

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

her down, in light of substantial evidence that Lahoma II has a reputation for lying, coupled with her own admission she has a habit of lying, and evidence that many of her relatives and acquaintances believe she was lying about the rape, coupled with the total absence of corroborating evidence such a rape took place (see Averment of Facts, Part H).

h) Whether the women lied about Judy's body and her red pickup not being moved from their house until after Jessie returned from Oklahoma City after midnight, in light of Ella Faye Potter's statements that she stopped by the Cummings' house looking for Judy around 8:00 pm and found nobody home and Judy's pickup gone (Appendix 35); coupled with Loretta Wells McCullar's statements that she stopped by the Cummings' house around 10:00 pm that night and found nobody home and Judy's pickup not there (Appendix 33).

i) Whether the women lied under oath about keeping Melissa alive and confined in their small bedroom for over 10 hours, and in handcuffs during much of that time, without Melissa complaining or protesting in any way or asking about her mother, in light of substantial evidence that Melissa was an active child who would not tolerate being confined, and who was a mama's girl and would have been asking about her mother (Affidavit 7), coupled with Anita's claim that Sherry handcuffed Melissa and Sherry's claim that Anita handcuffed Melissa.

j) Whether Sherry lied under oath about having a telephone conversation with Jessie Cummings the evening of this offense when he called her from Oklahoma City at Stella Knight's house, in light of Stella's statements that no such phone call took place that day (Appendix 31), coupled with Stella Knight's phone records which show no collect calls were made to her home that day (*id.*).

k) Whether the wives lied about the circumstances under which Anita shot Judy to death in light of Anita's claim Sherry called her to the back porch and gave Anita the gun with instructions to go shoot Judy, which is in direct contradiction to Sherry's claim that she was on the toilet going to the bathroom when she was surprised by the sound of gunshots and then discovered Anita had shot Judy.

l) Whether the wives lied about Jessie having sexual intercourse with Melissa the night of this offense in light of Sherry's complete lack of knowledge that this supposedly happened in

contrast to Anita's testimony that both she and Sherry were present and watched it take place, coupled with Sherry's claim that Melissa and Jessie were joking around together immediately after the alleged rape took place, in light of substantial evidence that Melissa was a virgin, not yet menstruating, and would not have reacted to being raped in a joking manner (Appendix 7; see also T. 587).

m) Whether Anita and Sherry lied about how Anita shot Judy in light of Anita's testimony that she stood in the same place about 7' from Judy and shot Judy who was sitting on the couch and immediately slumped sideways on the couch, coupled with the Medical Examiner's finding that some of Judy gunshot wounds went from right to left and at least one other from left to right, and some went upward while at least one went downwards, and in light of the large abrasion on the back of Judy's right leg, indicating that she was hit with something or stomped on just before her death (Appendix 14).

n) Whether Sherry lied about Jessie taking Melissa off to an isolated area and killing her there in light of testimony that when this supposedly happened Melissa was dressed in shorts and a T-shirt, but her body was found nude and no clothing was found in the vicinity, and in light of the fact that Sherry was supposedly sitting in the car with the windows down not far from where Melissa supposedly was killed, but nonetheless testified that she did not hear Melissa cry out or any other unusual noise.

o) Whether Anita and Sherry were bisexual lovers and conspired to frame Jessie for this offense, in light of the substantial evidence the wives were bisexual, were lovers, and had motives to frame Jessie (Appendix 7).

p) Whether Anita and Sherry lied about what happened to the gun after Judy was shot in light of Anita's claims that she threw the gun on the bed immediately after shooting Judy and never saw it again, in contrast to Sherry's claim that Anita put the gun on the T.V. and never saw it again.

q) Whether Anita and Sherry lied about who was the person in charge of this offense and hiding the fact that it took place, in light of Anita's claims that Sherry forced the gun on her and made her shoot Judy and then made her help move the body and clean up the crime scene, in contrast with Sherry's claim that she did not know Anita was going to shoot Judy

until after Anita did it, and that Anita was the one who forced her to help move the body and clean up the crime scene, coupled with Sherry's claim that it was Anita's idea to put the kids in the bedroom while they cleaned up and Anita was the one who put Melissa in the bedroom in contrast with Anita's claim that Sherry gave instructions on putting the kids in the bedroom and that Sherry was the one who put Melissa in the bedroom.

- r) Whether the women lied about when and how Judy's and Melissa's bodies were disposed of in light of Anita's claims that she was inside the house and did not help load Judy's body into Judy's pickup (T. 701 & 743) in contrast to Sherry's claim and that both she and Anita helped load Judy's body into the truck (T. 530),
- s) Whether the women lied about disposing of the couch on which Judy supposedly was sitting when she was shot in light of Anita's claim that the couch was in the livingroom later that night and the cushions were outside drying from having been washed, in contrast to Sherry's testimony that she was sitting on the couch watching T.V. that evening and also Sherry's conflicting testimony that the couch was outside later that night.
- t) Whether the wives lied about not being free to leave Jessie and not having any opportunity to leave him in light of substantial evidence Jessie was often gone away from home working or hunting a day or more at a time under circumstances in which the wives had vehicles to use, a checking account from which to access money, relatives to provide them a place to live, and friends to assist them.
- u) Whether Timothy Chancellor had a mental disability that impaired the accuracy of his trial testimony, and whether the prosecution failed to produce to the defense impeachment evidence relevant to Chancellor's credibility (see Proposition 3).
- v) Whether the prosecution failed to produce to the defense material evidence relevant to guilt or punishment in this case in violation of *Brady v. Maryland* (see Proposition 3).
- w) Whether Mr. Cummings was denied the effective assistance of counsel in prior proceedings (see Proposition 2).

x) Whether Anita and Sherry lied about when and how they committed these murders in light of the totality of the conflict, inconsistent and reliable evidence in this case.

y) Whether there was sufficient corroboration at trial for the self-serving testimony of Anita and Sherry Cummings that they were victims of being controlled and dominated by Jessie in light of the absolute lack of any corroboration at trial of any of their claims to that effect, and/or in light of the absence of any expert testimony finding that they were victims of battered spouse syndrome.

z) Whether Anita and Sherry lied about how and when they killed Judy and Melissa in order to frame Jessie in the mistaken belief that they would not be charged if they claimed duress as a defense to their actions.

