No. 94-2034

THE STATE OF TEXAS	§	IN THE 299TH DISTRICT
	§	
vs.	§	COURT OF
	§	
CATHY LYNN HENDERSON	§	TRAVIS COUNTY, TEXAS

CAPITAL CASE: EXECUTION SET FOR APRIL 18, 2007

MEMORANDUM IN SUPPORT OF MOTION TO VACATE EXECUTION DATE

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MEMORANDUM IN SUPPORT OF MOTION TO VACATE EXECUTION DATE

I. INTRODUCTION

On November 20, 2006, this Court (the Hon. Jon Wisser) held a hearing on the State's motion to set February 28, 2007 as the date of execution of defendant Cathy Lynn Henderson. By letter dated October 30, Judge Wisser invited undersigned counsel to "voice any objections to a setting or to request a date beyond that which the State seeks, in writing." Exhibit 1 to this Motion is a true copy of our letter of November 16, responding to Judge Wisser's invitation, and undersigned counsel also appeared before Judge Wisser at the November 20 hearing on the State's motion.[1]

At that time, our most pressing obligation was the preparation of a petition for a writ of certiorari that was due in the Supreme Court of the United States on December 12, 2006. We therefore asked the Court *not* to set an execution date, in order to accommodate both the certiorari process itself, and the time necessary to pursue other avenues of relief should certiorari be denied. Judge Wisser declined our request not to set any execution date at that time, but did set it for April 18, 2007 as an accommodation to the schedule of proceedings in the Supreme Court. At the hearing, Judge Wisser also intimated that we might ask for additional time depending on the outcome before the Supreme Court.

We now do so because the Supreme Court denied Ms. Henderson's petition for a writ of certiorari on February 26, 2007. On Ms. Henderson's behalf, we move this Court either to vacate the April 18th execution date entirely, or reset the

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[1] For the convenience of this Court, we provide copies of the Exhibits to the instant Motion in a separately bound and tabbed set of Exhibits.

execution date to a date at least ninety days after April 18, 2007. This request is made pursuant to Texas Code of Criminal Procedure Article 43.141(d). State's counsel has declined our request that the motion be granted by stipulation.

The chief reason for this motion is to allow time for our retained experts to complete their reports on two new and previously unavailable areas of evidence that we wish to present for due consideration by this Court and the Court of Criminal Appeals in a subsequent application for state habeas relief, and if need be, by the federal courts in a petition for federal habeas, and by the Governor and the Board of Pardons and Paroles in their consideration of Ms. Henderson's forthcoming application for clemency or commutation of sentence to life imprisonment. These are:

1. A forthcoming analysis by John J. Plunkett, M.D., who is reviewing all the evidence concerning the death of Brandon Baugh, the infant for whose capital murder our client, Ms. Henderson, now stands convicted. Dr. Plunkett is a renowned specialist in the field of infant head trauma, a field in which there have been enormous scientific advances since Ms. Henderson's trial in 1995. At the trial, State's witnesses debunked Ms. Henderson's claim of accidental death, and Ms. Henderson had no opportunity to refute them because this Court denied her request for funds to engage an expert to refute those charges. We anticipate that, when he has completed his investigation, Dr. Plunkett will be able to advise this Court and all others that the injuries sustained by the decedent were entirely consistent with an accidental fall, and that advances in science now show that the injuries were not — as the State claimed at trial in 1995 — the product of a willful, deliberate, and murderous blow delivered by Ms. Henderson.

2. Undersigned counsel have also engaged the services of a leading psychiatric expert, Seth Silverman, M.D., P.A., who has both examined Ms. Henderson and obtained considerable additional information bearing upon her

current mental state and the substantially diminished degree of her dangerousness while incarcerated until, at the very least, the year 2035, at which time she will be 78 years of age, if she lives that long.[2]

II. COURSE OF PROCEEDINGS AND PRESENT STATUS OF THE CASE

In May 1995, a jury of this Court convicted defendant Cathy Lynn Henderson of capital murder, and returned a sentence of death, for the offense of murdering "an individual under six years of age," in violation of Texas Penal Code § 19.03(a)(8). On direct appeal, the Court of Criminal Appeals affirmed the conviction and sentence in *Henderson v. State*, 962 S.W. 544 (Tex. 1997); *cert. denied sub nom.*, *Henderson v. Texas*, 525 U.S. 1978 (1988).

