 2008 Post-Conviction Application, at 2 “my right to have the judge determine my sentence without undue procedural influence,” *Id.* at 3, “The Eighth Amendment right that prohibits disproportionate punishments,” *Id.* at 4, and “My right to effective counsel,” *Id.* at 5. All of these grounds were denied by Judge Twyla Mason Gray without any consideration on the merits. Exhibit 2 - District Court Denial of Tondalo Hall’s 2008 Post-Conviction Application. Ms. Hall’s appeal of that denial was similarly dismissed without consideration on the merits. Exhibit 3 - Oklahoma Court of Criminal Appeals Dismissal of Tondalo Hall’s 2008 Post-Conviction Application. At no time

¹ Ms. Hall’s first ground, the failure of Ms. Hall’s counsel, Bill Smith, to adequately represent her in violation of the Sixth Amendment to the United States Constitution, was not raised on direct appeal because Ms. Hall was not in possession of key information and understanding necessary in order to discern or raise it. Hall’s second, the absence of a knowing and voluntary guilty plea in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, was raised inadequately through no fault of Ms. Hall’s. Her third proposition, the facially disproportionate nature of Ms. Hall’s sentence for her derivative offense in relation to that of the actual perpetrator, Mr. Braxton, in violation of the Eighth and Fourteenth Amendments was likewise raised inadequately and is subject to intervening changes in constitutional law. Hall’s fourth ground, the State’s use of an unproven allegation of criminal conduct made and adjudicated without procedural due process in violation of the Due Process Clause of the Fourteenth Amendment, has yet to be adjudicated because Ms. Hall has hitherto not been in a position to discern and raise it adequately. Petitioner’s fifth proposition, concerning the State’s failure to give any mitigating consideration or inquire into the impact of intimate partner violence on Ms. Hall’s degree of culpability in violation of the Eighth Amendment and Fourteenth Amendments to the United States Constitution, was not raised previously due to the unavailability of key evidence and understanding necessary to raise it adequately. Finally, Hall’s sixth proposition, the State’s disparate application of Permitting Child Abuse, 21 O.S. 843.5, on the basis of gender and race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, likewise relies on information unavailable at the time of her initial application.

have the full merits of Hall's grounds for relief been considered by any court of law. Petitioner now seeks precisely this consideration, to which she retains absolute constitutional and statutory rights. She is joined in her request by domestic violence experts and by the victims themselves, whose declarations join Ms. Hall's herein. Maintaining and protecting trust in the integrity of Oklahoma's prosecutors and courts demands correction of the gross and glaring miscarriage of justice permitted in her case. The PCPA's exceptions to the prohibition on subsequent applications wisely allow just such a correction to occur.

FACTUAL BACKGROUND²

I. Petitioner's Offense

The child abuse acts for which Ms. Hall is incarcerated were committed solely by her co-defendant and former boyfriend, Robert Braxton, Jr.. Mr. Braxton abused the couple's two children during the Fall of 2004, according to the State of Oklahoma. The child abuse victims were the children of Ms. Hall and Mr. Braxton, who were living together domestically but not married. The two children were, at the time of Mr. Braxton's abuse, an infant and a toddler, respectively. Mr. Braxton's physical abuse of the couple's children was sufficiently violent to break one child's ribs and the other's femur. Ms. Hall was not found to have participated in Mr. Braxton's acts, solicited them, or conspired to commit them. Ms. Hall was not present during Mr. Braxton's abuse of the children to observe his actions directly. Ms. Hall was present in the couple's apartment outside the room during instances of what she suspects was physical abuse. She heard screaming and crying, but when she questioned Mr. Braxton about it, he denied any abusive actions and forced her to back off. Mr. Braxton's physical abuse of the children was discovered when Ms. Hall took one of the children to the hospital over Mr. Braxton's objections,

² All the facts laid out herein are founded in the Court's records, the exhibits attached herein including sworn declarations, or both, which are incorporated by reference. Except where noted, Petitioner does not expect these facts to be the subjects of substantial dispute.

due to worsening symptoms of injury, such as swelling, redness, and pain. Upon the medical staff's discovery of Mr. Braxton's abuse, the children were placed into Department of Human Services custody, and both Ms. Hall and Mr. Braxton were later arrested on suspicion of child abuse.

Prior to committing child abuse against his own children, Mr. Braxton engaged in a pattern of both physical and emotional abuse of Ms. Hall, which included, *inter alia*, assault, strangulation, threats of physical harm to her and the children, and threats to utilize alleged family contacts within the Department of Human Services to sever Ms. Hall from their children should she attempt to leave Mr. Braxton, report his abuse, or otherwise limit his access to her or the children. By the time of the couple's arrest, Mr. Braxton had succeeded in isolating Ms. Hall from most family and community resources available to her. She had previously dropped out of high school, and had little means of her own to secure and maintain a safe and comfortable residence for her children. Despite this, in the months prior to the couple's arrest, Hall had hoarded and hidden multiple miscellaneous checks rather than cashing or depositing them, in order to have the capability to scrape together minimal money necessary to enable her to leave Mr. Braxton without his finding out in advance. Only days prior to taking her injured child to the hospital, Hall had succeeded in securing the help of her adoptive father to look for a house for rent where she and her children could escape Mr. Braxton.

Following his commission of child abuse and the couple's arrest, Mr. Braxton continued to use emotional manipulation and mental abuse in order to dissuade Ms. Hall from giving candid and inculpatory testimony in his case. The State of Oklahoma failed to protect her from this abuse and even facilitated it by allowing Mr. Braxton to be alone in an interrogation room with Ms. Hall, where he implored her to keep quiet and protect him, then later by transporting

Mr. Braxton and Ms. Hall together from the jail to the courthouse, during which Mr. Braxton verbally abused her. During the Oklahoma City Police Department's initial investigation of the case, Hall attempted to take responsibility for the children's injuries. Hall's false confession to injuring the couple's children ultimately was not successful. Hall was initially charged in the alternative with counts of both committing child abuse and permitting it, but the former were later dropped by the State.

Following the filing of charges against Mr. Braxton and Hall, bond was set at \$40,000 for each. There is no record of the Oklahoma County Court being presented with any evidence demonstrating any flight risk, nor was any such finding made to support this determination of bond. It was not challenged and remained as initially set for the duration of the case. The case against Ms. Hall and Mr. Braxton was pending for over two full years, being filed on November 29, 2004, and not completed until December 2006. Unable to post her bond, Ms. Hall remained locked within the Oklahoma County Jail for the entire two-year duration of the case.

During the pendency of the action, Ms. Hall was represented by three different court-appointed attorneys. The last of which, her trial attorney Bill Smith, did little to no investigation or consultation with Ms. Hall. Defendant Mr. Braxton elected to take the case against him to jury trial, while Ms. Hall entered a plea of guilty. She entered the plea on or about October 16, 2006, without any plea deal or agreement, and sentencing was set for December 20, 2006.³

³ The nature of Ms. Hall's plea appears to be disputed by the Oklahoma County District Attorney's Office. While the entire court record and declaration of Ms. Hall clearly support that she entered a blind plea, District Attorney David Prater has since stated multiple times that Ms. Hall in fact was subject to a plea agreement (apparently without disclosure to the court or her knowledge), then violated it (also apparently without her knowledge) by failing to sufficiently inculcate Mr. Braxton at his trial, thus purportedly warranting her draconian punishment for failing to stop her abuser's crimes. Petitioner will initiate additional discovery to ascertain the factual basis, if any, for Prater's claims.

Mr. Braxton's jury trial commenced on December 4, 2006. Ms. Hall was one of the State's witnesses, being set to testify on December 7, 2006. Prior to Ms. Hall's testimony, the prosecutor, Angela Marsee, became aware of prior domestic violence committed by Mr. Braxton and sought to introduce evidence of the same at trial. For reasons unknown to Petitioner, Marsee neglected to file a Burke's Notice as required by law before such evidence can be introduced. As Ms. Hall was testifying concerning Mr. Braxton's physical abuse, specifically concerning his attempt to strangle her on a couch in the couple's apartment while she was pregnant, the Court sustained objections by Mr. Braxton's defense counsel and barred Ms. Hall from testifying further about the abuse. *See* Exhibit 4 – Transcript of Jury Trial Proceedings (Testimony of Tondalo Hall Only), at 19-23.

The record reflects that the Court sustained several other objections to Marsee's questions. However, no objection was made as to the sufficiency of any response by Ms. Hall. At no time during the testimony did the Court or any other party in the courtroom accuse Ms. Hall of failing to cooperate or to answer any question truthfully. At no time was Ms. Hall threatened with or cited for any sort of contempt, nor was she admonished at any time for any inappropriate behavior or deficient testimony of any kind. *See* Exhibit 4, *supra*. At the conclusion of Ms. Hall's direct testimony, a recess was held. *Id.* at 49. During that recess, Marsee approached counsel for Mr. Braxton and made a deal whereby Mr. Braxton would enter a plea in exchange for immediate release to probation and the dismissal of two of the counts against him. Due to this agreement, the jury trial in progress was terminated, and Ms. Hall was asked for no further testimony. During this time, Ms. Hall was kept in a courthouse holding cell. She was not informed of Mr. Braxton's plea or sentencing.

II. Sentences Allowing the Abuser to Walk Free While Petitioner Remains Imprisoned

Pursuant to his plea agreement, Mr. Braxton was convicted of perpetrating the actual child abuse, and was sentenced to eight years of probation following time already served awaiting trial. His order of release was effective the day he made his plea. *See* Exhibit 5 – Judgment and Sentence for Robert Mr. Braxton, Jr. in CF-2004-6403, filed therein on December 8, 2006.

On December 16, 2006, nine days after Mr. Braxton was released, Ms. Hall appeared before Judge Elliot for her sentencing following her plea entered three months earlier in October. At the time of Ms. Hall’s sentencing, a Pre-sentence Investigation report had been completed and DHS had a reunification plan ready in the assumption that Ms. Hall would receive probation. The Court took no testimony on, and made no findings of, any aggravating factors in Ms. Hall’s case. *See* Exhibit 6 - Transcript of Tondalo Hall’s Formal Sentencing after Previous Plea of Guilty. The Court took no testimony or evidence of any kind relating to Ms. Hall’s sentencing, relying instead entirely on the argument of prosecutor Angela Marsee and court-appointed defense counsel Bill Smith. In her arguments to the Court, Angela Marsee blamed Ms. Hall for Marsee’s failure to secure a greater sentence for Mr. Braxton, stating, *inter alia*:

...the case against [Mr. Braxton] fell apart in part because of her minimizing and denying what happened in that household...He definitely should have received a more significant sentence, but because of her minimizing and continuing to protect herself and protect him, that had a real impact on what we were able to do with him in the jury trial.

Exhibit 6, *supra*, at 11.

No evidence was presented by Marsee in support of these accusations. During these arguments, Marsee did not discuss or reference her own failure to file a Burke’s Notice or for the State to take the most basic precautions and techniques to enable Ms. Hall to testify candidly about the conduct of her abuser, such as limiting his access to her before or during the

proceedings, or providing any counseling or victim services of any kind whatsoever. Following Marsee's accusations, the Court made statements in agreement. Judge Elliot stated, *inter alia*: "I believe [Ms. Hall] was less than candid with the Court and the jury. I'm of the opinion, based on her responses, that she was less than truthful at times." *Id.* at 13. The record reflects no evidence being reviewed nor any findings adopted in support of these accusations. No formal accusation of perjury or contempt was made, and thus no due process of any kind provided. Instead, the Court characterized its summary conclusion that Ms. Hall had failed to be truthful as an "opinion" multiple times, but then used the same effectively as an aggravating factor in arriving at its sentence, without providing any meaningful notice or opportunity for Hall to defend herself thereon. *Id.* at 12-13. The Court also noted Mr. Braxton's impact on Ms. Hall's testimony, stating:

There would be certain questions that would be asked of [Ms. Hall] where she would look over at the defendant [Mr. Braxton] and make direct eye contact with him prior to her taking a moment or two to respond. That tells me something based on my years of experience. Was she scared of him? Probably.