18. Mr. Cummings' convictions must be reversed because they are based on the admission of unreliable evidence which required jurors to engaged in a process of making multiple layers of inferences in order to arrive at a guilty verdict.

19. The evidence at trial was insufficient to support the conclusion of guilt beyond a reasonable doubt in this case.

20. Mr. Cummings' Statement of Arguments and Authorities in Support of this Application are set forth in Addendum A, which is incorporated herein by reference.

II. MR. CUMMINGS HAS BEEN DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN ALL PRIOR PROCEEDINGS.

Claims for Relief

21. Due to ineffective assistance of counsel, in the failure of prior counsel to accord Mr. Cummings the standard of representation for effective assistance of counsel in capital proceedings, in all prior proceedings Mr. Cummings has been denied substantive and procedural due process, his right to the effective assistance of counsel, a fair trial, a fair and reliable determination of the appropriate sentence, and a meaningful and reliable appellate review of his conviction and sentence,

as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 2, §§2, 7, 9, 19, 20 & 21 of the Oklahoma Constitution. If Mr. Cummings had received effective assistance of counsel, there is a reasonable probability that the outcome of prior proceedings, including both phases of his trial and his direct appeal, would have been different.

Factual Contentions in Support

22. 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* App. Brief, Proposition 10).

23. At all times material to this case Mr. Cummings was and is indigent and has been represented by court-appointed counsel. During all prior proceedings, counsel failed to provide him with conflict-free counsel, and counsel acting on his behalf without interference from others, and failed to provide him with the effective assistance of counsel.

24. Mr. Cummings was represented at trial by OIDS staff attorney Paul S. Faulk. At all times material to this case, Mr. Faulk had a burdensome caseload and inadequate investigative and other resources in order to devote sufficient time to preparing for this case and provide Mr. Cummings with effective assistance of counsel. Because Mr. Faulk had more clients and cases than he could effectively handle, Mr. Faulk had divided loyalties and a conflict of interest in how he would allocate his limited time and resources. Mr. Faulk in fact failed to devote sufficient time to acquaint himself with the facts of this case and adequately prepare for trial.

25. Mr. Faulk arranged for attorney Joseph ("Jody") Minter V to serve as co-counsel in this case. Mr. Minter was required to do so with a \$5000 cap on payment for his services, which was inadequate compensation for the services and time commitment that was needed. Mr. Faulk unreasonably relied on Mr. Minter to shore up Mr. Faulk's inadequate preparation, because the contract with Mr. Minter did not provide for sufficient hours for Mr. Minter to do so. At all times

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during his representation of Mr. Cummings, Mr. Minter had too many clients and other commitments to devote sufficient time to this case, and he failed to be adequately prepared for trial. Mr. Minter has a reputation for neglecting cases, which has resulted in disciplinary proceedings (see *State of Oklahoma ex rel Oklahoma Bar Association vs. Joseph O. Minter, V*, 69 OBJ 19 (1997)).

26. Mr. Faulk failed to provide Mr. Minter with copies of all relevant and material information about this case in order for Mr. Minter to have an adequate understanding of this case and to provide Mr. Cummings' with effective advice. By way of example, Mr. Minter reports that he never was given copies of the audio tapes that Mr. Faulk received during discovery, and that Mr. Minter never listened to them, including the taped confessions of Anita that had not been transcribed until recently (see Appendix 18 & 19).

Pre-Trial and Guilt Phase

27. Despite being inadequately prepared for trial, Mr. Cummings' trial counsel failed to request necessary continuances. They were in a rush throughout the trial, and needed to get this trial done and out of the way in order to move on to cases of other clients.

28. Trial counsel was ineffective in failing to investigate, develop and present available and relevant evidence. Due to trial counsel's failure to conduct a reasonably competent investigation, trial counsel was unable to competently advise Mr. Cummings or make competent strategic decisions. Furthermore jurors, and this Court on direct appeal, were denied material and relevant information to assist them in judging the credibility and reliability of the prosecution's evidence.

29. Trial counsel failed to provide Mr. Cummings with adequate and appropriate advice regarding the advisability of accepting the prosecution's plea offer to a Life sentence on Count I and a Life Without Parole sentence on Count II. Trial counsel failed to effectively negotiate with the prosecution for a better plea offer, because counsel failed to be adequately prepared in order to effectively marshal facts in support of a better plea offer. Mr. Cummings' was prejudiced by this despite his innocence of these offenses, because a criminal defendant must access a plea offer in light of the potential evidence against him and whether it may be sufficient to convince a jury to convict and impose a death sentence.

30. Trial counsel failed to protect Mr. Cummings' right to a fair and impartial jury that represented a fair cross section of the community, and one that could be fair and impartial. Counsel failed to adequately question potential jurors during jury selection in order to make necessary challenges for cause and to rationally exercise peremptory challenges (see, e.g., OR 477-79 & T. 1010-20). As a result, Mr. Cummings' jury included persons who were not qualified to serve on his jury (see Proposition 7) and jurors who were biased against him and jurors could not weigh the evidence impartially with an open minded.