Ms. Henderson then timely pursued her statutory rights of collateral review, but again to no avail. The CCA denied Ms. Henderson's first application for post-conviction state habeas relief in *Ex Parte Henderson*, Appl. No. 49,984-01 (CCA 2001) (unpublished).[3] The United States District Court for the Western District of Texas then denied Ms. Henderson's petition for a federal writ of habeas corpus in *Henderson v. Dretke*, No. A-02-758-SS (March 2004) (unpublished), and the United States Court of Appeals affirmed in *Henderson v. Quarterman*, 460 F.3d 654 (5th Cir. August 11, 2006). The Fifth Circuit denied rehearing en banc in an unpublished

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[2] Under Texas law, if Ms. Henderson is not executed, she must serve at least 40 calendar years from date of conviction (1995) until she could even be considered for release. See Section V of this Memorandum, *post*. Thus, although Texas does not have a *de jure* scheme for "life without parole," there is a *de facto* scheme in place as regard *this* defendant.

[3] The Honorable Charlie Baird, then sitting as a Judge of the Court of Criminal Appeals, did not participate in the CCA's consideration of Ms. Henderson's direct appeal, or of her habeas application. The instant Motion therefore does not ask Judge Baird to revisit *any* proceeding in which he was previously involved.

order filed September 13, 2006, and undersigned counsel then began the preparation of Ms. Henderson's petition for a writ of certiorari to the Supreme Court of the United States. Under Rule 13 of the Rules of the Supreme Court of the United States, the certiorari petition was due on December 12, 2006, i.e. within ninety days "from the date of denial of rehearing" by the Fifth Circuit. *Id.,* Rule 13.3.

That is where matters stood on November 20, 2006, the date on which this Court entered the subject order setting Ms. Henderson's execution date at April 18, 2007, and hence our reference to the then-incomplete state of the certiorari proceedings in our letter to Judge Wisser, dated November 16, 2006 (Exhibit 1 hereto). Undersigned counsel timely filed the petition for certiorari on December 12, 2006, and after receipt and consideration of the Brief in Opposition (filed by the State on January 23, 2007) and our Reply Brief (filed February 5, 2006), the Supreme Court denied certiorari on February 26, 2007.[4]

Meanwhile, early during the now just-completed certiorari phase of this case, undersigned counsel retained the services of a licensed private investigator (Joseph Ward, of Austin) and a Houston psychiatric expert (Dr. Seth Silverman) to assist Ms. Henderson in gathering additional evidence on her behalf.[5] As we shall explain in further detail, this case involves considerations of the medical and other scientific

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[4] A copy of the Supreme Court's docket sheet, available at www.supremecourtus.gov/docket/06-828.htm, is Exhibit 2 to the instant Motion. The State therefore cannot be heard to say that there has been any untoward "delay" in the proceedings since the 1995 trial. Ms. Henderson pursued all of her rights of direct appeal, state and federal habeas, and certiorari petitions, that the law made available to her, and did so in a timely manner in each instance.

[5] Put another way, this motion is *not* being made under circumstances in which Ms. Henderson waited until denial of certiorari before taking any other steps. Investigator Ward and psychiatrist Silverman were retained and began their work in November 2006, a month before the certiorari petition was even due. All of counsel's legal work has been provided *pro bono*, and we have paid all expenses (including expert witness fees) out of the *pro bono* resources of the Morgan Lewis law firm.

evidence that bears upon the manner in which the infant did or did not meet his death in 1994, advances in that science over the ensuing years, and the present mental state and proclivity of "dangerousness" of Ms. Henderson. Accordingly, it is the office of the instant Motion to secure for Ms. Henderson a vacation or postponement of her April 18, 2007 execution date, so that everything necessary to a fair consideration of whether she must die can be gathered, presented, and considered by the judicial branch, and if need be, by the Board of Pardons and Paroles and the Governor himself.

