

Part C: FACTS

AVERMENT OF PRELIMINARY FACTS IN SUPPORT OF APPLICATION

To assist the Court in reviewing the claims presented for review in this Application for Post-Conviction Relief, the following preliminary background information is provided about Jessie Cummings, hereafter referred to as Jessie or Mr. Cummings, the co-defendants, the victims, the offense, and the circumstances of the offense. These facts are incorporated into the specific Claims for Relief below, as if fully set forth therein.

A. Introduction.

In October 1987, Jessie Cummings and Sherry Mitchell were married in Tupelo, Oklahoma. This was Sherry's second marriage. They already had a daughter, Debbie Cummings, born in June 1987. In June 1989, Jessie Cummings and Juanita Lewis, who is known to family and friends as Anita, and is so referred to herein, were married in Batesville, Arkansas. Anita had a son from a previous relationship, Robbie Lewis, who was born out of wedlock in August 1988.

Both Sherry and Anita are bisexual, and Jessie's marriage to Anita was encouraged by Sherry, who attended the wedding ceremony. Throughout their joint marriage, the three of them shared the same bedroom and marital bed. Sometimes Anita and Sherry would have sex with each other when Jessie was not around. In addition, Sherry often recruited other women to come to the house for sexual activity with Jessie, which was Sherry's way of checking the women out for potential bisexual encounters. Sherry and Anita also had relations with men other than Jessie, sometimes without his knowledge.

On September 5, 1991, while Jessie was in Oklahoma City with his elderly father who was dying of cancer, Anita and Sherry Cummings shot and killed Judy Moody Mayo, Jessie's older half-sister, and killed her 11 year-old daughter, Melissa Moody. These offenses were unsolved for three years. By July 1994, Anita and Sherry had grown disenchanted with Jessie and were interested in other men. Because she was being dominated by Sherry, Anita especially wanted to leave this three-

person marriage. This set in motion a series of events which resulted in Anita going to the police, and Anita and Sherry claiming that their participation in killing Judy and Melissa was the result of Jessie ordering them to do it. Naively, the women believed they would be relieved of any culpability if they shifted responsibility to Jessie for these killings.

B. Jessie Cummings Is Factually Innocent of These Offenses.

Because there was no evidence connecting Jessie Cummings to the homicides, other than the self-serving testimony of Anita and Sherry Cummings, the primary focus of the State's case at trial was to emphasize Mr. Cummings' alleged "control" over the two women. However, there was no evidence to corroborate the women's self-serving claims that they were dominated and controlled by Jessie. The evidence at trial showed that Jessie had no motive to want either Judy or Melissa dead, and that he was on good terms with them both (T. 541, 714). There was no physical evidence linking Jessie to the killings. In addition, important evidence which would have impeached the women and their claims was not presented at trial. Moreover, jurors were unaware that Sherry and Anita were bisexual lovers and had incentives to frame Jessie.

C. The Wives Were Not Battered Women and They Did Not Act Out of Duress

In order to bolster Anita's and Sherry's credibility at trial, the prosecution attempted to portray the women as victims of Battered Woman Syndrome [BWS]. The women had admitted to killing Judy Moody while Jessie was out of town. The women falsely claimed they kept Melissa alive until his return many hours later. The facts make it clear, however, Anita and Sherry also killed Melissa and disposed of the bodies before Jessie returned (see Part K, below). In order to explain their behavior in a way which would shift criminal responsibility to Jessie, the women claimed they shot Judy at Jessie's command. To make this claim sound convincing, the women tried to present themselves as abused, controlled and dominated by Jessie.

The prosecution presented Anita and Sherry to the jury as the helpless victims of Jessie's abuse. However, the prosecution presented no evidence, expert or otherwise, to support this conclusion, just the contradictory statements of the women themselves. Neither of the women has

ever been evaluated by an appropriate mental health expert to determine if either met the diagnostic criteria for classification as suffering from BWS. No expert testimony was presented at trial that the women were victims of BWS. No medical records or corroborating evidence was presented to support the women's claims. Even though numerous persons lived in the Cummings' household or visited it frequently, not a single witness testified to confirm any of the abuse alleged by Anita and Sherry. The women themselves provided inconsistent and conflicting versions of the abuse. For example, Anita claimed at trial it was not uncommon for Jessie to handcuff the kids (T. 740). In contrast, Sherry testified at the Preliminary Hearing that none of the kids had ever been handcuffed in the house before (PH-I 35).

Battered Woman Syndrome [BWS] is a subclass of Post-Traumatic Stress Disorder in the *Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition* [DSM-IV] of the American Psychiatric Association. It is characterized by a number of psychological and behavior symptoms commonly shared by women who have been the victims of repeated physical and/or psychological abuse by a dominate male figure. An average juror does not possess the knowledge, experience or training to determine whether a woman suffers from BWS. The factual predicate that must be met before a woman can claim she acted out of fear due to BWS is outside the ordinary experience of lay persons. Nonetheless, jurors were asked to infer that Anita and Sherry were victims of BWS based on scant information, and none of the women's claims were corroborated by other evidence or expert testimony.

In addition to asking jurors to infer that the women's contradictory self-serving claims satisfy the definition of BWS, jurors were asked to infer from those claims alone that Jessie had the propensity and ability to dominate and control the women, from which jurors then were to infer that Jessie ordered them to kill Judy, from which jurors were to infer that Anita and Sherry were telling the truth that they committed this offense under the duress of Jessie's command, motivated by fear of his reprisal if they failed to comply with his orders. These multiple layers of inferences must crumble because they are built on a foundation of sand. None of the inferences the jury was asked to make are based on anything other than the contradictory statements of the two truly guilty parties in

this proceeding: Anita and Sherry.

The record is insufficient to support a claim that Anita and Sherry are victims of BWS or some related theory of duress, or that they acted on Jessie's orders out of fear of him. Indeed, the facts actually disprove that claim. Sherry claimed the night before Jessie went to Oklahoma City, he ordered her to shoot and kill Judy while he was out of town the next day, but that she refused to do so (T. 516). Such a refusal is inconsistent with a claim the women had no choice but to blindly obey Jessie's every command. Anita claims that the morning that Jessie went to Oklahoma City, he took her aside and told her to kill Judy while he was gone. Both Sherry and Anita said that Sherry was unaware of that alleged conversation (PH-I 92; PH-II 18). Nonetheless, Anita claims that, while Jessie was out of town that day, Sherry brought the gun to her and told Anita that she knew what she had to do (T. 694). This is only one of the numerous material inconsistencies in the women's versions (see Appendix 11).

Anita's and Sherry's claims of abuse at Jessie's hands are little more than generalized statements, lacking any concrete detail. They can be summarized as follows:

Sherry: I always did what Jessie told me to do (T. 536).

Jessie had the habit of saying something and not be serious; he would ask somebody to do something just to see if they would (T. 561-2).

Anita: If I didn't do what Jessie told me to, I'd get into trouble (T. 703).

If I had questioned him, he would have gotten mad (T. 705).

I didn't leave Jessie because I was scared of him; I'd seen things he done before (T. 714).

I was afraid of Jessie and Sherry when I shot Judy (T. 726).

Jessie was abusive to both of us, starting a month after I married him. The first time was the end of July 1989; he blamed it on a car wreck and had me go to the hospital. He was abusive to Robbie, too, starting around the same time (T. 725-28).

I wrote [the love letter] to Jessie after he knocked my teeth out (T. 731).

It wasn't uncommon for Jessie to handcuff one of the kids; at times Jessie would have us cuff Robbie or Brandon (T. 739) [but see, Sherry: none of the kids had ever