31. Trial counsel were ineffective at both the guilt and sentencing stages of Mr. Cummings' trial in failing to object, request appropriate jury admonitions or move for mistrials, raise as error and otherwise preserve as error, issues affecting Cummings' fundamental rights where the circumstances presented clearly required that such action be undertaken in order to protect and preserve Mr. Cummings' rights.

32. Trial counsel was ineffective in failing to investigate and present relevant evidence and testimony, in failing to make relevant arguments based on the evidence at trial, and in failing to effectively cross-examine witnesses and impeach them with available information.

33. Trial counsel violated Mr. Cummings' constitutional rights at trial when they admitted guilt to Accessory After the Fact (T. 375 & 376) by Mr. Cummings allegedly helping the women to move Judy Mayo's body from the cellar to the pond where she was found, despite the fact that Mr. Cummings denies that he was involved in moving the body, and recanted his false confession to the contrary within a short time of giving it. In addition, trial counsel made that admission without obtaining from Mr. Cummings his informed consent to make that admission of guilt at trial or an affirmative waiver of his rights.

34. There could have been no reasonably competent strategic decision for trial counsel to concede Mr. Cummings' alleged participation in moving Judy's body. Counsel knew that Mr. Cummings had recanted his false confession within a short time of making it. In addition, Mr. Cummings never told his counsel that he had assisted in moving Judy's body, but rather Mr. Cummings consistently and repeatedly told counsel that he had not done that.

35. Counsel's unauthorized concession to the jury that Mr. Cummings had assisted in moving Judy's body had the effect of annihilating Mr. Cummings' only viable defense in this case: that the women had killed Judy and Melissa while he was away in Oklahoma City and he had no knowledge of their participation in the killings until Anita confessed to him the night before she went to the police.

36. There was only one inference that jurors could draw from counsel's conceding that Mr. Cummings was an accessory after the fact in helping to move Judy's body, to wit: that Mr. Cummings had known for years that Anita had shot and killed Judy, and how Judy's body was deposited at the pond, but he never reported that to the authorities, hence Mr. Cummings must have been involved in the decision to kill Judy. If Mr. Cummings knew that Anita had killed Judy, then he must have known that Anita and Sherry were also involved in getting rid of Melissa, but did nothing, from which jurors could only infer that he also was involved in Melissa's disappearance. However, those inferences are not consistent with the truth -- that Mr. Cummings did not participate in either of these killings, directly or indirectly or in any manner.

37. Trial counsel were ineffective in failing to present evidence at trial that the night before Anita went to the authorities she had confessed to Mr. Cummings, in a naive attempt to prompt him to end his marriage to her, that she was the one who had shot and killed Judy and done away with Melissa. Counsel were further ineffective in failing to present evidence that Mr. Cummings asked Anita to go with him to tell this to Sheriff Ward, and that was the real reason Anita went to the authorities: she knew that she had to turn herself in first and give her version before Mr. Cummings went to the authorities and told them what Anita had told him. Mr. Cummings was prejudiced by this omission because that evidence would have explained how Mr. Cummings knew the basic details about Judy's death in order to falsely confess that he helped move her body, in an misguided attempt to absolve Sherry of blame. In addition, as a result of this omission by counsel, the prosecution was allowed to argue to jurors that Mr. Cummings must have been involved in Judy's murder, because he did not ask police who did it when he was first questioned by them when arrested (T. 373).

38. Trial counsel were ineffective in failing to move to suppress Mr. Cummings' false confession to the police about moving Judy's body, which confession was induced by one of the interrogators by promises that Sherry would be released from custody, if exonerated by Mr. Cummings, and his children could be given to her while he was in jail. Throughout police questioning, Mr. Cummings repeatedly inquired about where his children were and expressed concern that they would be placed to the custody of Sherry's mother and hence known child molesters would have access to the children. Knowing about Mr. Cummings' concerns, an OSBI agent told Jessie that Sherry's mother was the only relative of the children living in Oklahoma and she would get the children, but that Sherry would get them if Jessie would exonerate her. Based on those inducements, Mr. Cummings falsely confessed to moving Judy's body, attributing to himself the actions that Anita had told him Sherry had taken in moving the body.

39. Trial counsel failed to investigate and present evidence that David Potter, the live-in boyfriend of Sherry's mother, and his brother, Patrick Potter who also lived with Sherry's mother, were child molesters. This evidence was necessary in order to establish Mr. Cummings' motive for giving his false confession to the police, to wit: to clear Sherry of any involvement so she would be released from jail to take care of their children, rather than let the children be placed with Sherry's mother.

40. Trial counsel were ineffective in failing to investigate and present evidence and argument that both Sherry and Anita were in relationships with other men at the time of the arrests in this case, and wanted to end their marriage with Mr. Cummings, and hence had a motive to falsely implicate Mr. Cummings in these offenses. Trial counsel also failed to present evidence and argument that the women had opportunity conspire to frame Mr. Cummings, including during their drive together to Anita's place of employment the night before Anita went to the authorities.

41. Trial counsel failed to give Mr. Cummings competent advice regarding his decision to testify, as a result of which Mr. Cummings did not make a knowing, intelligent and voluntary waiver of his Fifth Amendment right not to testify. Mr. Cummings, who has borderline intellectual functioning, was overwhelmed by trial counsel's insistence on making this decision for him, and

hence Mr. Cummings' will was overcome by trial counsel's forcefulness.