Id.

Despite noting Ms. Hall's fear of Mr. Braxton, the Court declined to inquire further about the impact of domestic abuse on Ms. Hall's offense or testimony. Based purportedly on Marsee's accusations of criminal perjury or contempt, on which no due process was afforded to Ms. Hall, the Court sentenced Hall to a total of thirty years' incarceration. Exhibit 7 - Judgement and Sentence for Tondalo Hall, in CF-2004-6304, filed therein on December 26, 2006. Subsequently, Judge Elliot denied Ms. Hall's application to withdraw her guilty plea as well as her later application for post-conviction relief. Judge Elliot's actions forced DHS and Ms. Hall to abandon reunification plans and make an agreement whereby Ms. Hall had to sign away her parental rights to her children since she is set to be incarcerated until well after the children reach

adulthood. The children continue to correspond with Ms. Hall and wish to see her released, as does their custodian. *See* Exhibit 8 - Declaration of Ukiah Hall; *See also* Exhibit 9 - Declaration of Robert Hall; *See also* Exhibit 10 - Declaration of Cynthia Wells. The children do not understand why their mother is in prison for their father's crimes while their father has remained free.

ARGUMENT

I. The Interest of Justice Requires Ms. Hall's Convictions and Sentences to be Vacated Based on Newly Discovered Evidence of Domestic Violence and Its Impact on Ms. Hall's Culpability

Ms. Hall's newly discovered evidence of intimate partner violence and its impact on her culpability compels relief under Section 1080(d) of Oklahoma's Post-Conviction Procedure Act (the PCPA).

1. Legal Standard

Section 1080(d) of the PCPA provides relief where "there exists evidence of material facts, not previously presented and heard, that requires citation of the conviction or sentence in the interest of justice." 22 O.S. § 1080(d). New evidence is grounds for relief where it is material, could not have been discovered through due diligence prior to trial, is not cumulative to evidence already in the record, and creates a reasonable probability that the trial's outcome would have been different had it been introduced.⁴ *Sellers v. State*, 1995 OK CR 11, 889 P.2d at 897 (Okla. Crim. App. 2006) n. 11.

2. The Newly Discovered Evidence

⁴ In the context of *Brady* violations, the Oklahoma Court of Criminal Appeals has noted that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Ray v. State*, 1988 OK CR 133, 758 P.2d 823, 825 (Okla. Crim. App. 1988).

Ms. Hall was a victim of intimate partner abuse perpetrated by Mr. Braxton. The effects of that abuse significantly impaired her autonomy and thus mitigate her culpability for a crime derivative of that of her abuser.

A. Mr. Braxton Perpetrated Domestic Violence Against Ms. Hall

Mr. Braxton abused Ms. Hall emotionally, physically, sexually, and financially. Early in their relationship Mr. Braxton would call Ms. Hall names such as “bitch” and “slut.” Exhibit 11 - Declaration of Tondalo Hall, at ¶¶ 3, 5. He would repeatedly threaten to physically abuse her. *Id.* at ¶ 3. Ms. Hall’s son, Jeffery, recalls Mr. Braxton talking to her as though “he owned her.” Exhibit 12 - Declaration of Jeffery Hall, at ¶ 2. Mr. Braxton coerced Ms. Hall into feeling that his violent and abusive behavior was her fault. During arguments he would say things to her such as, “you turned me into who I am” and “it’s your fault I’m like this.” Exhibit 11, *supra*, at ¶ 12. Ms. Hall blamed herself for his behavior, asking herself “how can I change for him? What can I do to make him happy?” *Id.* at ¶ 7.

While living together, Mr. Braxton’s mood was unpredictable. He would suddenly become angry and possessive and would berate Ms. Hall for every mistake she made. Mr. Braxton also berated Ms. Hall for not wanting to have sex with him on several occasions. *Id.* at ¶¶ 6, 27. She recalls it being like “living with Jekyll and Hyde.” *Id.* at ¶ 7. Never knowing when Mr. Braxton would lash out in anger kept Ms. Hall in a state of constant fear and anxiety. Ms. Hall recalls her stress becoming so disabling that she had to go to the hospital. *Id.* at ¶ 7.

Mr. Braxton would frequently get angry when the father of Ms. Hall’s first child would call her; he thought Hall would cheat on him. *Id.* at ¶ 2. Shortly after becoming pregnant with their first child, Mr. Braxton became obsessed with the idea that Ms. Hall had cheated on him and that the child was not his, exclaiming to her that the child was “probably some other nigga’s

baby.” *Id.* at ¶ 5. Mr. Braxton would unexpectedly show up to the houses of Ms. Hall’s friends while she was there. *Id.* at ¶ 4. Mr. Braxton was particularly jealous of Ms. Hall’s relationship with family and friends, especially male friends. *Id.* at ¶¶ 8, 13. Ms. Hall recalls lying to Mr. Braxton about hanging out with her male friends so that he would not become violent or angry. *Id.* at ¶ 13. When Ms. Hall would leave the house, Mr. Braxton would grow angry and then call her repeatedly while she was away. *Id.*

Once at a friend’s house, Mr. Braxton and Ms. Hall were arguing. He verbally assaulted and physically confronted her, saying that she was “acting like a bitch.” *Id.* at ¶ 3. She responded by pushing him back by his shoulders. *Id.* At this moment, he grabbed her and held her against the wall by her throat, choking her until she lost consciousness. *Id.* During another fight, Mr. Braxton picked up the couple’s mattress and shoved it against Ms. Hall, pinning her between it and the wall. *Id.* at ¶ 11. On one occasion, Mr. Braxton threw a boot at Ms. Hall, narrowly missing her head. *Id.* at ¶ 14.

When Ms. Hall would threaten to leave Mr. Braxton, he would tell her that “no one else want[ed] [her].” *Id.* at ¶ 5. He exploited Ms. Hall’s resources without permission or warning, making escape from the relationship nearly impossible. *Id.* at ¶ 16. Robert was particularly jealous of Ms. Hall’s relationship with her family. *Id.* at ¶ 8. When she would visit her family, he would not come with her. *Id.* When Ms. Hall would leave to spend time with her family, Mr. Braxton would tell her, “fine, go be a slave, go be around a bunch of miserable people.” *Id.* He would refer to Ms. Hall’s cousin, Cynthia, as “that fat bitch.” *Id.* at ¶ 8. Ms. Hall started to hide phone conversations with her family from him to avoid his anger and sarcastic comments. *Id.* Ms. Hall recalls her relationship with her infant son, Jeffery, as the only relationship she was able to maintain without incurring Mr. Braxton’s anger. *Id.* at ¶ 9. In an effort to avoid some of

Mr. Braxton's anger, Ms. Hall recounted that she "saw less and less of my family." *Id.* at ¶ 9. Ms. Hall became isolated from her family and friends. She stated that "Jeffery became a security blanket. . . . I was isolated." *Id.* Braxton made her feel like she had to depend on him. *Id.*

Throughout the duration of their relationship, Braxton would threatened to slap, hit, or strangle Ms. Hall, telling her that she needed to "get slapped in the mouth" and get her "ass beat." *Id.* at ¶ 3. He would frequently slap Hall and punch holes in the walls of their home. *Id.* at ¶¶ 13, 20. On several occasions, Mr. Braxton strangled Ms. Hall to the point of unconsciousness. *Id.* at ¶¶ 3, 18.

Ms. Hall was not, as the State charged, a co-defendant willfully permitting Mr. Braxton to abuse their children. She was another victim of Mr. Braxton's abusive behaviors.⁵

B. The Impact of Domestic Violence on the Victim's Culpability

Since Ms. Hall's conviction and sentencing, our understanding of the scope of impact of intimate partner violence has changed significantly; experts have expanded the framework of intimate partner violence to include coercive control. This expansion helps to capture why victims often stay in abusive relationships instead of leaving their abusers. Coercive control is a fear-based pattern of domination that includes violent and non-violent tactics of control, resulting in a hostage-like condition for the victim.⁶ Coercive control affects a victim's autonomy and capacity for independent decision making. When a victim is under the control of their abuser, it

⁵ Complete accounts of the intimate partner violence Ms. Hall experienced are included as the declarations of Ms. Hall and her family members. Exhibit 10, *supra*; Exhibit 11, *supra*; Exhibit 12, *supra*; Exhibit 13 - Declaration of Jeffery Len Hall.

⁶ Evan Stark, *Re-presenting Battered Women: Coercive Control and the Defense of Liberty*, Violence Against Women (2012).

mitigates their culpability because the hostage-like state of intimate partner violence significantly impairs the victim's autonomy.⁷

Ms. Hall experienced the coercive control of her abuser throughout her intimate relationship with him and during her incarceration. Many tactics of coercive control prevented Ms. Hall from leaving her abuser and from seeking help outside of the relationship. These tactics included emotional degradation, isolation, financial exploitation, and physical violence. The emotional degradation she experienced from her abuser resulted in low self-esteem, depression, and internalization of blame. These symptoms of coercive control are linked to victims' inhibitions and barriers to seeking assistance.⁸ Ms. Hall felt isolated from friends and family as a result of her relationship with her abuser. Coercive control targets a victim's social support system and instills dependence on the abusive partner.⁹ Furthermore, Mr. Braxton repeatedly exploited Ms. Hall's financial resources making it tangibly impossible for her to leave while continuing to provide necessities for her children and herself.

⁷ *Id.* at 4 (“[C]oercive control targets a victim’s autonomy, equality, liberty, social supports and dignity in ways that compromise the capacity for independent, self-interested decision-making vital to escape and effective resistance to abuse.”); *Id.* at 7 (“The primary outcome of coercive control is a condition of *entrapment* that can be hostage-like in the harms it inflicts on dignity, liberty, autonomy and personhood as well as to physical and psychological integrity.”); *Id.* at 12 (“Control tactics also foster dependence by depriving partners of the resources needed for autonomous decision-making and independent living”); Cheryl Hanna, *The Paradox of Progress: Translating Evan Stark’s Coercive Control Into Legal Doctrine for Abused Women*, 15 *Violence Against Women* 1458 (2009) at 1464-1465 (“If women are victims of the kind of coercive control Stark describes, then their autonomy is significantly compromised. Although these women may continue to engage in small acts of resistance, fully embracing legal interventions to escape the relationship may be asking them to do something that may be nearly impossible given their hostage-like existence.”); Emma Williamson, *Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control*, 16 *Violence Against Women* 1412 (2010), at 1413 (“Stark suggests that coercive control acts to undermine the autonomy of women and is a liberty crime.”).

⁸ Deborah L. Rhatigan et al., *The Impact of Posttraumatic Symptoms on Women's Commitment to a Hypothetical Violent Relationship: A Path Analytic Test of Posttraumatic Stress, Depression, Shame, and Self-Efficacy on Investment Model Factors*, 3 *Psychological Trauma: Theory, Research, Practice, and Policy* 181 (2011); Williamson, *supra*, footnote 5.

⁹ Stark, *supra*, footnote 4.

