

Factual Contentions in Support

4. All other claims, facts, and allegations in this Application are realleged and incorporated by reference in this proposition, as well as the information in the Appendix, Addenda, and information to be produced at an evidentiary hearing on this Application. Related claims raised in Mr. Cummings' pending direct appeal are also realleged and incorporated by reference (*see, e.g.,* App. Brief, Propositions 2 & 5).

5. The evidence of Mr. Cummings' innocence set forth in this Application (*see, e.g.,* Averment of Facts, *above*) is sufficiently strong to destroy confidence in the outcome of his trial. It is more likely than not a reasonable juror hearing all of the now available evidence would not vote to convict Mr. Cummings beyond a reasonable doubt.

6. There is newly discovered evidence and/or evidence not previously available of Mr. Cummings' innocence of this offenses. This new evidence materially impeaches Anita's and Sherry's false claims Mr. Cummings was in involved in this offense. As a result of this newly discovered evidence, it is not possible to have confidence in the reliability of the outcome of Mr. Cummings' trial.

7. There is evidence showing that Mr. Cummings' July 30, 1994 confession to assisting in moving Judy's body was a false confession made due to inducements by a law enforcement officer. There now is evidence available to substantiate Mr. Cummings' reasons for falsely confessing in order to protect his children from living with child molesters (*see* Averment of Facts, Parts M & F, *above*).

8. There is also new evidence to impeach the prosecution's theory at trial that Anita and Sherry Cummings were abused spouses who were dominated and controlled by Mr. Cummings (*see, e.g.,* Averment of Facts, Parts C, F & G, *above*), and to show that theory should never even have gone to the jury. Trial counsel was not given sufficient notice that the prosecution would rely at trial on a Battered Woman Syndrome theory. As a result, trial counsel did not have a reasonable opportunity to: request that Sherry and Anita submit to psychological testing; request the production

of Sherry and Anita's medical and psychological records; consult with an expert in Battered Woman Syndrome [BWS] and present testimony of such an expert which would have impeached the women's attempts to portray themselves as victims of BWS who had become so fearful and helpless that they had no choice but to carry out any command of Mr. Cummings, including a command to kill. (See, e.g., Affidavits of Dr. Ray Hand, Ph.D. (Appendix 5 & 6), and Averment of Facts, Part C, above).

9. There now is evidence that Mr. Cummings is limited intellectually and cognitively, and lacks sophisticated planning skills to be able to plan out these offenses and conceal them for three years (see, e.g., Appendix 5). This evidence also shows that Mr. Cummings lacks the psychological makeup to dominate and control Anita and Sherry Cummings (see, e.g., Appendix 5), the evidence at trial regarding Anita and Sherry is insufficient to support the prosecution's theory they are victims of Battered Women Syndrome (see, e.g., Averment of Facts, Part C, , above, and Appendix 6), and evidence Anita and Sherry were not battered spouses (see, e.g. Averment of Facts, Parts F & G, above).

10. The new evidence includes evidence of the cultural norms, mores and interpersonal dynamics of the Poor White Trash subculture in which Mr. Cummings and his wives were raised, socialized and lived. (See, e.g., Affidavit of Dr. Wayne Flynt, Ph.D. (Appendix 4), and Averment of Facts, Part B, above). Defense counsel did not consult with an expert on the Poor White Trash subculture because counsel were unaware of the existence of such experts, and were unaware the psychological, behavior and interpersonal dynamics in that culture are materially different from the culture of poor whites, lower class and middle class persons. Hence, it was not unreasonable for defense counsel to fail to investigate this information, and this information was not previously available.

11. There now exists evidence of prosecutorial misconduct in suppressing material evidence and /or presenting evidence at trial in a false light (see Proposition 3).

12. The record previously did not contain evidence that trial counsel were ineffective in conceding Mr. Cummings' guilt to Accessory After the Fact under circumstances in which Mr.