42. Trial counsel was ineffective in the extreme in the manner in which Anita and Sherry were cross examined at trial. Trial counsel asked questions in such a manner which conveyed the impression that he agreed with and endorsed the women's versions of what happened, and was only nitpicking with minor details. This impression was conveyed in two ways:

a) By asking questions regarding the women's version using statements of fact as opposed to qualifying the questions in terms of what the women alleged. These questions conveyed the impression that counsel was adopting the women's version of the offenses. For example:

Sherry: I seen him cross over a railing, yes.
Trial counsel: All right. Jesse told you to wait in the car, right?
Sherry: Yes. (T. 574)

b) By counsel frequently saying "okay" or "right" after something that one of the women said in response to his questions. This communication to jurors counsel agreed with what the women were saying. For example:

Sherry: There wasn't conversation on the gun until he got ready to -- till we got ready to leave with Judy.
Defense Counsel: Right. (T. 582)
Sherry: Just that Melissa was--she had asked where we were going, and she--and Jesse said that we was going to meet her mom.
Defense counsel: Okay. Jesse told her that in the house?
Sherry: I don't recall if it was said in the house or in the car.
Defense counsel: Okay. (T. 578)

43. Trial counsel failed to file a motion in limine and request a preliminary hearing, pursuant to Evidence Code Rule 2105, with regard to the evidentiary sufficiency and admissibility of the prosecution's claim that Melissa had been "kidnapped" from Coal County and then taken to Choctaw County where she was killed. Prior to trial the only evidence of the alleged kidnapping was that: Melissa and Mr. Cummings were laughing and joking when he supposedly told her and Sherry to get in the car (PH-I 258 & 324-5; PH-II 39) and nothing else was said before they left (PH-

II 95); nobody asked where they were going (PH-I 53 & 113); Melissa did not ask where they were going (PH-II 40); when they got to Choctaw County, Mr. Cummings supposedly told Melissa to get out of the car because they were going to see her momma (PH-II 97); Melissa had not asked about her mother any other time prior to this (PH-I 65); and Anita recalled "somebody" telling Melissa they were going to meet her momma, but she didn't know who (PH-II 39 & 58). Given the prejudicial effect of exposing jurors to specious allegations and arguments that Melissa had been kidnapped, the evidence of a kidnapping was too insubstantial to permit that evidence to be heard by the jury. Any probative value of Anita's self-serving testimony about somebody telling Melissa that she was going to see her mother (which in itself was insufficient to constitute kidnapping) was outweighed by the prejudicial effect of that claim.

44. Trial counsel failed to file a motion in limine and request a preliminary hearing, pursuant to Evidence Code Rule 2105, with regard to the evidentiary sufficiency and admissibility of Anita's claim that months after this offense Mr. Cummings, during rough bondage sex, whispered in her ear a confession about slitting Melissa's throat when he killed her. This ludicrous claim was invented by Anita on December 2, 1994, months after the arrests and just days before she testified at the Preliminary Hearing (Appendix 17). Prior to that she told police that she never had any indication of what might have happened to Melissa, and thought Mr. Cummings made Sherry kill Melissa (Appendix 19, p. 34). Four months later, she changed her story and said he had told her a few weeks after the offense that he had slit Melissa's throat. This sudden change in Anita's story clearly was an attempt to curry favor with the prosecution by supplying false evidence to fill in a serious evidentiary gap in the State's case, and the prosecution knew that. Anita is a confessed killer who desperately was trying to save herself from the death penalty by manufacturing far-fetched claims. Under the circumstances of this case, it was fundamentally unfair to admit at trial every allegation springing from Anita's fertile imagination, and trial counsel were ineffective in failing to test the credibility, reliability and admissibility of her claims before they were heard by jurors. Trial counsel were further ineffective in failing to object to this testimony at trial.

45. Trial counsel failed to file a motion in limine and request a preliminary hearing, pursuant to evidence Code Rule 2105, with regard to the evidentiary sufficiency and admissibility of Anita's claims regarding the alleged rape of Melissa Moody. Given the insufficiency of the evidence as to that claim, the trial court dismissed Count III at the close of the evidence (T. 855).

46. Trial counsel failed to move for a mistrial when Count III was dismissed, and failed to request that jurors be admonished not to consider any of the evidence admitted in support of Count III. Any evidentiary sufficiency that Anita's uncorroborated claim may have had, its prejudicial effect was far outweighed by its probative value.

47. Trial counsel failed to object and request a mistrial when Anita testified at trial about inadmissible hearsay by Melissa during Mr. Cummings' alleged sexual encounter with Melissa. One of the embellishments that Anita added to her confessions was that Mr. Cummings' raped Melissa before she was killed. That claim is notably absent from Anita's first confessions (see Appendix 16). Not even Sherry corroborated Anita's claim that the two women watched while Mr. Cummings supposedly raped Melissa. At trial, Anita added the further embellishment that Melissa told Mr. Cummings that she had done it (i.e., oral sex) before in Arkansas (T. 702). This unreliable and inadmissible hearsay allowed jurors to speculate that Mr. Cummings was the person who had sexual contact with her in Arkansas, when he had not. In addition, jurors did not know that Melissa's father and older brothers, James and Henry Moody, were child molesters.