In addition to the non-violent tactics of coercive control used against her, Ms. Hall experienced physical abuse including non-fatal strangulation (NFS) on more than one occasion from her abuser. NFS is one of the most dangerous and effective tools of coercive control that abusers have over their victims.¹⁰ NFS is a uniquely effective tool of physical abuse as it incites the fear of death in the victim and communicates the abuser's control over whether the victim lives or dies.¹¹ Experts note the significant lethality for victims at the point of separation from their abusers.¹² Since Ms. Hall had experienced previous instances of physical abuse, she reasonably believed that any threat of physical abuse could materialize at any moment. It is significant to note that Mr. Braxton's coercive control over Ms. Hall continued while she was incarcerated. He sent her letters in prison with threats of abuse and strategically coerced her throughout her prosecution and sentencing.

The hostage-like condition Mr. Braxton created for Ms. Hall through coercive control impacted her autonomy and capacity for independent decision making. She was not a willing participant in her children's abuse. Rather, she was another victim.

3. The Newly Discovered Evidence of Domestic Abuse and Its Impact Are Grounds for Relief under the PCPA

Evidence of the abuse Ms. Hall experienced at the hand of Mr. Braxton as well as evidence of the impact of that abuse on her culpability are grounds for relief because the evidence (a) could not have been discovered through due diligence prior to trial or sentencing,

¹⁰ Kristie A. Thomas et al., "Do You Know What It Feels Like to Drown?" : *Strangulation as Coercive Control in Intimate Relationships*, *Psychology of Women Quarterly* (2013).

¹¹ Adam Pritchard et al., *Nonfatal Strangulation as Part of Domestic Violence: A Review of Research*, *Trauma, Violence, & Abuse* (2015).

¹² Melissa E. Dichter & Richard J. Gelles, *Women's Perceptions of Safety and Risk Following Police Intervention for Intimate Partner Violence*, *18 Violence Against Women* 44 (2012).

(b) is not cumulative to evidence already in the record, and (c) creates a reasonable probability that the outcome of her sentencing hearing would have been different had it been introduced.

A. Due Diligence

Evidence of intimate partner violence and its effects may be considered newly discovered evidence that could not have been discovered through due diligence prior to trial. *See McMaugh v. State*, 612 A.2d 725, (R.I. 1999); *States v. Brown*, 891 F.Supp. 1501 (D.Kan. 1995); *Commonwealth v. Conaghan*, 740 N.E.2d 956 (Mass. 2000). Courts have treated evidence of intimate partner violence known to the victim at the time of trial, as well as evidence of its effects on the victim, as newly discovered because the nature of intimate partner violence and the resulting trauma is to conceal itself. *Brown*, 891 F.Supp at 1510 (“According to Dr. Hutchinson’s report, it is the nature of Ruby’s illness [battered woman’s syndrome] to conceal its existence.”); *McMaugh*, 612 A.2d at 732 (“The uncontradicted evidence is that because of the battering she was subjected to by her husband, McMaugh was precluded from coming forward with exculpatory evidence for use at the original trial.”); *Conaghan*, 740 N.E.2d at 959 (“Evidence of battered woman syndrome may be considered newly discovered evidence warranting a new trial because usually there is delay in coming forward with information on the abuse . . .”). Victims of intimate partner violence face numerous barriers to coming forward about their abuse at the time of trial. Exhibit 14 - Expert Witness Declaration of Angela Beatty, at ¶¶ 2 - 5; Exhibit 15 - Expert Witness Declaration of Anita Rydberg, at ¶¶ 7, 8.

First, intimate partner violence places the victim under the coercive control of their abuser.¹³ “Domestic violence perpetrators seek to control the thoughts, conduct, and behavior of

¹³ *See Williamson, supra, footnote 5*, at 1413 (“Domestic violence is a pattern of controlling behavior against an intimate partner or ex-partner, which includes but is not limited to physical assaults, sexual assaults, emotional abuse, isolation, economic abuse, threats, stalking, and intimidation. Although only some forms of domestic violence are illegal and attract criminal

their victims.” Exhibit 14, *supra*, at ¶ 1. They seek to put their victims under their coercive control so that the victim’s ability to execute their own will is significantly diminished. Coming forward to counsel, the court, or even close family members about the abuse would directly contradict the will of the abuser. Therefore, the coercive control of the abuser acts as a powerful psychological barrier for victims of intimate partner violence when assessing help-seeking behaviors like disclosing their abuse at the time of trial.

Second, fear of violence from their abuser acts as a barrier for intimate partner violence victims to seek help.¹⁴ “Threats to assault the victim are given if she seeks help from outside authorities or lets anyone know about the violence that is occurring in the home. Very frequently that fear of increased violence keeps victims from seeking help.” Exhibit 14, *supra*, at ¶ 5. Additionally, “women who do not report their experiences of domestic violence may be fearful of . . . threats toward their children.” Exhibit 15, *supra*, at ¶ 8. Thus, fear of retribution keeps victims of intimate partner violence from presenting evidence of abuse at trial.

Third, victims of intimate partner violence experience isolation from their support systems as a result of the abuse, which acts as a barrier to seeking help.¹⁵ “Abusers use isolation tactics to inhibit their victim’s ability to resist their control.” Exhibit 14, *supra*, at ¶ 4. Lack of

sanctions (physical and sexual assault, stalking, threats to kill), other forms of violence can also have very serious and lasting effects on a person’s sense of self, well-being and autonomy.”); *See also* Jill Messing et al., *The Oklahoma Lethality Assessment Study: A Quasi-Experimental Evaluation of the Lethality Assessment Program*, 89 *Social Service Review* 499 (2015) at 500 (“Intimate partner violence (IPV) is the systematic use of power and control by one partner in an intimate relationship in order to subordinate another, and it is often reinforced through physical or sexual violence.”).

¹⁴ *See* Denise Hien & Lesia Ruglass, *Interpersonal partner violence and women in the United States: An overview of prevalence rates, psychiatric correlates and consequences and barriers to help seeking*, 32 *International Journal of Law and Psychiatry* 48 (2009), at 50, 51 (Fear created by IPV acts as a barrier to seeking help. Two of the most prevalent reasons why women did not report were fear of retribution and threats toward their children.).

¹⁵ *See* Stark, *supra*, footnote 4, at 10 (“Controllers isolate their partners to prevent disclosure, instill dependence, express exclusive possession, monopolize their skills and resources, and keep them from getting help or support.”).

access to those crucial support systems creates a barrier for intimate partner violence victims to seek help. By the time prosecution is initiated, domestic violence victims have become accustomed to dealing with the abuse by themselves and are unlikely to expect meaningful aid from the court or their counsel. This isolation, therefore, prevents victims from presenting evidence of their abuse.

Fourth, “[d]istrust of others serves as a barrier for victims sharing their experiences with domestic violence both during and after the abuse.” Exhibit 14, *supra*, at ¶ 2. Much of that distrust is rooted in the victim’s internalization of their abuse. Perpetrators of intimate partner violence commonly convince their victims that the abuse is the victim’s fault. *Id.* at ¶ 2. As a result, victims become embarrassed by the abuse and develop feelings of guilt, shame, and self-hatred.¹⁶ Victims are therefore further reluctant to admit any abuse has occurred. *Id.* at ¶¶ 2-3.

Finally, many victims of intimate partner violence do not report their abuse to the police, the court, or their counsel due to distrust in the legal system’s ability to protect them and willingness to believe them.¹⁷ These fears, too often validated by reality, serve as a barrier to victims in presenting evidence of their abuse at trial.

¹⁶ See Rhatigan, *supra*, footnote 6, at 183 (“[V]ictimhood women, particularly those suffering from psychiatric conditions like PTSD or depression, may struggle to obtain adequate alternatives because of tendencies toward anger or withdrawal. Even with repeated attempts at obtaining those resources, women’s feelings of shame may increase because of negative experiences with informal or formal sources of support (i.e., via victim-blaming); See also Williamson, *supra*, footnote 5, at 1417 (“Women who experience domestic violence expect to be hated because they have learned to hate themselves.”); See also Melissa E. Dichter, *Associations Between Psychological, Physical, and Sexual Intimate Partner Violence and Health Outcomes Among Women Veteran VA Patients*, 12 *Social Work in Mental Health* (2014) at 414 (“Sexual violence victims also often feel shame, humiliation, and degradation and experience stigmatization and blame for their victimization.”).

¹⁷ See Zuzana Podana, *Reporting to the Police as a Response to Intimate Partner Violence*, 43 *Czech Sociological Review* 453 (2010) (Twenty five percent of women surveyed said they didn’t report their abuse to the police because of the tendency of the police to minimize seriousness of incidents. Twenty nine percent of women do not report because of the belief that police do not take IPV seriously. Many women fear that police will make a double arrest. Ethnic minorities in

However, time out of the abusive relationship, and the ongoing experience of security and safety, can enable a victim to recognize, confront, and reveal the abuse they endured.¹⁸ “It takes a long time for a repeatedly abused woman to trust anyone, even a competent professional. . . .” Exhibit 15, *supra*, at ¶ 7. “[T]ime out of the relationship was negatively related’ to the effects of domestic violence and trauma.” *Id.* at ¶ 12.¹⁹ Courts have recognized the impact that time and separation have on the impact of trauma, finding that evidence of intimate partner violence and its impact must be considered newly discovered evidence. *McMaugh*, 612 A.2d at 732 (“[A]n individual subjected to battered woman's syndrome is incapable of freeing herself from the influence of the batterer. Thus *McMaugh* could not have fully assessed the reality that she was a battered woman, with all the legal ramifications of that assessment, until prison confinement physically, and eventually mentally, separated her from her abusive husband.”).

Intimate partner violence creates such powerful barriers to help-seeking behaviors, such as disclosing the abuse to counsel or the court, that courts have found that evidence of intimate partner violence may be considered newly discovered evidence even where some knowledge of the abuse existed at the time of prosecution. *Commonwealth v. Conaghan*, 740 N.E.2d 956, 959 (Mass. 200) (“Evidence of battered woman syndrome may be considered newly discovered evidence . . . even if there were some knowledge of abuse at trial.”). Even where some evidence

of intimate partner violence was presented at trial, the effects of intimate partner violence are

particular do not report because of fear that DHS will take their children away.); *See also* Hein, *supra*, footnote 15 (At the prosecution level, victims are often blamed.); *Id.* at 51, 52 (Poor black women are the most likely to experience re-victimization after initiating legal action, perhaps because of unresponsiveness of the police to their needs.).

¹⁸ *See* Ditchter & Gelles, *supra*, footnote 10, at 54, 59 (“Some women felt that being away from the partner—physically and geographically separated—helped, or would help, them to feel safer and protected from future assaults. . . . As emphasized in the qualitative interviews, once out of the relationship, having physical distance from the (ex)partner and an informal social support network are critical to women’s sense of security.”).

¹⁹ *Citing* Holtzworth-Munroe, A., Smutzler, N., & Sandin, E., (1997). A Brief Review of the Research on Husband Violence, 238.

such that the victim still remains unable to properly recognize, let alone present, all relevant evidence of that abuse and its effects.

Ms. Hall faced these barriers to fully and adequately presenting evidence of her abuse and its effect at the time of her conviction, direct appeal, and initial post-conviction application.

First, Mr. Braxton used multiple abusive tools to place Ms. Hall under his coercive control, which hampered her ability to advocate for herself. “The foundation of domestic abuse is the abuser’s goal to gain and maintain power and control over the victim. Oftentimes, this is accomplished without becoming physically or sexually abusive, but rather by using psychological methods of abuse. Examples of psychological abuse include: yelling, name-calling, put-downs, shaming, and blaming the victim for their own actions. . . .Tondalo experienced all of the aforementioned types of abuse.” Exhibit 15, *supra*, at ¶ 2. Because Ms. Hall was under the coercive control of Mr. Braxton as a result of his abuse, she was unable to effectively advocate for herself.