III. TRIAL EVIDENCE CONCERNING THE DEATH OF BRANDON BAUGH

On the morning of January 21, 1993, the parents of Brandon Baugh delivered him to Ms. Henderson at her home in Pflugerville. This was routine, as Ms. Henderson was Brandon's daily caregiver, both parents being employed outside the home. Brandon was born about a month prematurely, and was only about 3.5 months old at that time. Tragically, Brandon died later that day when, according to Ms. Henderson, he fell from her arms and struck his head on the bare concrete floor of a playroom in the home, which had been converted from its original construction as the garage.

At trial, therefore, the State sought to debunk Ms. Henderson's claim of accidental death by presenting the opinion testimony of then-Travis County Chief Medical Examiner Roberto J. Bayardo, who conducted the autopsy of Brandon Baugh, and the opinion testimony of then-Lubbock County Deputy Chief Medical Examiner Sparks Veasey, who reviewed the autopsy report but did not conduct any investigation on his own. The full transcripts of each witness's testimony are before this Court in Exhibit 3 (Dr. Bayardo) and Exhibit 4 (Dr. Veasey) to the instant Motion.

Reduced to essentials, each witness opined that Brandon's death absolutely could *not* have been the result of an accident, such as his falling to the floor from Ms. Henderson's arms. Rather, they opined, the baby's skull fractures and resulting subdural hematoma (bleeding of the brain) absolutely "proved" that Ms. Henderson deliberately killed the baby by a murderous blow to the head. Thus, for example, Dr. Bayardo testified that in his opinion, Brandon died from skull injuries "consistent with striking his head against a blunt object," [RT 854], [6] that it would have been "impossible" for the injury to have been caused "by a fall of four to four-and-a-half feet" [RT 855], that "you need a lot of force" [RT 867], that the baby would have to have fallen "from a height higher than a two-story building," or have had his head "run over by a car" or have been "involved in a motor vehicle accident" [RT 868]. The State offered *no* evidence that crime scene investigators found any evidence of the child's death in any of the manners hypothesized by Dr. Bayardo.

Later in his testimony, Dr. Bayardo opined that "I would say the baby was caught up with the hands by the arms along the body and then swung and slammed very hard against a flat surface," that Brandon was "an abused child," [RT 876] and that the explanation that Brandon fell from Ms. Henderson's arms was "incredible." [RT 878]. Dr. Veasey said about the same thing, in fewer words, e.g., "the child's head impacting in an extremely forceful manner a blunt surface — a floor, counter top, a desk top, a wall." [RT 891]. Again, no crime scene evidence was offered to corroborate this opinion.

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[6] In the interest of brevity, we cite individual pages of the Reporter's Transcript of the trial, which are before this Court as Exhibits 3, 4 and 13 to the instant Motion, as, e.g., "RT 854."

Before trial, defense counsel anticipated this line of attack by the State, and therefore moved this Court for the funds necessary to hire an expert to "perform a biomechanical investigation into the incident which caused the death of the victim," explaining that "an independent biomechanical expert will attempt to recreate the incident and thereby shed light as to whether the incident which caused the victim's death was an accident or an intentional act."[7] The Court, however, flatly denied the motion, without comment or explanation, in its Order of August 16, 1994. [Exhibit 6 hereto].

Approximately two weeks ago, our investigator, Joseph Ward, located a preeminent expert in the field of biomechanical analysis of infant head trauma, John J. Plunkett, M.D., whose *curriculum vitae* is Exhibit 7 to this Motion, and a sample of whose research and writings in the field are provided in Exhibits 8 through 11 to this Motion. Mr. Ward has provided all of the available autopsy and other medical records to Dr. Plunkett,[8] and he is now working on a report for us.

However, because of other commitments, Dr. Plunkett cannot resume his work until about two weeks hence, so it will be about another month before he is

[7] See Defendant's Ex Parte Motion No. 1 for Expert Assistance Fee in Indigent Case [Exhibit 5 to the instant Motion], at pp. 1-2.