48. Trial counsel failed to properly inform themselves of the content of Anita's July 29, 1994 confession to the police and Anita's July 30, 1994 confession to the police, which were produced to them in the form of audio tapes. Counsel were further ineffective in failing to have transcripts prepared of the same. These tapes have recently been transcribed (Appendix 18 & 19 respectively). In addition, counsel were ineffective in failing to make effective use of those confessions by impeaching Anita with information contained in them that was material to her credibility. By way of example, it was in the July 30, 1994 confession that Anita volunteers for the first time her claim that Melissa was raped by Mr. Cummings. Sheriff Bill Ward, who had extensively interviewed Anita prior to this, expressed his surprise that she had never told him about

that before (Appendix 19 at p. 3).

49. Trial counsel was ineffective in failing to offer and have admitted into evidence relevant portions of the tape recorded statement that Anita made to the police in July 1994. This resulted in the State making an objection, which was sustained, during closing arguments when defense counsel attempted to refer to that statement to show that Anita did not get her facts right (T. 879).

50. Trial counsel were also ineffective in failing to investigate and present evidence that Anita was upset with Judy when she killed her, because the night before Judy had dropped Melissa off at the Dairy Queen where Anita was working and made Anita take care of Melissa while Judy went drinking at Roland's Bar. People present at the Cummings' house when Anita got home from work, including Loretta McCullar, could have testified that Anita was in a snit over Judy doing that (Appendix 7). In addition, Anita makes reference to this in her December 2, 1994 statement to the police (Appendix 17). This was relevant because Anita denied at trial that she had an argument with Judy before shooting. This omission by counsel was especially prejudicial to Mr. Cummings because it established the probable motive for the fight between Anita and Judy which escalated into Anita shooting and killing Judy.

51. Trial counsel failed to investigate and present at trial available and admissible evidence of the propensity of Anita and Sherry to use violence to resolve disputes (see Averment of Facts, Parts F & G; see also, Appendix 7). In the Cummings' household and their extended circle of relatives and friends, you resolve conflict on the spot by fighting it out. Might makes right, and the best fighter wins the argument. Both Sherry and Anita were seasoned fighters, and both knew how to use a variety of holds, kicks and maneuvers. This was relevant because the most probable reason for Judy's death was an argument between Anita and Judy that escalated into a fight and Anita grabbing a gun.

52. Trial counsel were ineffective in failing to investigate, discover and use at trial evidence to impeach State witness Timothy Chancellor with his prior felony convictions and his mental health history, which includes memory impairment problems (Appendix 27), and in failing to request a preliminary hearing, pursuant to OK Evid. Code, §2105, out of the presence of the jury to determine

the admissibility of Chancellor's testimony. Mr. Chancellor's testimony was particularly prejudicial because he claimed to have asked Mr. Cummings, years after these offenses, about the .38 that he had sold to Mr. Cummings before these offenses. Chancellor purported to quote Mr. Cummings as saying, in response, that the gun was a "gone son of a bitch" (T. 478). Given Mr. Chancellor's memory problems, it is incredible that he could accurately recall Mr. Cummings using those precise words. In addition, others present during that conversation could have testified that was not what Mr. Cummings said (Appendix 7). Chancellor's testimony was particularly prejudicial because jurors would have interpreted it as an admission by Mr. Cummings, which he had not in fact made, that the gun had been used to kill somebody and had been done away with to hide that fact.

53. Trial counsel failed to object to Anita's and Sherry's self-serving claims at trial that they and their children had been abused by Mr. Cummings, and in failing to request a preliminary hearing, pursuant to OK Evid. Code, §2104, out of the presence of the jury, to determine the admissibility of those claims. There were no medical records, teachers, counselors, eye witnesses or any other evidence offered to corroborate the women's claims. Given the absolute absence of any corroborating evidence of the women's claims these unsubstantiated allegations should not have been admitted at trial. Moreover, any probative value those claims may have had was outweighed by the prejudicial effect of their admission.

54. Trial counsel failed to investigate and present at trial available and admissible evidence to rebut Anita's and Sherry's claims that they and their children were abused and dominated by Mr. Cummings. Counsel failed to: request the production of the children's medical, school, and counseling records; failed to request that the children be evaluated by a defense expert; and failed to interview teachers, counselors and other adults familiar with the children. By way of example, Robbie is the child that Mr. Cummings was primarily accused of abusing. However, Robbie started attending school in the Fall of 1992, when he was four years old. He was referred by the school for counseling, which resulted in his being diagnosed with ADHD and attending regular monthly sessions with a counselor. The principal and teachers where Robbie attended school for two years prior to the arrests report that there was no evidence that he was mistreated or abused in any way.

Robbie's counselor at the Guidance Clinic, Steve Beck, was interviewed by DHS in April 1994, and he did not report any evidence of maltreatment or abuse. It was noted that Robbie was made to walk off his excessive energy, but it was not considered to be abusive. (Appendix 43).

55. Trial counsel failed to consult with and present at trial the testimony of necessary experts on relevant issues in this case. By way of example, trial counsel failed to consult with an anthropologist, evolutionary psychologist, historian or sociologist regarding the socio-economic "White trash" subculture in which Mr. Cummings, his wives and the victims were raised, lived, and socialized. As a result, jurors had insufficient information to correctly evaluate the evidence at trial. Trial counsel also failed to consult with an expert on Battered Woman Syndrome (BWS) to testify to rebut Anita's and Sherry's self-serving claims that they were dominated and abused by Mr. Cummings.