Second, Mr. Braxton instilled within Ms. Hall the fear of violence and retribution should she report or disclose his abusive behavior by use of threats and physical violence. “The fear that Tondalo had for her abuser can be read throughout her personal declaration. She shares that ‘She never knew what mood he would wake up in. I was like living with Dr. Jekyll and Hyde. The stress of never knowing which man would wake up beside me, which would be there when I got home, or which would walk through the door was overwhelming.’ That kind of fear can be paralyzing and keep victims from reaching out for help.” Exhibit 14, *supra*, at ¶ 5. “Tondalo also experienced intimidation with his threats of hurting her and having DHS take the children away from her. He punched holes in walls and found her the first time she left him. Tondalo became

fearful of the unfamiliar future, and fearful he would find out she was trying to leave.” Exhibit 15, *supra*, at ¶ 3.

Furthermore, “Tondalo’s fear of her abuser due to his manipulation and control continued after his assault on their children and throughout the trial process.” Exhibit 14, *supra*, at ¶ 7. Mr. Braxton sent Ms. Hall letters while they were in jail awaiting trial, threatening to “slap the fuck out of” her. Exhibit 11, *supra*, at ¶ 31. “His threats continued throughout the trial process. He would berate and belittle her while they were being transported from the jail to the courthouse . . . he even threatened to ‘kick her ass’ because of her testimony.” Exhibit 14, *supra*, at ¶ 7. Not only did Ms. Hall experience fear as a result of threats and physical violence that prevented her from reporting her abuse before trial, but Mr. Braxton’s continued access to her and renewed threats during the trial process prolonged Ms. Hall’s trauma and discouraged her from fully disclosing the extent of her abuse to either the police or her counsel.

Third, Mr. Braxton isolated Ms. Hall from her support systems which weakened her ability to seek their help and support. “Robert Braxton used tactics that isolated Tondalo, leaving her without a solid support system. He would become upset when she would talk to her child’s father, he obsessed with the idea that she was going to cheat on him. Additionally, he put down her family and degraded her when she wanted to visit her family. She hid her phone conversations and didn’t spend as much time with her family in attempt not to anger him. His tactics were used to sever her support system.” Exhibit 15, *supra*, at ¶ 3. Ms. Hall states that “[a]t every chance, Robert would undermine my relationship with my family. I started hiding my phone conversations with my family from him, just to avoid his anger... They stopped coming over to our house. No one wanted to be around Robert...Slowly I saw less and less of my family.” Exhibit 14, *supra*, at ¶ 4, *quoting* Exhibit 11, *supra*, at ¶ 9. Isolation from her support

system made seeking help far more difficult. Ms. Hall became accustomed to keeping her experience to herself and was not able to fully disclose her experiences to the Court or counsel during trial. Her grossly extended time spent locked in the Oklahoma County Jail awaiting disposition of her case naturally strengthened this isolation, and thus its weakening effects.

Fourth, as a result of Mr. Braxton's abuse, Ms. Hall experienced embarrassment, guilt, and distrust of her friends and family which acted as a barrier for her to seek help and disclose the abuse. "Tondalo's feelings of self-blame and shame acted as a barrier to seeking help as evidenced by her feeling like Robert's abuse was her fault and not her wanting to tell her family members about the abuse she was experiencing." Exhibit 15, *supra*, at ¶ 7. For example, Ms. Hall was too ashamed of the abuse she endured to let her friend in the house when she came to check on Ms. Hall or to tell her about the abuse she was experiencing. Exhibit 14, *supra*, at ¶ 3. Her internalized feelings of guilt, shame, and embarrassment prevented Ms. Hall from coming forward about the abuse she experienced. She was too embarrassed to share her experiences with her friends and family, let alone the Court.

Finally, Ms. Hall's distrust in the ability of the legal system to protect her and her children dissuaded her from reporting the abuse she endured. She was afraid DHS would take her children away, a fear completely validated by her subsequent experience. Exhibit 11, *supra*, at ¶¶ 20, 22. When she asked her counsel for a Victim's Protective Order, he dismissed her concerns. *Id.* at ¶ 33. When she spoke of Mr. Braxton strangling her, the Court cut her testimony short and instructed that her testimony of her experience not be considered.²⁰ Exhibit 4, *supra*, at 23. Repeatedly experiencing negative, dismissive reactions from agents of the State reinforced

²⁰ While her testimony at Mr. Braxton's trial of the time he strangled her on the couch was properly excluded from evidence because of the prosecution's failure to file a Burke's notice, such a dismissal can discourage a victim of intimate partner abuse from recounting incidents of their abuse in the future.

distrust in the legal system and dissuaded Ms. Hall from fully presenting evidence of her abuse or its effects.

However, time out of the abusive relationship and out of reach of her abuser, coupled with counseling and guided help, has enabled Ms. Hall to overcome those barriers and present evidence of intimate partner abuse and its effects on her autonomy and culpability in this application. Ms. Hall needed time out of the abusive relationship and away from Mr. Braxton to identify and process the abuse to the point that she could speak about her experiences and better advocate for herself. “Tondalo has had over a decade of time out of the relationship. She has had thirteen years behind bars. She sees things in a clearer light. She has had time to process and heal.” Exhibit 15, *supra*, at ¶ 12. She is now able to present evidence of her abuse and its effects.

Additionally, the understanding of the effects of domestic and intimate partner violence has developed significantly over the decade since Ms. Hall’s convictions and previous appeals, providing new, research-based evidence for her claims previously unavailable to her. *See* Appendix 1. Since Ms. Hall’s conviction and sentencing, experts have a far greater understanding of the impact of intimate partner violence, particularly the devastating impact of coercive control, which results in a hostage-like condition for the victim.²¹ Though experts have studied the impact of domestic violence for over 30 years, the field’s understanding of coercive control wasn’t nearly as nuanced and complex at the time of Ms. Hall’s sentencing as it is today.

²¹ *See* Hanna, *supra*, footnote 5 (Hanna develops Evan Stark’s theory of coercive control as it affects the victim’s autonomy. She argues that, because victims are under the coercive control of their abuser, their autonomy is significantly lessened.); *See also* Williamson, *supra*, footnote 5 (Williamson defines domestic violence within the context of coercive control, expanding upon Evan Stark’s initial theory. Like Hanna, Williamson applies Stark’s theory of coercive control to the impact domestic violence has on the victim’s autonomy.). *See also* Stark, *supra*, footnote 4 (Stark further develops his initial theory of coercive control, expanding that framework of domestic violence to find new methods of prosecuting domestic abusers. He considers the effect coercive control has on the victim’s autonomy, arguing that the victim’s lessened capacity for independent decision-making acts as a barrier to help-seeking behaviors.)

A thorough knowledge of coercive control is essential in understanding alternative, less culpable explanations for Ms. Hall's behavior.

Therefore, evidence of Mr. Braxton's intimate partner abuse of Ms. Hall and the effect that abuse had on Ms. Hall's culpability must therefore be considered newly discovered evidence that could not have been discovered through due diligence prior to trial and sentencing.

B. Duplicative

Evidence of the domestic violence Ms. Hall experienced and the impact of that abuse is not duplicative of evidence already on record because Ms. Hall has not previously presented evidence of either her abuse or its effects. During Ms. Hall's testimony at Mr. Braxton's trial, she recounts how Mr. Braxton strangled her in their living room during the Fall of 2004, just months before their arrests. However, because the prosecution failed to give the Defense a Burke's notice of their intention to use evidence of Mr. Braxton's abuse of Ms. Hall at trial, the Court asked the jury to disregard all evidence of the strangulation. Exhibit 4, *supra*, at 25. Evidence of Mr. Braxton's abuse of Ms. Hall was not brought on direct appeal. *See* Exhibit 16 - Tondalo Hall's 2007 Direct Appeal. Nor was it included in Ms. Hall's initial post-conviction application. Exhibit 1, *supra*.²² Therefore, evidence of the abuse Ms. Hall experienced and the impact that abuse had on her culpability are not duplicative of evidence on the record.

C. Reasonable Probability of a Different Outcome

²² Though Ms. Hall had been out of her abusive relationship with Mr. Braxton and no longer in constant contact with him for two years at the time of her 2008 post-conviction application, studies show that victims of intimate partner violence "can experience fear and anxiety some 10 years since a previous assault or incident." Williamson, *supra*, footnote 5, at 1416. Additionally, she did so as a pro se litigant. She did not understand the legal significance of obtaining expert witnesses on intimate partner and domestic violence. She thus made her initial application while still experiencing the psychological impact of her abuse and without the assistance of legal or mental health professionals.

Under the PCPA, a reasonable probability of a different outcome is “probability sufficient to undermine confidence in the outcome.” *Hooks v. State*, 902 P.2d 1120, 1123 (Okla. Crim. App. 1995) (applying *Strickland v. Washington*, 466 U.S. 668 (1984) standard for prejudicial deficiency of counsel to the PCPA). Had Ms. Hall presented evidence of her abuse and its effects either as an affirmative defense of duress or as a mitigating consideration at sentencing, there is a reasonable probability that the outcome of her case and the sentencing hearing would have been different.

First, had Ms. Hall presented evidence of the intimate partner violence she experienced and its effects as an affirmative defense of duress, there is a reasonable probability sufficient to undermine confidence in the factual basis of her guilty plea that the outcome of her case would have been different. Had the evidence been presented, it would have supported that Ms. Hall did not have the mental state required for a conviction of Permitting Child Abuse under 21 O.S. 843.5. Oklahoma’s Permitting Child Abuse requires a mental state of willful or malicious. 21 O.S. 843.5(B). Evidence of intimate partner violence and the coercive control under which it places the victim would be sufficient to undermine confidence in any finding that Ms. Hall willfully or maliciously permitted her abuser to abuse their children.

Second, the result would have been different because there is a reasonable probability that, had evidence of Ms. Hall’s abuse and its effects been presented, Ms. Hall would likely have rejected the blind plea or the State would have offered a plea deal. The circumstances surrounding the plea negotiations would have been entirely different. For example, with expert testimony on intimate partner violence available to Ms. Hall, she would have understood that the effects of the abuse she suffered would have provided her with a defense of duress. Effective

counsel would have advised Ms. Hall to go to trial rather than enter a blind plea or would have negotiated a plea deal with the prosecution.

Third, there is a reasonable probability that, had Ms. Hall presented evidence of the intimate partner violence she experienced and its effects as mitigating circumstances at her sentencing hearing, she would not have received a thirty year sentence. The probability is sufficient to undermine confidence in the proportionality of her sentence. The impact of intimate partner abuse on Ms. Hall's culpability for an offense derivative of that of her abuser is central to any meaningful analysis of a proportionate sentence and therefore has a reasonable probability of producing a significantly lessened sentence had evidence of that abuse and its impact been presented. Evidence of her abuse at the hand of Mr. Braxton, the primary offender, would have shown the Court that Ms. Hall was a co-victim rather than a co-defendant. Evidence of the effects of that abuse would have contextualized and explained her decision-making, illustrating how she did not merely fail to act but was making strategic decisions for her and her children's safety. The evidence would have explained the fear Ms. Hall felt during her testimony at Ms. Braxton's trial and shown how that fear made Ms. Hall less, rather than more, culpable.