[8] A non-exhaustive list of items thus far provided to Dr. Plunkett include the trial testimony of State witnesses Drs. Bayardo and Veasey, the testimony of defense medical expert, Dr. Kris Sperry, the Autopsy Report of Brandon Baugh (authored by Dr. Bayardo), an incomplete or edited videotape showing the recovery of the body and the autopsy, 35 color copies of photographs taken at autopsy, color copies of the three autopsy photos admitted at trial as State's exhibits, and color copies of forensic artist's drawings of Brandon's skull fractures that were admitted at trial during Dr. Bayardo's testimony *in lieu of* the actual X-ray photographs that the artist's rendition purports to represent. The latter is particularly troublesome, because it was only about one week ago that the State produced to us one (and only one) of the X-rays taken during the autopsy, despite our request made through this Court in our November 16, 2006 letter to Judge Wisser (Exhibit 1 to this Motion). Until the State produced all of the X-rays—which it finally did, but only just a few days ago—Dr. Plunkett did not have all the evidence necessary for his investigation..

able to provide the detailed, well-documented final report that any court would expect of such an expert.

Nevertheless, three things can be said at this juncture. *First*, from August 16, 1994, when this Court denied Ms. Henderson's motion for funds to seek counterpart "biomechanical" expert testimony, until undersigned counsel's very recent location and retention of Dr. Plunkett, Ms. Henderson was wholly without knowledge of the availability of the new scientific evidence that Dr. Plunkett will utilize in analyzing the infant's death, and was wholly without funds and other resources to obtain such expertise at an earlier date.

Second, the State's refusal to provide the funds necessary to secure such expertise is a violation of Ms. Henderson's Fourteenth Amendment due process rights under *Ake v. Oklahoma*, 470 U.S. 68 (1985), holding that the State's refusal to provide funds to hire an expert to support the defendant's claim of mental incapacity violated the defendant's due process rights under the Fourteenth Amendment. Here, the opinion testimony of Drs. Bayardo and Veasey was the *sine qua non* lynchpin of the State's capital case against Ms. Henderson, yet she had no biomechanical expert who might have spoken in her defense.

Third, the new scientific investigation that we have asked Dr. Plunkett to undertake may, if it bears fruit, show the Court not only the other side of the coin, but also whether the unscientific trial opinions of Drs. Bayardo and Veasey were even admissible. We cannot say for sure at this stage of the investigation, and therefore simply ask this Court to allow us a modicum of time to allow Dr. Plunkett to complete his scientific analysis.

IV. THE NEW SCIENTIFIC EVIDENCE THAT DR. PLUNKETT WILL UTILIZE IN HIS INVESTIGATION

Two problems attend the prior opinion testimony of Drs. Bayardo and Veasey.

First, it is a matter of judicially noticed ordinary understanding that the amount of "force" required to break or shatter *any* object is the subject of the sciences of physics and engineering, not medicine. This is so whether the "object" is a skull or other human bone, a steel beam, a window of "shatterproof" glass, and so forth. Absent specialized research and training in physics and engineering — and Drs. Bayardo and Veasey professed absolutely none at trial — no physician is qualified to express any opinion about the "force" required to shatter a skull or other human bone, much less to express *any* opinion as to how such a skull fracture could or could not have occurred, or *any* opinion that the injury could (or in this case could not) have occurred by means of accident versus that of a murderous blow. True it is that back in 1995 some physicians "opined" on such matters, but these were *ipse dixits*, ungrounded in scientific fact and analysis.[9]

Second, because Ms. Henderson's capital conviction rested upon opinion testimony that may turn out to be unsound, there is a compelling need for completion of the investigation that Dr. Plunkett has been retained to undertake.

Dr. Plunkett has done this before, and Exhibits 8 and 9 to this Motion are illustrative examples. In each instance, Dr. Plunkett advised Solicitors in the United Kingdom in regard to cases in which the Crown had convicted someone of a homicide in the "head trauma" death of an infant. In each case — just as here — the

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[9] We acknowledge that at trial a defense pathologist, Dr. Kris Sperry, also opined that the death was not accidental, but that simply shows how far science has come since 1995, and how crucial was the Court's denial of funds to enable a biomechanical expert to conduct an investigation of the circumstances of the infant's death.

Crown's physician-"experts" asserted that the defendant's explanation of an accidental fall defied credulity and that the "only" explanation for the infant's death lay in "shaken baby" or other deliberate and murderous behaviour. In each instance, Dr. Plunkett applied modern science to the facts, and concluded that the Crown's "experts" were wholly mistaken.