Cummings had never made that admission to defense counsel, and in fact consistently denied doing that, and trial counsel conceded guilt without Mr. Cummings' informed consent (see Proposition 2); and evidence that explains why Mr. Cummings' falsely confessed to moving Judy's body (see Averment of Facts, Part L, above), which confession he recanted shortly after making it.

13. The record previously did not contain evidence regarding the circumstances in which Anita Cummings decided to go to the police three years after the offenses, and the inconsistencies in her initial versions of the offenses with her preliminary hearing and trial testimony (see, e.g., Averment of Facts, Parts K & L, and Appendix 11, 16 - 19).

14. There is now evidence that Sherry and Anita Cummings committed perjury at Mr. Cummings' trial (see, e.g., Averment of Facts, Parts F & G, above). This includes information provided to the undersigned by Sherry about Anita' testimony.

15. There is now other substantial and material evidence to impeach Anita's and Sherry's versions of events, including information about Melissa which renders improbable and incredible their claims that Melissa passively and without resistance or complaint allowed herself to be kept captive in a bedroom for 10-12 hours, during much of which she was allegedly handcuffed, and without ever asking about her mother (see Averment of Facts, Part D, above).

16. There now is substantial evidence that Lahoma Yaws II's allegation that Mr. Cummings had raped her at age 14 is insufficiently reliable for jurors to have been exposed to that allegation (see, e.g., Averment of Facts, Part H, above).

17. In the alternative, this case should be remanded to the District Court for an evidentiary hearing because there exists material issues of fact and the pleadings and record before this Court is insufficient to resolve those factual issues. By way of example, the following issues of material fact require an evidentiary hearing:

- a) Whether Anita Cummings lied under oath in stating that she did not know Jessie was married to Sherry when Anita married him (T. 689) and did not learn about his marriage to Sherry until after Anita and Jessie moved to Oklahoma (P.H. 689), in light of Sherry's post-trial statements to the undersigned counsel that Anita lied about that, coupled with the fact

that Anita was living with Sherry and Jessie when she married Jessie, and Sherry was present during Anita and Jessie's marriage ceremony (Appendix 7).

b) Whether Anita Cummings lied to jurors in stating it was not uncommon for Jessie to handcuff the kids (T. 740), in light of Sherry's Preliminary Hearing testimony that none of the kids had ever been handcuffed in the house before Melissa was handcuffed during this offense (P.H. 35).

c) Whether Anita lied under oath in stating that she never had any disagreements or arguments with Judy prior to the murder (T. 691 & 726; P.H. 17), in light of evidence that Anita was upset and angry with Judy the night before this offense, because Judy had dropped Melissa off at Anita's place of employment and told Anita to watch Melissa for her while she went out drinking (see Anita's 12/2/94 statement to police in Appendix 17; see also Appendix 7).

d) Whether Anita lied under oath in claiming she and Sherry did not have any friends who visited them on a regular basis (P.H. 283) in light of abundant evidence that they had many friends and acquaintances with whom they had frequent contacts (Appendix 7;

e) Whether Anita and Sherry were dominated and controlled by Jessie beyond that which is normal in marital relationships in their socio-economic class and to such an extent that Anita and Sherry would have committed this offense at his command in light of substantial evidence that Sherry was as domineering and controlling as Jessie, could hold her own against him in a fight, and does not meet the criteria for Battered Women Syndrome (Appendix 6 and 7).

f) Whether Sherry lied under oath in claiming that Jessie has hit her almost daily ever since they have been together (P.H. 132) in light of Sherry's post-trial admission that any abuse that took place did not begin until years after they met and a long time after their marriage in 1988 (Appendix 7).

g) Whether Lahoma II lied under oath, and whether there was sufficient credible evidence to admit her testimony in the first place, when she testified at the sentencing hearing that Jessie had raped her in April 1991 while her sister, Sherry Cummings, and Anita Cummings held