Therefore, had evidence of the intimate partner violence Ms. Hall experienced and its effects been presented, there is a reasonable probability, sufficient to undermine confidence in the factual basis of her guilty plea and the proportionality of her sentence, that the result would have been different.

II. Relief is Warranted under the Sixth Amendment to the United States Constitution Because Ms. Hall was Effectively Denied Right to Counsel

Ms. Hall's ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution compels relief under Section 1080(a) of Oklahoma's Post-Conviction Procedure Act (the PCPA).

1. Legal Standard

Section 1080(a) of the PCPA provides relief where “the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state.” 22 O.S. § 1080(a). The Sixth Amendment to the United States Constitution ensures a criminal defendant the right to counsel. The United States Supreme Court held that a lack of adequate assistance of counsel is a violation of that right requiring the reversal of a conviction where the defendant’s counsel was (a) deficient and (b) the deficiencies were prejudicial to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Court similarly held that the *Strickland* standard applies to guilty plea challenges based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52 (1985).

Deficiency is judged from a reasonableness standard viewed at the time of counsel’s conduct and is found where counsel did not adequately perform their duty to investigate. *Strickland*, 466 U.S. at 690. While courts have given deference to counsels’ decisions, that deference is given only to the extent that the decision was based upon sufficient investigation. *Id.* at 690-691. Where decisions were made after little or no investigation into the surrounding circumstances, they are not the result of strategic, informed advocacy of the client’s best interests. Therefore, awarding deference to those uninformed decisions is inappropriate.

Counsel’s assistance may also be deficient where they have some notice that their client has experienced or is experiencing domestic violence, yet fail to (a) properly investigate evidence of abuse and its effects on the client’s mental state, (b) properly investigate the validity of a duress defense based on the effects of domestic violence, (c) have the defendant evaluated by a domestic violence expert, or (d) inform their client of the legal significance of an expert. *Commonwealth v. Martinez*, 80 Mass. App. Ct. 1116 (Mass. App. Ct. 2011) (The Court denied

defendant's ineffective assistance of counsel claim based on counsel's failure to discover the Battered Woman Syndrome claim because defendant did not inform her counsel about the abuse and nothing in record would have put him on notice that she was suffering from Battered Woman Syndrome.); *McLuckie v. Abbott*, 337 F.3d 1193 (10th Cir. 2003) (Counsel's performance was deficient because they failed to investigate and present evidence from mental health professionals regarding Battered Woman Syndrome and its effects on the defendant's mental state.); *Dando v. Yukins*, 461 F.3d 791 (6th Cir. 2006) (Counsel's performance was deficient because they failed to consult a mental health expert and otherwise investigate the validity of a duress defense based on Battered Woman's Syndrome.); *Smith v. State*, 144 P.3d 159 (Okla. Crim. App. 2006) (Counsel's failure to have the defendant evaluated by an expert on Battered Woman Syndrome and to fully inform the defendant of the legal significance of expert testimony on Battered Woman Syndrome and other possible defenses rendered counsel's assistance ineffective.); *State v. Peterson*, 857 A.2d 1132 (Md. App. 2004) (Counsel's performance was deficient because they failed to properly investigate and present lay evidence of domestic abuse and expert testimony that the defendant suffered from Battered Woman Syndrome.)

A deficiency in counsel's performance is prejudicial to the defendant where "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In the context of a challenge to a guilty plea, prejudice is found where, but for the counsel's errors, the defendant would not have plead guilty, would have insisted upon going to trial, and the outcome of the trial would likely have been different from that of the guilty plea. *Hill*, 474 U.S. at 59.

2. Ms. Hall's Assistance of Counsel Was Deficient

The assistance of Ms. Hall's counsel, Bill Smith, was deficient as a result of his failure to (a) investigate or inquire about the facts and circumstances that led Ms. Hall to request a Victim's Protective Order, (b) properly investigate the validity of a duress defense based on the impact of intimate partner violence, (c) obtain an intimate partner violence expert to examine Ms. Hall, (d) inform Ms. Hall of the legal significance of such an expert, (e) adequately explain the content and legal significance of her plea, and (f) contest Ms. Hall's charge for which the State lacked a sufficient factual basis.

The performance of Mr. Smith is distinct from that of counsel in *Martinez* because Mr. Smith was given notice that Ms. Hall was experiencing intimate partner violence. Toward the beginning of Mr. Smith's representation of Ms. Hall, she asked him for a Victim's Protective Order (VPO) to protect her from Mr. Braxton once they were released. Exhibit 11, *supra*, at ¶ 33. This request gave Mr. Smith notice that Ms. Hall was experiencing abuse sufficient to cause a reasonable professional in his position to further investigate the facts and circumstances that led to her request.

First, Mr. Smith's performance fell beneath an objective standard of professional reasonableness when he was given notice of intimate partner violence through Ms. Hall's request for a VPO, and then failed to conduct any investigation into abuse. He did not ask Ms. Hall a single follow-up question at the time of her request nor did he conduct any subsequent investigation into what might have motivated Ms. Hall to make such a request. *Id.* at ¶ 33. Like the record in *McLuckie*, the record here "reflects a complete lack of preparation and investigation." *McLuckie*, 337 F.3d at 1199. Such a failure to investigate is unreasonable, particularly when the client requesting the VPO has been charged with failure to protect her children from the abuse of the same man from which she is requesting protection. Insinuations of

intimate partner violence and abuse are particularly relevant in cases of parents charged with child abuse and permitting child abuse because it contextualizes the extent to which the accused is truly a co-defendant acting in conjunction with the other parent or a co-victim facing similar abuse from the same individual. Responding to such a client's request for a VPO with the instruction that they sign a blind guilty plea without first conducting any investigation into possible abuse and its effect on the client's culpability is, therefore, objectively unreasonable.

Second, Mr. Smith's failure to investigate into the validity of a duress defense based on the impact of intimate partner violence is objectively unreasonable. Though Smith had reason to know Ms. Hall had a history of intimate partner abuse, he did not investigate the validity of a duress defense based on that abuse. Where counsel has notice that their client may have a history of abuse, the failure to investigate the defense of duress based on the effects of that abuse has been found unreasonable. *Dando*, 461 F.3d at 799 ("Investigation of this potential defense [of duress as the result of intimate partner violence] was a minimal requirement to providing adequate representation at the plea stage, particularly since Dando herself told her attorney about her history of abuse, and even suggested the need for a mental health expert.") Ms. Hall similarly alerted Mr. Smith to the need to investigate her abuse and the related defense of duress when she asked for a VPO. At that point, investigating a duress defense became an integral part of Mr. Smith's duty to adequately assist Ms. Hall. Thus, Mr. Smith's failure to conduct any such investigation is therefore objectively unreasonable.

Third, Mr. Smith's performance was deficient due to his failure to obtain an expert on intimate partner violence or mental health. As discussed above, intimate partner violence creates various barriers for victims to serve as their own best advocates. An expert is therefore necessary to help identify all accounts of abuse, including those the client may not yet identify as abuse,

and to fully present the effects of that abuse as it relates to the victim's mental state. Courts have found that, where counsel has notice that their client has experienced abuse, failure to obtain a mental health or intimate partner violence expert is unreasonable and sufficient to establish deficient assistance of counsel. The Maryland Court of Special Appeals found counsel's performance deficient because they failed to "introduce[] factual and expert opinion evidence of battered spouse syndrome, which was available and which he knew or should have known was available." *Peterson*, 857 A.2d at 1154. Such evidence would have supported a defense based on the impact of that abuse. *Id.* Therefore, the Court found counsel's performance deficient. *Id.* In *Smith*, the Court found counsel's assistance deficient for failure to have his client evaluated by an expert, even where the client insisted that they did not need such an expert, because "he failed to adequately impress upon Appellant the necessity for an expert [on the issue of Battered Woman's Syndrome] in her case." *Smith*, 144 P.3d at 167. "Counsel's failure to appropriately educate himself on the issue [of Battered Woman's Syndrome] is glaringly apparent in his failure to recognize that Appellant's mood swings and feelings of hopelessness and inevitability of conviction might be an indicator of the syndrome, thereby making it even more imperative that she at least be evaluated by an expert." *Id.* Ms. Hall's counsel similarly failed to adequately perform that duty when he neither educated himself on the issue of intimate partner violence nor sought an expert on the issue to evaluate Ms. Hall and the viability of a defense based on her abuse.

Fourth, Mr. Smith's performance was deficient because he failed to adequately explain the content and legal significance of Ms. Hall's plea. While the Oklahoma Rules of Professional Conduct (ORPC) do not "lay the groundwork for claims of ineffectiveness," "they are pertinent to any discussion of attorney conduct when the rules touch on subjects raised in a claim of

ineffectiveness.” *Smith*, 144 P.3d at 167. Accordingly, Rule 1.4(b) states that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 1.4(b), *Rules of Professional Conduct*, 5 O.S.2001, Ch. 1, App. 3-A. Smith failed to adhere to the standards of professional conduct as laid out in the ORPC when he failed to adequately explain the elements of Ms. Hall’s charge. When Ms. Hall signed the blind plea, she did not know what the word “permitting” meant, let alone its legal significance in the context of her charge. Exhibit 11, *supra*, at ¶ 33. Ms. Hall did not understand the charge to which she pled guilty at the time she signed the plea.

Additionally, Mr. Smith failed to adequately explain the legal significance of signing a blind plea. According to the Oklahoma Rules of Professional Conduct, “The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.” *Comments to Rule 1.4, Rules of Professional Conduct*, 5 O.S.2001, Ch. 1, App. 3-A. Mr. Smith failed to provide sufficient information for Ms. Hall to participate intelligently in the decision of whether to sign a blind plea. While he did instruct Ms. Hall that the blind plea did not secure a deal for her, he led her to believe that signing a blind plea would result in lenience from the judge. Exhibit 11, *supra*, at ¶ 33. This assumption was unfounded, misleading, and prevented Ms. Hall from making an informed decision about her plea. Mr. Smith’s conduct, therefore, fell beneath Oklahoma’s professional standards, rendering his assistance deficient.

Lastly, Mr. Smith did not adequately assist Ms. Hall by failing to contest her charges for which the State lacked a sufficient factual basis. He thus breached his duty to both investigate the law and to discuss possible defenses with his client. *Heard v. Addison*, 728 F.3d 1170 (10th Cir.

2013) (The Court held that counsel’s assistance was deficient due to their failure to inform their client that his conduct was not criminal under the charged statute, finding the failure to be a breach of counsel’s duty to investigate the law and to discuss possible defenses with their client.) Ms. Hall was charged with permitting child abuse under 21 O.S. 843.5, which prohibits the willful or malicious permitting of child abuse.²³ Nothing in the record suggests that Ms. Hall acted willfully or maliciously. In fact, the record does not even clearly establish Ms. Hall acted knowingly. *See* Exhibit 4, *supra*, at 11, 15-18. Thus, an entire element of the crime charged has no factual basis in the record. Yet, Mr. Smith failed to contest the charge and failed to instruct Ms. Hall that her conduct did not fall under the statute. His failure to inform Ms. Hall and to present the defense that her conduct was not criminal under 21 O.S. 843.5 is objectively unreasonable and renders his assistance deficient.

3. The Deficiency of Ms. Hall’s Counsel Was Prejudicial

The deficiencies of Mr. Smith’s performance prejudiced Ms. Hall because they resulted in Ms. Hall’s decision to sign a blind plea and in an excessive sentence wildly disproportionate to her culpability.

First, Mr. Smith’s deficient performance resulted in Ms. Hall’s decision to sign a blind plea, which she would not have signed but for Mr. Smith’s failures detailed above. Rather, Ms.