Beginning in the late 1990's, medical, physical, and engineering sciences have begun to converge, particularly as respects traumatic head injuries suffered by infants. This new and emerging field of science, in which Dr. Plunkett is one of the leading experts, is often called "injury biomechanics" because it brings together the field of medicine with the sciences of physics and engineering. As Dr. Plunkett stated at pages 3 and 6-7 of Exhibit 8 hereto, explaining why the Crown's "experts" were wrong in their analysis of the death of the infant in the criminal case of *Regina v. Alan Cherry*:

> Unfortunately, the scientific discipline of mechanics, and the practice of medicine did not interact very often. The biomechanicians did their thing, defining injury thresholds and suggesting better safety devices, and practicing physicians did theirs, diagnosing and treating patients with head injuries. That was not a problem until physicians ventured from diagnosis and treatment into speculation of an ultimate mechanical cause for an injury. It has been assumed that physicians, skilled in the art of medicine, must have particular knowledge of injury mechanisms. This assumption is wrong. * * *
>
> Medicine's understanding of infant injury mechanisms is still in its infancy, but is significantly different from what we understood at the time of Sarah's death. We know much more than we did ten years ago. In 1995, it was widely believed that low-level falls were incapable of causing serious injury or death. It was also taught and believed that a certain mechanism, shaking, was responsible for most if not all significant infant brain injury, unless there is a history of a motor vehicle accident or a fall from a 2-3 story window. We now know that these beliefs are not correct.

Viewed in this light of modern scientific knowledge, the opinion testimony of Drs. Bayardo and Veasey at the 1995 trial may not stand up well to scrutiny. If it

does not, the appropriate remedy may well be a new trial, so that a jury can consider all the evidence from the fresh perspective of science not available twelve years ago.

V. NEW EVIDENCE AS TO MS. HENDERSON'S PRESENT "DANGEROUSNESS"

In this section, we address the first of the two "special issues" that Texas courts put to juries at the conclusion of the "punishment phase" of capital cases in 1995, *viz*., the issue of the defendant's future dangerousness. We then present reasons why current scientific evidence may well change this dangerousness assessment from what it was a decade ago.

A. Submission of "Issue No. 1" to the Jury

May 25, 1995 was the last day of the "punishment phase" of Ms. Henderson's trial, and a full copy of the Reporter's Transcript (Vol. 40) of that day is now before this Court as Exhibit 15 to this Motion.[10]

Before closing argument, the Court charged the jury to answer two special "Issues" on the verdict form, "Issue No. 1" being phrased thus:

> THE COURT: Then on the verdict form, Issue No. 1: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" Answer "Yes" or "No." [RT 869].

After final argument and jury deliberation, the jury answered "Yes" to Issue No. 1, and "No" to the mitigation "Issue No. 2." Promptly upon receiving the verdict, the Court sentenced Ms. Henderson to death. [RT 923-24].

At bottom, "Issue No. 1" asked the jurors to make a rather uninformed "risk assessment" of Ms. Henderson's capacity for dangerousness during the remainder of

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[10] Again, we cite individual pages of the transcript as "RT ___."

her life. Permitting a jury to offer an unschooled "assessment" of this kind *might* be justified if the choice were between death and "early release" of the defendant back into society, but even then, the Board of Pardons and Paroles would never release a defendant — no matter what a jury might have "found" — before conducting its own informed "risk assessment" based upon all *current* and available data.

In the present case, however, the jury's assessment is flawed because it was misfocused then and stale now. Under Texas law, if Ms. Henderson had received a sentence of life imprisonment, as opposed to death, Ms. Henderson would not be eligible for release until she has served every calendar day of forty years of incarceration for the crime of murder. Accordingly, this was not and is not a case where the choice is or was between death and "early" (or any) release back into society. Defense counsel therefore appropriately asked the trial judge to include this information in the jury charge. [RT 862-63]. The State objected, but nevertheless advised the Court that "the State would encourage the defense to argue with impunity that law. We will not object to the jury being informed of that." [RT 863-64].

The Court therefore ruled that a portion of an in limine order

> that restricted it being brought to the knowledge of the jury that a life sentence means that a defendant must serve at least 40 years is now lifted. So each side is at liberty, if they so elect, to inform the jury that if the defendant is sentenced to life in this type of case they must serve 40 calendar years before being eligible for any form of release. [RT 864].