56. Trial counsel knew or should have known that the prosecution would rely at trial on a theory that Anita and Sherry are victims of Battered Woman Syndrome, or some analogous theory of duress, and as such committed the offenses out of fear of Mr. Cummings. Nonetheless, trial counsel failed to put the prosecution to its burden of proof on this theory. Trial counsel failed to file an application with the court requesting that Anita and Sherry submit to an examination by an expert witness for the defense for the purpose of determining whether either woman met the criteria for BWS or a duress claim. Trial counsel failed to demand pre-trial notice of the facts upon which the prosecution intended to use as an evidentiary predicate for requesting jurors to infer that the women were victims of BWS or some analogous form of duress, and failed to request the production of any and all medical records for Anita and Sherry, and failed to request the production of any police reports or other documentation to support the BWS/duress claims. Trial counsel failed to file a motion in limine to preclude from being admitted at trial any evidence or arguments that Anita and Sherry acted under Mr. Cummings' dominion and out of fear of him unless the prosecution could lay a sufficient factual predicate for such a claim at trial.

57. Trial counsel was ineffective in failing to consult with appropriate mental health experts in this case and in failing to have Mr. Cummings evaluated by appropriate mental health experts.

Due to trial counsel's omission in this regard, they failed to investigate, develop and present evidence to: rebut at the guilt phase Anita's and Sherry's false allegations that they were dominated and abused by Mr. Cummings; and support at the sentencing hearing a sentence less than death (*see, e.g., Appendix 5 & 6*).

58. Trial counsel failed to adequately impeach Anita and Sherry at trial with the inconsistencies in their various versions of this offense, and failed to adequately argue those inconsistencies during closing arguments to the jury (*see, e.g., Appendix 11*).

59. Due to insufficient pre-trial preparation, trial counsel lacked an adequate knowledge of the facts of this case. By way of example, during cross examination of a police witness during a mid-trial *Jackson v. Denno* hearing, trial counsel is taken by surprise to learn that Mr. Cummings had been interrogated on at least two different occasions, with only the second interrogation having been tape recorded (*see T. 624-27*).

60. Trial counsel were ineffective in failing to meaningfully and adequately consult with Mr. Cummings. As a result, trial counsel failed to learn important information that they should have presented at trial in order to aid jurors in understanding the evidence. By way of example, jurors heard a taped-recorded statement taken from Mr. Cummings by OSBI agents the day after his arrest (Exh. 27). In that statement, Mr. Cummings makes reference to a wood stove and moving the couch. This was meaningless to jurors because they had insufficient information to decipher it. If trial counsel had taken the time to adequately interview Mr. Cummings, they would have learned that each Fall Anita and Sherry bring into the house the wood-burning stove which is their sole source of heat in the house during the winter. The stove is put in the garage every Spring and brought into the house in the Fall. It is placed in the middle room which was being used as a livingroom at the time of this offense. The couch is then moved out of the room onto the front porch, and sometimes the children's bedroom is moved into the middle room to make sure they will be warm, and their old bedroom is then converted into a livingroom. Because Mr. Cummings' father was dying of cancer and had lost a considerable amount of weight, the wood stove was brought in early that year in order to make sure he was warm. Like a typical male, Mr. Cummings did not pay much attention to when

and why the women moved the furniture around and/or brought in the wood stove. His best recollection is that the wood stove had been moved into the house while he was in at the hospital with his father in Oklahoma City, and did not find it odd for the couch to be gone. In addition, Mr. Cummings and his family never purchased new furniture, but salvaged old furniture, which resulted in there being a constant change of couches in his house, as beat up couches were replaced by used couches in slightly better condition.

61. Trial counsel was ineffective in failing to present evidence at trial that, a few days after Mr. Cummings had attempted to clear Sherry of any culpability by falsely claiming that he was the one who helped dispose of Judy's body, Mr. Cummings contacted Agent Birchfield and informed him that he had lied about assisting with moving Judy's body.

62. Trial counsel failed to effectively present the testimony of witness Eddie Fields and failed to impeach his credentials as a "minister", which allowed the prosecution to mislead jurors into believing that Anita Cummings told Mr. Fields about shooting Judy Moody because she was prompted by a desire to "confess her sins," thereby cloaking her admission to Mr. Fields with a credibility that it did not have.

63. Trial counsel failed to interview and call as a defense witness at trial Stella Knight who was available to testify that Mr. Cummings had not called home the day of the offense (see Appendix 31), which would have impeached Anita's and Sherry's testimony that he had called home that afternoon; counsel's failing to impeach the women's false claims about this phone call taking place resulted in jurors inferring that Mr. Cummings had called home to check on whether the women had killed Judy Mayo.

64. Trial counsel failed to investigate, develop, present evidence to support, and meaningfully argue Mr. Cummings' only defense: that Sherry Cummings dominated and controlled this household; that she and Anita killed Judy and Melissa, without Mr. Cummings knowledge, while he was out of town; that the women were bisexual lovers who each also had male lovers other than Mr. Cummings; that the women conspired to frame Mr. Cummings in order to end their marriage to him; that each wife gave a series of inconsistent versions of what happened which are

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conflicting with what the other wife claimed, and are unreliable to the extent of wholly lacking in credibility.

65. 66. Trial counsel failed to investigate and present evidence at trial that Mr. Cummings did not own any handcuffs at the time of the offense, and that he did not acquire them until 1992 in connection with locating bond jumpers for bondsmen in the area. Trial counsel also failed to present evidence that Mr. Cummings and his wives owned handcuffs at the time of their arrests because all of them were involved in bond recovery activities, and hence the handcuffs were tools of their trade. Without this information, jurors were misled to believe that the handcuffs belonged to them for reasons alleged by Anita at trial -- abusing the children and/or bondage sex --, which they were not.

67. Due to ineffective assistance of counsel, jurors did not know that Anita and Sherry Cummings had a consensual bisexual relationship, that began before Anita's marriage to Mr. Cummings, and that Sherry and Anita were lovers. This evidence was extremely relevant to their credibility and their motives to frame Mr. Cummings for an offense which the women had committed.