²³ 21 O.S. 843.5(B) “Any parent or other person who shall willfully or maliciously engage in enabling child abuse shall, upon conviction, be punished by imprisonment in the custody of the Department of Corrections not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars (\$500.00) nor more than Five Thousand Dollars (\$5,000.00) or both such fine and imprisonment. As used in this subsection, ‘enabling child abuse’ means the causing, procuring or permitting of a willful or malicious act of harm or threatened harm or failure to protect from harm or threatened harm to the health, safety, or welfare of a child under eighteen (18) years of age by another. As used in this subsection, ‘permit’ means to authorize or allow for the care of a child by an individual when the person authorizing or allowing such care knows or reasonably should know that the child will be placed at risk of abuse as proscribed by this subsection.”

Hall would have presented her various defenses and supporting evidence at trial, creating a reasonable probability that the result of the proceeding would have been different from the result of her guilty plea and sentencing.

In determining whether a defendant would have gone to trial, the United States Supreme Court requires a showing that “a decision to reject the plea bargain would have been rational under the circumstances.” *Padilla v. Kentucky*, 559 U.S. 356, 372 (2009). Had Ms. Hall known of the defense of duress based on the abuse she experienced, the availability and legal significance of an intimate partner violence or mental health expert evaluation and testimony, the fact that signing a blind plea does not ensure leniency from the court, and the defense that her conduct was not criminal under the statute charged, her decision to go to trial would have certainly been rational. Reason stands to show that Ms. Hall would have had a much greater likelihood of success at trial with various defenses and mitigating factors. Additionally, Ms. Hall agreed to sign a blind plea specifically because she was lead to believe that a trial would result in a conviction and life in prison while a blind plea would ensure the Court’s leniency. Exhibit 11, *supra*, at ¶ 33. Had she been informed that neither choice were likely to have the result her counsel represented, her decision to go to trial would have been rational.

Additionally, had Ms. Hall gone to trial, the inclusion of the defenses and evidence Mr. Smith failed to investigate or present creates a reasonable probability that the result of the proceeding would have been different from a conviction and thirty year sentence. The United States Supreme Court found that factors relevant in determining whether a different result would have been reasonably probable include “whether an unmade evidentiary or legal discovery ‘likely would have changed the outcome of a trial,’ or whether a defense about which the

defendant was not advised ‘likely would have succeeded at trial.’” *Heard*, 728 F.3d at 1183 quoting *Hill*, 474 U.S. at 59.

There is a reasonable probability that the result of Ms. Hall’s trial would have been different had Mr. Smith presented the defense of duress based on the intimate partner violence Ms. Hall experienced and the defense that her conduct was not criminal under the statute charged. Both work to negate the presence of a willful or malicious mental state as required by Oklahoma’s Permitting Child Abuse statute.

Had Mr. Smith he made any inquiry into the abuse Ms. Hall endured, he would have found that the same man who strangled, beat, and threatened her for years also demanded that she not take their children to the hospital when they were injured. Exhibit 11, *supra*, at ¶ 23. He would have found that the same man had repeatedly threatened Ms. Hall with physical violence because of her decision to testify against him. *Id.* at ¶¶ 31-32. Ms. Hall lived under constant fear and threat of violence from Mr. Braxton, the same man whose violence she was charged for permitting. Had Mr. Smith presented these facts in support of the defense of duress, there is a reasonable probability sufficient to undermine confidence in the outcome of the proceedings that the result would have been different.

Courts have found that counsel’s failure to present a defense of duress based on intimate partner violence to be prejudicial because of the high probability that the defense would successfully negate the defendant’s mental state and result in acquittal. *Smith*, 144 P.3d at 168-169 (“Without the BWS defense, and proceeding under a ‘generalized self-defense’, Appellant was convicted of the lesser offense of second degree murder. However, if the testimony of a qualified expert was presented to the jury, Appellant might have been acquitted. This clearly establishes a reasonable probability that but for counsel's unprofessional errors, the result of the

proceeding would have been different.”); *Peterson*, 857 A.2d at 587 (“If trial counsel had introduced factual and expert opinion evidence of battered spouse syndrome, which was available and which he knew or should have known was available, the defense of imperfect self-defense would have been generated, and would have been presented to the jury to decide. It is reasonably probable that, if that defense had been decided by the jury, the result of the proceeding would have been different. Accordingly, the post-conviction court properly concluded that trial counsel's deficient performance prejudiced the appellee's defense.”).

Additionally, had Mr. Smith presented the defense that Ms. Hall’s conduct was not criminal under the statute charged, there is a reasonable probability that the result of her proceedings would have been different. This defense would have similarly negated Ms. Hall’s mental state, providing evidence that her actions were neither malicious nor willful as required by 12 O.S. 843.5. The record is void of evidence supporting that Ms. Hall knew of Mr. Braxton’s abuse of their children, let alone that she willfully permitting the abuse. Had Mr. Smith presented the defense, there is a reasonable probability sufficient to undermine confidence in the outcome that the result would have been different.

Therefore, both defenses about which Ms. Hall was not advised would have likely succeeded at trial. Mr. Smith’s failure to investigate or inform Ms. Hall of these defenses is therefore prejudicial.

Second, there is a reasonable probability that result of Ms. Hall’s sentencing hearing would have been different had Mr. Smith adequately investigated the facts of Ms. Hall’s case. At her sentencing hearing, Mr. Smith did not present any mitigating evidence of the violence and coercion she experienced at the hand of Mr. Braxton. Had Mr. Smith made any inquiry into Ms. Hall’s request for a VPO and the abuse which motivated it, he would have found evidence of

physical, emotional, and verbal abuse, financial coercion, strangulation, and threats of violence spanning the duration of Ms. Hall's relationship with Mr. Braxton. Because Ms. Hall was charged with a crime of omission, derivative of that of her abuser, there is a reasonable probability that evidence of the abuse would have produced a lesser sentence. Evidence of intimate partner violence would have shown that Ms. Hall was not properly a co-defendant but a co-victim.

Therefore, Mr. Smith's deficient performance was highly prejudicial to Ms. Hall, rendering his assistance ineffective and thus in violation of Ms. Hall's Sixth Amendment right to counsel.

III. Relief is Warranted under the Due Process Clause of the Fourteenth Amendment to the United States Constitution Because Ms. Hall's Plea Was Not Made Voluntarily or Knowingly

The State's failure to ensure Ms. Hall's guilty plea was made knowing and voluntary in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution compels relief under Section 1080(a) of Oklahoma's Post-Conviction Procedure Act (the PCPA).

1. Legal Standard

Section 1080(a) of the PCPA provides relief where "the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state." 22 O.S. § 1080(a). The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that all waivers of constitutional rights must be done knowingly and voluntarily. Because a guilty plea is a waiver of the defendant's right to trial, the United States Supreme Court has required that guilty pleas must be made voluntarily and knowingly as a

matter of constitutional right. *Brady v. U.S.*, 397 U.S. 742, 748 (1970). There is a presumption against the waiver of constitutional rights. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966).

2. Ms. Hall's Plea Was Not Made Voluntarily

Ms. Hall's plea was not entered into voluntarily because she lacked sufficient information to make an independent decision reflective of her own will. Voluntariness requires that the defendant understand the nature of the charge against them. *Henderson v. Morgan*, 426 U.S. 637, 645 (1976). The nature of her offense was never explained to Ms. Hall. In fact, at the time she signed her plea, she did not know what the word "permitting" meant. Exhibit 11, *supra*, at ¶ 33. Nor was she informed of the elements of her charge that the State would have to prove. Because she was never informed of the nature or her charge or the rights she was waiving by signing a plea, she could not enter into the plea voluntarily. Neither was Ms. Hall informed of various available defenses, such as the defense of duress based on the intimate partner violence she experienced. Courts have found that counsel's failure to investigate such a defense undermines the knowing and voluntary nature of a plea. *Dando*, 461 F.3d at 800. ("[F]ailure to investigate [a BWS defense] undermined the knowing and voluntary nature of her plea.").

Additionally, Ms. Hall was not given any meaningful alternatives to signing a blind plea. A valid guilty plea must represent a voluntary choice among alternative courses of action. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Ms. Hall was given no such choice. Her counsel represented that she could choose between life in prison and a blind plea. Exhibit 11, *supra*, at ¶ 33. She was not informed of the reasonably probable outcomes of going to trial nor was she fully informed of the option of a plea deal. Counsel's misrepresentation and exclusion of her available options deprived Ms. Hall of the ability to make a voluntary choice among meaningful alternatives.

3. Ms. Hall's Plea Was Not Made Knowingly

Ms. Hall's plea was not entered knowingly because she was not fully informed of the likely consequences of her plea, she was not advised by competent counsel of the nature of the charge against her, and the State failed to establish a factual basis for her plea. The United States Constitution requires that a defendant entering a guilty plea have knowledge sufficient to make an informed decision reflective of their independent will. To do so, a defendant must have "sufficient awareness of the relevant circumstances and likely consequences" of their plea. *Brady*, 397 U.S. at 748. Ms. Hall had no such awareness. Her counsel informed her that the likely consequence of her blind plea would be leniency from the Court. Leniency was neither given nor likely to be given as the result of a blind plea. Ms. Hall was therefore unable to make an intelligent waiver of her right to trial.

A defendant must also have been "advised by competent counsel" and made "aware of the nature of the charge against [them]." *Brady*, 397 U.S. at 756. As discussed above, Ms. Hall was neither advised by competent counsel nor aware of the nature of the charge against her. Her counsel failed to inform her of the consequences of her plea, the nature of the offense to which she plead guilty, or other available options such as a obtaining a plea deal or presenting various defenses at trial. Ms. Hall was therefore unable to make a sufficiently informed decision reflective of her independent will.

When accepting a guilty plea, the Court must also ensure that the State has established a sufficient factual basis to support the plea. "[I]n addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 [of the Federal Rules of Criminal Procedure] also requires the judge to satisfy himself that there is a factual basis for the plea." *McCarthy v. U.S.*, 394 U.S. 459, 467 (1969).

The judge must determine that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.

Id. at 467.

Thus, a plea without a sufficient factual basis is presumed to have been entered without the defendant's requisite knowledge of the plea and its consequences. It is therefore invalid.

The State failed to establish a sufficient factual basis for Ms. Hall charge of Permitting Child Abuse under 21 O.S. § 843.5.²⁴ Permitting Child Abuse, under the Oklahoma Criminal Code, explicitly requires a mens rea of permitting abuse "willfully or maliciously." 21 O.S. 843.5(B). However, the record reflects no evidence that Ms. Hall willfully or maliciously permitted Mr. Braxton to abuse their children.

The factual basis for Ms. Hall's plea as it appears on her signed plea provides no evidence that she acted willfully or maliciously. Her factual basis reads:

On or about and between August 26, 2004 and November 9, 2004 in Oklahoma County, Oklahoma, I caused injury to my two children, Robert Braxton III (3 years of age now) and Ukiah Braxton (2 years of age now) by permitting Robert Braxton, Jr., my children's father, to hurt them seriously, specifically to cause fractures to Robert's ribs + femur and to Ukiah's ribs + femur and then by being afraid to immediately seek medical treatment for my children.

Exhibit 17 - Tondalo Hall's Plea of Guilt and Summary of Facts, at 4.

Nothing within her plea provides any factual basis for the requisite mental state of Permitting Child Abuse. It provides no facts supporting that Ms. Hall intended to allow Mr. Braxton to abuse their children or that she failed to prevent the abuse due to any ill will toward them. It

²⁴ While Ms. Hall pled guilty to 10 O.S. 7115, that section of the Oklahoma Criminal Code was renumbered as 21 O.S. 843.5 in 2009.

does, however, support that Ms. Hall was afraid. She plead guilty to “being afraid” to contradict the will of the man who strangled her.