Hence, the choice actually presented to the jury was not "early release," but "death versus life imprisonment," because forty years from her 1995 conviction, Ms. Henderson will be (in the year 2035) either dead or 78 years old. [RT 887]. Defense co-counsel, Brenda Rhea and Linda Icenhauer-Ramirez, both explained this point during closing argument, e.g., RT 887-88, 889, 891 ("In this case, a life sentence for Cathy Henderson is as good as a death sentence"); see also RT 896,

898, 909 ("And she's already got a life sentence, and that sentence means 40 years in prison before she can be considered for parole").

The State for its part largely laced its closing argument with "evidence" of Ms. Henderson's behavior *before* she was incarcerated, e.g., RT 880-883, 885-87, 911-14. But *future* dangerousness in this case should have been focused solely upon an incarceration environment, *not* what Ms. Henderson did or might have done in a free society. All the State's counsel could muster on the "incarceration" score was anecdotal "evidence" about others who committed violence in prison. The State therefore suggested that unless Ms. Henderson was caged like an animal, she might go off medication and might then assault other inmates, e.g., RT 916 ("There is a term for people who either have to be medicated or isolated, and they're called dangerous. They're called threats to society.").[11] But in the end, "there's no predicting," conceded the State. [RT 878].

B. The Forthcoming Report by the Expert Psychiatrist, Dr. Seth Silverman

Indeed, "there's no predicting," least of all by a speculative "risk assessment" rendered by a jury twelve years ago. Our retained expert, Dr. Seth Silverman, will provide a full report in only a matter of a week or two hence. It will be based upon his extensive interviews of Ms. Henderson, information about her from other sources, the medical literature, and all other sources that his engagement requires. Again, we cannot and do not now offer a full substitute for Dr. Silverman's forthcoming report, but we can and so say at least this:

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[11] But it is the purpose of incarceration to remove "threats to society" from the very society they may otherwise threaten. The State thus invited the jury to make some sort of "economic" analysis, *viz.*: that the public fisc would be better served by executing Ms. Henderson instead of incarcerating her for life.

1. No matter what the jury might have supposed twelve years ago, Dr. Silverman's current, well-documented and well-grounded "risk analysis" of Ms. Henderson's "dangerousness" in a prison environment will be dramatically lower than anything heretofore considered by this Court, the former jurors, or anyone else.

2. This assessment may well be corroborated by prison officials themselves who — no matter what State's counsel said twelve years ago — have *not* relegated Ms. Henderson to caged-animal incarceration, and have therefore "testified" by their actions that she can and is living in prison under circumstances that prison officials *do not* regard as dangerous to guards, fellow inmates, visitors, or anyone else.

3. Even if Ms. Henderson lives long enough to serve the forty-year minimum term, it goes almost without saying that even then the Board would not consider release without a fresh and thorough assessment of her supposed dangerousness in the year 2035.

Sauce for goose and gander therefore go together. Whatever marginal, theoretical "assessment" of future dangerousness may have been provided by the jury's answer to "Issue No. 1" in 1995 has long since been eclipsed by the reality of scientific analysis brought to bear today, upon current facts and information. It would be monstrous indeed to execute Ms. Henderson by blinking today's reality and proceeding instead upon an unscientific "there's no predicting" analysis of a decade ago. There are, we submit, serious due process implications in a system of capital punishment based upon a years-ago "risk assessment," that then remains unchanged and unchangeable no matter what new light can be shed upon the subject through the application of the modern scientific principles in a current environment.

The State has no legitimate interest in summarily executing Ms. Henderson before the courts — and the Governor — have had due opportunity for the presentation and thoughtful consideration of *all* the scientific evidence and analysis that

will shortly be offered in full and documented experts reports that will be available shortly.

VI. CONCLUSION

Defendant Cathy Lynn Henderson's motion to withdraw or modify the Order of November 20, 2006 setting her execution date for April 18, 2007, should be granted pursuant to Texas Code of Criminal Procedure Article 43.141(d).

In addition, Ms. Henderson respectfully requests that the Court recall the warrant of execution upon granting the request to withdraw or modify the order setting a date for execution. *See* Texas Code of Criminal Procedure Article 43.141(d).

DATED: March 16, 2007 Respectfully submitted,

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