68. Trial counsel failed to investigate and present available evidence to show that Anita Cummings lied at trial when she claimed she did not know Mr. Cummings was already married to Sherry Cummings when Anita married him, and she lied when she said she did not learn about the marriage to Sherry until Mr. Cummings and Anita moved to Oklahoma a few months after getting married. Anita was living with Sherry and Mr. Cummings when she married him. Sherry attended their wedding, and Anita and Sherry had already engaged in bisexual sexual activity before Anita's marriage to Mr. Cummings. This intimate relationship between Sherry and Anita was relevant to their motive to conspire together to frame Mr. Cummings, and was relevant to impeaching their attempts at trial to portray themselves as having been dominated and abused by Mr. Cummings. In addition, Anita had informed a social worker in 1994, in connection with proceedings for Mr. Cummings to adopt Anita's son Robbie, that she knew Mr. Cummings was married to Sherry when she married him (see Appendix 43).

69. Trial counsel failed to investigate and present available evidence to impeach Anita

Cummings' false claims at trial that Mr. Cummings would engage in bondage sex with her (Appendix 7).

70. Trial counsel failed to interview James Moody and hence failed to learn that the OSBI report about its interview with James was inaccurate. This was extremely prejudicial to Mr. Cummings because it resulted in trial counsel believing the report accurately reported that Judy had told James Moody a week before her death that Mr. Cummings was molesting Melissa. James Moody would have informed trial counsel that Judy never told him anything of that nature.

71. Counsel failed to make proper and timely objections to instances of prosecutorial misconduct at the guilt phase (see, e.g., Proposition 3, below).

72. Trial counsel failed to effectively litigate Mr. Cummings' request to sever Count I from Counts II and III.

73. Trial counsel failed to investigate and present evidence pointing to other suspects who assisted Anita and Sherry in committing this offense, including disposing the bodies of Judy and Melissa, and failed to establish the motives that those other suspects would have had in assisting the women. The most likely other suspects were: Sherry's mother and her boyfriend, David Potter, who lived in Atoka County between Atoka and where Melissa's body was found; and Daniel Franklin Chick, one of Sherry's lovers who was living in the Coalgate area at the time of the offense and who mysteriously moved into the Cummings' household a few weeks after these offenses.

74. Trial counsel was ineffective in failing to object to inadmissible hearsay at trial, and request that it be stricken from the record. By way of example, Anita was allowed to testify that "Rev. Fields" had said to her that everybody knew that Mr. Cummings was involved in these murders, but nobody could prove it (T. 759).

75. Trial counsel failed to interview and call as a defense witness Ella Faye Potter who would have impeached Sherry's and Anita's version of this offense. In her statements to the police (Appendix 35), Ella Faye reported that she had gone back to the Cummings' house the day Judy died. She was looking for Judy. Judy had not shown up for dinner at Ella Faye's house as they had discussed. Ella Faye went to the Cummings' house between 7:00 - 8:00 pm the day Judy was killed.

Nobody was there and Judy's truck was not there. This means that Judy and her pickup had been moved by then, not 5-6 hours later when Mr. Cummings arrived home from Oklahoma City.

76. Trial counsel similarly failed to present the testimony of Loretta McCullar who also went to the Cummings' house that night. In her September 1991 statement to the police (Appendix 33), Loretta reported that she stopped at the Cummings' house around 10:00 pm the day Judy was killed, and nobody was home and Judy's truck was not there. That is further proof that Judy and her truck were moved while Mr. Cummings was still in Oklahoma City.

77. Trial counsel failed to impeach Anita's and Sherry's claims that they had no opportunity to get away from Mr. Cummings. Mr. Cummings was often away from home for one or more days at a time doing odd jobs in Texas and elsewhere, and the women had many opportunities to leave Mr. Cummings. By way of example, Anita Cummings went home with her children to Batesville, AR, to see her mother in January 1994, when her mother had bypass surgery. Moreover, the women often went together to take the kids to doctor's appointments and to run other errands. Mr. Cummings received a \$9000 lump sum payment from Social Security in 1993, which was deposited in a joint checking and savings accounts. Sherry had the check book in her purse when she was arrested. The women had vehicles, money and opportunities to leave Mr. Cummings, and jurors should have known that.

78. Trial counsel failed to investigate the medical records of Anita Cummings in order to impeach her false claims that she had been abused by Mr. Cummings, had an eating disorder, and used birth control pills in excess to cause bleeding.

79. Trial counsel failed to investigate the medical records of Sherry Cummings in order to impeach her false claims that she had been abused by Mr. Cummings (*see, e.g.*, Appendix 7).

80. Trial counsel were ineffective in failing to present evidence at trial that Mr. Cummings, Anita and Sherry owned handcuffs in connection with their activities as bond recovery agents. They would use the handcuffs in making citizens arrests of persons for whom bench warrants had been issued for violating the conditions of their bail bonds. By way of example, Anita Cummings was paid, in 1993 or 1994, by Kidd Bonding and by Shipler Bonding for bringing Margaret Vitela into

custody.

81. Trial counsel failed to investigate and present evidence that Melissa Moody was an active and rebellious young adolescent, and was a "mama's girl" (Appendix 7), such that she would not have meekly and quietly allowed Anita and Sherry to confine her in a small bedroom for over ten hours, would not have allowed herself to be handcuffed for hours without protest, and would have insistently asked about her mother during the alleged confinement. This evidence would have impeached the women's claims that they kept Melissa confined in their small bedroom for over 10 hours, and was handcuffed during much of that time, and that Melissa never complained or protested, and never asked about her mother. Given the improbabilities of the wives' claims in light of Melissa's character, with this evidence jurors would have realized that Melissa was not kept alive for over 10 hours after her mother's death, but was probably killed contemporaneously with her mother.