Ms. Hall’s testimony at Mr. Braxton’s trial is similarly void of any factual basis supporting willful or malicious acts on her part, but does illustrate the fear Ms. Hall felt toward Mr. Braxton. Ms. Hall testified that she never saw Mr. Braxton abuse their children. *See* Exhibit 4, *supra*. When the prosecutor asked Ms. Hall what knowledge she had of the abuse that led her to decision to plead guilty, Ms. Hall testified that one evening she was awakened by her youngest child, Ukiah, crying while Mr. Braxton was changing her diaper. *Id.* at 15, 17-18. When Ms. Hall entered the room to check on them, Mr. Braxton instructed her to go back to bed. *Id.* at 18. Ms. Hall did so.²⁵ *Id.* Ms. Hall did not testify to witnessing any abuse during that incident, nor does the record indicate elsewhere that she witnessed such abuse.

The prosecutor then asked Ms. Hall if she had any reason other than the crying incident to suspect her children were being abused. *Id.* Her response was to describe an argument between Mr. Braxton and herself that resulted in him strangling Ms. Hall and pushing her face into the cushion of their couch. *Id.* She testified that “he had me by the throat on the blue couch.” *Id.* at 19. The primary reason Ms. Hall had to believe Mr. Braxton was abusing their children was that he was abusing her.

Ms. Hall was not a co-defendant willfully or maliciously allowing Mr. Braxton to abuse their children. She was a co-victim living under constant fear and threats of violence. The record fails to clearly establish that Ms. Hall knew of her children’s abuse, let alone maliciously or willfully permitted it as required by the statute with which she was charged. Thus, the record fails

²⁵ Not only did Ms. Hall not witness any abuse during this incident, but her decision to obey Mr. Braxton’s instruction to return to bed without further investigation into the cause of Ukiah’s crying is typical of an abused partner. She had been conditioned not to contradict the will of her abuser and reasonably feared violence if she did not return to bed as instructed.

to establish a sufficient factual basis for Ms. Hall's guilty plea to the crime of Permitting Child Abuse.

Not only is the requirement of a malicious or willful mental state a crucial element of the crime of Permitting Child Abuse, it also serves as the differentiation between Oklahoma's Permitting Child Abuse statute and the Child Endangerment statute, 21 O.S. § 852.1. Child Endangerment is the crime of knowingly permitting child abuse or neglect. 21 O.S. § 852.1(A). It is punishable by a maximum of four years in prison. Both Permitting Child Abuse and Child Endangerment require a custodial relationship with or control over the abused child. Both cover the same kinds of abuse. The significant differences between the two separate legislative crimes are the mental states required and the maximum sentences available. While willfully or maliciously permitting child abuse has a maximum sentence of life, endangerment through exposure to child abuse has a maximum sentence of four years. Thus, the Oklahoma legislature intended the crimes of endangerment and maliciously permitting child abuse to be distinct, punishable by vastly different terms of years. The difference in mental state was so significant to the Oklahoma legislature that they did not find the same punishment appropriate for both acts. Had Ms. Hall, in fact, been charged with the more appropriate crime of Child Endangerment, found to have knowingly permitted the abuse, and been sentenced to the maximum term of years for all four counts with the sentences running in the same way as her Permitting Child Abuse sentences, she would have been released from prison five years ago. The State failed to establish a sufficient factual basis for the crime to which Ms. Hall plead guilty. If the record supports a factual basis for any crime, it is that of Child Endangerment, the maximum sentence for which would have run many years ago.²⁶

²⁶ However, even the factual basis for Ms. Hall's knowing permissance of child abuse is tenuous.

Not only is Ms. Hall's plea void of any factual basis for a willful act, but the primary offense from which her crime derived is also void of any factual basis supporting a willful act. Ms. Hall's crime of Permitting Child Abuse is wholly derivative of Mr. Braxton's crime of Child Abuse. The factual basis for Mr. Braxton's guilty plea also lacks any facts suggesting he acted willfully. In fact, in the text of his plea, he wrote "these acts are not deliberate." Exhibit 18 - Robert Braxton, Jr.'s Plea of Guilt and Summary of Facts, at 4. The State failed to establish malice or willfulness of the primary offense. Therefore, the State cannot point to facts of the primary offense as support for their finding of a factual basis to support Ms. Hall's malice or willfulness in the commission of her derivative offense.

Furthermore, the two counts of child abuse which correspond with the two counts of permitting child abuse for which Ms. Hall is currently serving time were dismissed.²⁷ Exhibit 18, *supra*. Ms. Hall is therefore serving time for purportedly permitting a criminal act that is no longer even alleged. Because the State dismissed two counts of Mr. Braxton's child abuse, Ms. Hall's guilty plea to permitting criminal conduct no longer alleged lacks a sufficient factual basis.

Because a finding of a factual basis of a guilty plea is required to establish the knowing requirement of all guilty pleas accepted by the Court, Ms. Hall's plea was not entered knowingly. She was not aware that her conduct was not criminal under the statute to which she pled guilty. Additionally, the Court erred in accepting a plea for which there was an insufficient factual basis. Ms. Hall's plea, therefore, was neither knowing nor voluntary and was entered in violation of due process.

²⁷ Mr. Braxton's counts two and four were dismissed.

IV. Relief is Warranted under the Eighth and Fourteenth Amendments to the United States Constitution Because Ms. Hall's Sentence is Facially Disproportionate

The facially disproportionate nature of Ms. Hall's sentence for her derivative offense in relation to that of the actual perpetrator, Mr. Braxton, in violation of the Eighth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution compels relief under Section 1080(a) of Oklahoma's Post-Conviction Procedure Act (the PCPA).

1. Legal Standard

Section 1080(a) of the PCPA provides relief where "the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state." 22 O.S. § 1080(a). The Eighth Amendment of the United States Constitution's prohibition of "cruel and unusual punishment" requires that a sentence be proportional to the crime. *Ewing v. California*, 538 U.S. 11, 20 (2003).

2. Ms. Hall's Sentence Is Facially Disproportionate

Ms. Hall's sentence is grossly disproportionate for the derivative offense of omission of which she was convicted, particularly in relation to that of the actual perpetrator. Ms. Hall neither abused her children nor was convicted of doing so. Her only crime was failing to stop abuse committed by the same man who was abusing her. Mr. Braxton, on the other hand, abused both the children and Ms. Hall. He was both charged with and convicted of multiple counts of child abuse. While Mr. Braxton received eight years of probation following time already served awaiting trial for committing the primary offense, Ms. Hall received a total sentence of thirty years imprisonment for her derivative offense of purportedly failing to stop him.

As such, Ms. Hall's sentence is grossly disproportionate on its face and thus void under the Eighth Amendment to the United States Constitution and the Due Process Clause of the

Fourteenth Amendment to the United States Constitution. It is absurd, and constitutionally untenable, that a derivative offense of omission, effectively consisting of something between misprision and being an accessory, can warrant a period of imprisonment fifteen times greater than that of the principal perpetrator. This is especially true in Ms. Hall's case, where she came before the sentencing court with no prior criminal record, was only twenty years of age when arrested and charged, and was a victim of the same abusive perpetrator who hurt her children.

In affirming Ms. Hall's absurdly disproportionate sentence on direct appeal, the Oklahoma Court of Criminal Appeals not only lacked important information now available, but also stopped well short of a full and appropriate consideration of Ms. Hall's Eighth Amendment claim. Instead, the Court's shortcut relied predominantly on the relationship between the statutory range of punishment set by the Oklahoma Legislature and the punishment received. *See* Exhibit 19 - Oklahoma Court of Criminal Appeals Summary Opinion Denying Certiorari on Direct Appeal, at 3. The Court held simply that so long as the latter fit within the former, no further inquiry is necessary unless the sentence "shocks the conscience" of the court. *Id.* The Court of Criminal Appeals claimed it did not.

It must be noted that in doing so, the Court did not have the benefit of understanding Mr. Braxton's abuse of Ms. Hall or its impact on her culpability. It did not have the benefit of knowing that Hall was not actually guilty of the crime to which she pled, but rather, at most, of Child Endangerment, which carries a maximum punishment 26 years shorter than the prison term Ms. Hall received. These factors alone, and the other new evidence presented above and below, create more than a reasonable likelihood that the result would have been very different had the court considered Ms. Hall's Eighth Amendment with the full facts, context, and expert research available.

In either case, however, the Court’s test itself is now deficient. In the time since Hall’s sentence was affirmed, the United States Supreme Court has clearly and unambiguously held that a proportionality review is appropriate, and effectively required, in noncapital as well as capital cases. *See Miller v. Alabama*, 567 U.S. 460 (2012). Such a review is required because “the concept of proportionality is central to the Eighth Amendment.” *Graham v. Florida*, 560 U.S. 48 (2010). The requirement “‘flows from the basic precept of justice that punishment for crime must be proportioned’ to both the offender and the offense.” *Miller*, 567 U.S. at 469 (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)) (additional internal quotation omitted).

In reviewing proportionality of the length of a sentence, a court must “consider[] all of the circumstances of the case to determine whether it is unconstitutionally excessive.” *Graham*, 560 U.S. at 59. This is something that was neither done, nor could have been done by the Oklahoma Court of Criminal Appeals in Ms. Hall’s direct appeal. Moreover, the nexus between Ms. Hall’s conviction and victimization makes her, like the juvenile offenders in *Miller*, *Roper*, and *Graham*, possess “diminished culpability and greater prospects for reform.” *Miller*, 567 U.S. at 471. As in these cases, developments outside the records of a case drive this review as well. In *Miller*, the Supreme Court affirmed not just the requirement for robust review of proportionality, but also the use of current and evolving social science to understand and contextualize how the attributes of an offender may substantially reduce culpability and thus weaken rationales for punishment. *Id.* at 471-473. As argued at length above, scientific understanding of intimate partner violence and its relationships to coercion and culpability have evolved significantly since the time of Ms. Hall’s sentencing and appeal. This understanding, when applied to her case, strongly and unequivocally militates for her release.²⁸

²⁸ This point is argued in greater detail below in Proposition VIII.

V. Relief is Warranted under the Due Process Clause of the Fourteenth Amendment to the United States Constitution Because the State Used an Unproven Allegation of Criminal Conduct to Enhance Ms. Hall's Sentence.

The State's use of an unproven allegation of criminal conduct made and adjudicated without procedural due process to enhance Ms. Hall's sentence in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution compels relief under Section 1080(a) of Oklahoma's Post-Conviction Procedure Act (the PCPA).

1. Legal Standard

Section 1080(a) of the PCPA provides relief where "the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state." 22 O.S. § 1080(a). The Due Process Clause of the Fourteenth Amendment to the United States requires that all persons charged with a crime receive both notice of the offense charged and an opportunity to be heard.

2. The State's Use of an Unproven Allegation of Criminal Conduct to Enhance Ms. Hall's Sentence is a Violation of Procedural Due Process

During Ms. Hall's sentencing hearing, the prosecutor used as an aggravating factor the purported fact that Ms. Hall was still protecting Mr. Braxton by withholding or altering testimony. This conclusion was based upon the unproven assumption that Ms. Hall was not forthcoming with her testimony against Mr. Braxton and that she purportedly knew more than that to which she testified. Such an allegation effectively charges that Ms. Hall committed contempt of court, concealing or compounding of a felony, or even perhaps outright perjury, depending on exactly how the prosecutor's allegation is interpreted. This allegation was made only at Ms. Hall's sentencing, with no other notice thereupon. Hall never received meaningful notice or opportunity to be heard. The allegation was unproven, vague, and in violation of

procedural due process. Moreover, it was used explicitly to justify enhancement of Ms. Hall's sentence even though the record does not support it.

The State, therefore, violated Ms. Hall's right to procedural due process by using an unproven allegation of criminal conduct for which she was given neither meaningful notice nor opportunity to be heard to enhance her sentence.

VI. Relief is Warranted under the Eighth and Fourteenth Amendments to the United States Constitution Because the State Failed to Give Mitigating Consideration to the Impact of Domestic Violence

The State's failure to give any mitigating consideration or inquire into the impact of domestic violence on Ms. Hall's degree of culpability in violation of the Eighth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution compels relief under Section 1080(a) of Oklahoma's Post-Conviction Procedure Act (the PCPA).

1. Legal Standard

Section 1080(a) of the PCPA provides relief where "the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state." 22 O.S. § 1080(a). Relevant to the proportionality analysis is the defendant's culpability, which may be mitigated by their inability to evaluate the consequences of their conduct at the time and the degree to which their actions are motivated by emotion and peer pressure. *Thompson v. Oklahoma*, 487 U.S. 815, 834-835 (1988).

2. The State's Failure to Give Mitigating Consideration to the Impact of Domestic Abuse on Ms. Hall Resulted In a Disproportionate Sentence In Violation of Due Process and the Eighth Amendment

Domestic violence victims like Ms. Hall operate under the coercive control of their abuser. Abusers achieve control over their victims through tactics such as isolating their victims

from their support systems, inciting feelings of guilt and shame in their victims, verbal abuse, physical assault, sexual assault, and threats of physical violence.²⁹ Ms. Hall experienced all of these tactics of control at the hand of Robert Braxton.³⁰ Her experiences of abuse are confirmed by her family members.³¹ The domestic abuse Ms. Hall experienced placed her under the coercive control of Mr. Braxton, drastically affecting her decision-making process.³² Domestic violence victims become susceptible to the pressure exerted upon them by their abuser, both as the result of the psychological effect of the abuse and as a strategic protective strategy. The culpability of intimate partner violence victims is, therefore, significantly reduced by the coercive effect of abuse, particularly when victims are charged with a crime which derives solely and specifically from the criminal activity of their abuser. Additionally, domestic violence victims live in a perpetual state of fear that dominates their decision-making process and often results in actions often heavily motivated by fear. The failure of the sentencing court to give any mitigating consideration to a factor which so drastically reduces culpability, and in fact effectively to treat it as an aggravating circumstance, resulted in a grossly excessive sentence in violation of the Eighth Amendment's requirement of proportionality of sentencing.

VII. Relief is Warranted under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution Because the State's Application of Permitting Child Abuse, 21 O.S. 843.5, Disparately Impacts Black Women.

²⁹ See Appendix 1; Exhibit 14, *supra*; Exhibit 15, *supra*; See Philip Held et al., *The Interrelationships Among Trauma-Related Guilt and Shame, Disengagement Coping, and PTSD in a Sample of Treatment-Seeking Substance Users*, 21 *Traumatology* 285 (2015) (Held analyses the psychological impact of intimate partner violence, focusing on the victim's tendency to internalize blame and develop feelings of guilt and shame.).

³⁰ See Exhibit 11, *supra*.

³¹ See Exhibit 13, *supra*; Exhibit 12, *supra*.

³² See Exhibit 14, *supra*; Exhibit 15, *supra*.

The State's disparate application of Permitting Child Abuse, 21 O.S. § 843.5, on the basis of race and gender on persons otherwise similarly situated in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution compels relief under Section 1080(a) of Oklahoma's Post-Conviction Procedure Act (the PCPA).

1. Legal Standard

Section 1080(a) of the PCPA provides relief where “the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state.” 22 O.S. § 1080(a). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits disparate treatment on the basis of race or gender of those otherwise similarly situated. *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . courts must subject them to the most rigid scrutiny.”); *Washington v. Davis*, 426 U.S. 229, 241 (1976), *citing Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (“A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.”); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

Additionally, courts have found that the State's failure to afford similar protections to victims of intimate partner abuse as they do other victims is a violation of equal protection. *Eckert v. Town of Silverthorne*, 25 Fed.Appx. 679, 688 (10th Cir. 2001) *quoting Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988) (“[A] ‘custom and policy of not providing assistance to victims of abuse by spouses in the same manner as other victims of assault deprived her of the equal protection of laws guaranteed by the fourteenth amendment’ . . .”). The failure

of the United States to adequately protect women and mothers who are victims of intimate partner abuse has such a pervasive, substantial, and systemic impact on women's right to equal protection under the law, right to liberty, and right to life that the failure has risen to the level of an international human rights violation. *Jessica Lenahan (Gonzalez) et al. v. U.S.*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).³³

2. The State's Application of Permitting Child Abuse, 21 O.S. 843.5, Disparately Impacts Black Women

While Permitting Child Abuse may, in the abstract, be designed to incentivize people to actively prevent and report child abuse, Oklahoma's disparate application of the charge has transformed what may, on its face, be a neutral statute once intended to protect children into a tool of discrimination. Because Oklahoma disproportionately convicts women, specifically black women, of Permitting Child Abuse, the statute acts to criminalize black motherhood at the expense of Oklahoma families.

When the State discovers an instance of child abuse in a two-parent household, it will frequently charge both parents with child abuse and permitting child abuse in the alternative. However, once the State discovers which partner committed child abuse, the charge of Permitting Child Abuse is often dropped for both individuals. Where the Permitting charge is not dropped and the State proceeds to criminalize the non-abusive parent, that parent is usually the mother. Where the mother commits child abuse, the father is less often charged with a crime. Thus, mothers are disproportionately held accountable for the actions of their abusive partner.

³³ Raeder frames the United State's failure to protect women who are victims of intimate partner violence as a human rights issue and suggests measures for the legislature and the judiciary to operationalize the findings of *Lenahan* domestically. Myrna S. Raeder, *Preserving Family Ties for Domestic Violence Survivors and Their Children by Invoking a Human Rights Approach to Avoid the Criminalization of Mothers Based on the Acts and Accusations of Their Batterers*, 17 *The Journal of Gender, Race, and Justice* 105 (2014).

Of all those convicted of Permitting Child Abuse in Oklahoma from 1997 to 2016, 75 percent of them were women.³⁴ When compared to their percentage of the Oklahoma population, women are overrepresented in those convicted of Permitting Child Abuse by 48.5 percent.³⁵ Women are criminalized and punished for the actions of their male partners at a rate 48.5 percent higher than men are punished for the actions of their female partners. This disparate application of Permitting Child Abuse is a violation of women's right equal protection under the law.

Additionally, black women are punished for the actions of their abusive partners at a disproportionately higher rate. Black persons in Oklahoma are overrepresented in those convicted of Permitting Child Abuse by 214.1 percent. While black persons account for 7.8 percent of the Oklahoma population, they account for 24.5 percent of those convicted. Of the women punished for the abusive actions of their partners, black women are punished at a disproportionately higher rate. The disparate application of Permitting Child Abuse in Oklahoma criminalizes black motherhood and violates the right of black women to equal protection under the law.

3. The State's Disparate Application of Permitting Child Abuse, 21 O.S. 843.5, Reflects a Discriminatory Purpose

Not only does Oklahoma's application of Permitting Child Abuse have a disparate impact on black women, but also reflects a discriminatory purpose. The disproportionate rate of black women convicted of Permitting Child Abuse is indicative of a larger State and societal attitude

³⁴ All Permitting Child Abuse statistics were taken from the raw data of convictions in Oklahoma compiled by Reveal. Reveal obtained the data through a public records request filed with the Oklahoma Department of Corrections on Jan. 19, 2016. Their raw data is available at <https://www.revealnews.org/article/let-down-and-locked-up-why-oklahomas-female-incarceration-is-so-high/>; Exhibit 20 - Affidavit of Brittany Faithe McMillin.

³⁵ This percentage of overrepresentation assumes men and women are permitting child abuse at the same rate, meaning that all instances of child abuse occur in two parent households with parents of different genders.

that holds women accountable for all goings on in the home, regardless of their actual culpability, while allowing men to escape accountability. This attitude is evident in Ms. Hall's sentencing hearing, specifically. While arguing before the Court that Ms. Hall deserved a harsh sentence, the prosecutor states that "She is their mother . . . She is the *one person* in this world who should be standing up for them" Exhibit 6, *supra*, at 7-8 (emphasis added). Stating that Ms. Hall is the "one person" who should be protecting her children completely takes their father and actual abuser, Mr. Braxton, out of the equation. The prosecutor's sexist allocation of full obligation and fault upon Ms. Hall, another victim of Mr. Braxton's abuse, simply because she is "their mother," while simultaneously completely disclaiming Mr. Braxton's responsibility as a father, is wholly inappropriate and reflective of the State's discriminatory approach to prosecuting child abuse.

The State's disparate application of Permitting Child Abuse on black women is reflective of a discriminatory purpose to criminalize motherhood and is a violation of black women's right to equal protection under the law.

CONCLUSION

Ms. Hall is an intimate partner violence survivor currently serving the thirteenth year of her thirty year sentence for failing to stop the actions of her abuser. Rather than protecting her from Mr. Braxton's abuse, the State of Oklahoma punished her for his actions. Ms. Hall now requests relief from her unjust convictions and sentences under the Oklahoma Post-Conviction Procedure Act because (a) evidence of intimate partner violence and its impact on Ms. Hall's culpability not previously presented and heard require vacation of her sentences in the interest of justice and because (b) her convictions and sentences were made in violation of the United States Constitution.

Ms. Hall was not afforded the adequate assistance of counsel in violation of her right to counsel under the Sixth Amendment. She was not informed of the nature of her charge or her legal options sufficient to make a voluntary or knowing plea in violation of the Due Process Clause at the Fourteenth Amendment. The State failed to present an adequate factual basis in support of Ms. Hall's guilty plea, rendering her plea invalid under the Due Process Clause of the Fourteenth Amendment. She received a facially disproportionate sentence for her derivative offense in relation to that of the actual perpetrator, Mr. Braxton, in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. The State used an unproven allegation of criminal conduct made and adjudicated without procedural due process to enhance Ms. Hall's sentence in violation of the Due Process Clause of the Fourteenth Amendment. The State failed to give any mitigating consideration to the impact of intimate partner violence on Ms. Hall's culpability for an offense derivative of that of her abuser in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Lastly, Oklahoma's disparate and discriminatory application of Permitting Child Abuse violates the equal protection rights of black women under the Fourteenth Amendment.

The interests of justice and the United States Constitution compel this Court to grant Ms. Hall relief from her unjust convictions and excessive, disproportionate, and discriminatory sentence. Ms. Hall, therefore, requests that this Court vacate her 2004 convictions and sentences and reunite a family too long torn apart by injustice.³⁶

³⁶ Notably, the victims of Ms. Hall's case, Robert and Ukiah Hall, support this Application and want their mother back in their lives, as does their guardian, Cynthia Wells. Exhibit 8, *supra*; Exhibit 9, *supra*; Exhibit 10, *supra*. Keeping Ms. Hall incarcerated is not only contrary to the interest of justice and a violation of her constitutional rights, but is also contrary to the explicit requests and best interests of the victims in this case.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the day of filing, a true and correct copy of the above and foregoing pleading was delivered via First Class US Mail, postage prepaid, to the following recipients:

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