82. Trial counsel failed to investigate and present evidence that Melissa Moody was a virgin and had not begun menstruating as yet (Appendix 7). This testimony would have served to impeach the Anita claim that Melissa would voluntarily submit to sexual activity, and joke around right after. It would also have served to dispel any innuendo that Melissa might have been pregnant at the time of her death.

83. Trial counsel failed to analyze the physical evidence in this case, and failed to present evidence and arguments that the physical evidence is inconsistent with Anita's and Sherry's claims as to how Judy Mayo was shot to death. By way of example, trial counsel failed to argue that the path of the bullet wounds, as indicated on the Medical Examiner's Report (Appendix 14), is inconsistent with Anita's version of how she shot Judy, and that Judy could have been shot during an argument; and failure to argue that the abrasion on the leg was most likely the result of a scuffle during that argument; and failure to elicit that the abrasion on the leg could not have been a rope burn, and that it had to have been inflicted pre-death.

84. Trial counsel failed to investigate Anita Cummings' religious beliefs and attitudes prior to her arrest in this case. As a result, counsel failed to learn that Anita had no religious beliefs and

considered herself to be an atheist. Counsel failed to impeach Anita's attempt at trial to portray herself as a contrite murderess who "confessed" her sins to a minister (Eddie Fields, who has questionable clergy credentials) out of remorse. Counsel also failed to object to Anita's fake displays of religiosity in the courtroom, including wearing a crucifix on a chain around her neck and carry a Bible with her to the witness stand.

85. Counsel knew or should have known that Mr. Cummings would be prejudiced by having this case tried by a jury drawn from residents of Coal County. Coal County is a sparsely populated county with a population of less than 6000 people in 1990. The county seat is Coalgate, which has a population under 2000 people. Most of the residents of Coalgate and Coal County knew Mr. Cummings and his family, or had heard about them. Given the notoriety from their household consisting of three martial partners, many rumors circulated about Mr. Cummings in the county. A May 7, 1996 newspaper article in the Ada Evening News noted that this case "has attracted tremendous interest and discussion in Coal County since the murders occurred in 1991" (Appendix 50). Most of the jurors who presided at Mr. Cummings' trial stated that they had read about the case in the newspaper and/or heard about it on T.V. The 1994 arrests contributed significantly to rumors in Coal County. Local newspaper coverage of this case included inadmissible information. For example, an August 3, 1994 article in the Coalgate Record Register makes reference to Mr. Cummings having failed an OSBI polygraph, a "'family" lifestyle" extending beyond the traditional one man-one woman marriage, and allegations of mind control, fear and abuse (Appendix 50).

86. During the undersigned post-conviction counsel's investigation of this case, considerable time was spent in Coal County. Practically everyone spoken to knew the Cummings and had stories to tell about them. An example of the unfounded rumors about this family is the story that a baby had been buried behind the Cummings' house. The OSBI heard this rumor, questioned Sherry about it in August 1994, and found it to be groundless.

87. Trial counsel failed to file and litigate appropriate motions to correct Mr. Cummings name as it appears in the Information and pleadings in this case, and failed to file a motion in limine to prohibit Mr. Cummings being referred to as "Jessie James" in the presence of the jury, and failed

to object at trial to the use of "Jessie James" to refer to Mr. Cummings.

88. Trial counsel failed to investigate and present evidence to show that the Missing Person report admitted at trial (Exhibit 23, reproduced in Appendix 40) was not signed by Mr. Cummings, but was signed by his father. The signature on the Missing Person report is that of Mr. Cummings' father. Mr. Cummings first name is "Jessie" and his father's first name was "Jesse". The signature on the Missing Person report is that of "Jesse Cummings" and it is his father's handwriting.

89. Trial counsel failed to present evidence that Ella Faye Potter was the person who informed Mr. Cummings that Judy's pickup had been seen by people two days after her death and that it was parked on the side of Highway 43 near Ella Faye's house (Appendix 35). Trial counsel also failed to present evidence that Mr. Cummings then reported the location of Judy's pickup to the Sheriff's Office and he was told to move it before somebody stripped it. Due to these omissions, jurors were allowed to speculate that Mr. Cummings knew where the truck was and moved it (T. 485-86), because he had been involved in Judy's death and leaving the pickup there.

90. Trial counsel were ineffective in failing to review all of the evidence obtained by the OSBI and law enforcement agencies during their investigation of these offenses, including evidence seized from the Cummings' household. Trial counsel only viewed the photos and evidence that the prosecution planned to use at trial. As a result, trial counsel was not aware that the OSBI had in its possession sexually explicit photos seized from the Cummings' household, which depicted adults, including Anita and Sherry Cummings, engaging in sexual activity with a variety of other adults. These photos were relevant to show the women's bisexual relationship with each other and other females, and potentially identified the third person that they recruited to assist them in disposing of Judy's body and Melissa.

91. Trial counsel failed to request that jurors otherwise qualified to serve on the jury except for their views on the death penalty would be permitted to serve during the guilt phase of the trial, and to request that additional alternate jurors should be selected for each such juror in order to replace during the sentencing stage of the jury trial those jurors not qualified to decide sentencing.

including one of a young child, and arguing proportionality was doomed to failure.

96. To make things worse, defense counsel during closing argument also conceded, without Mr. Cummings' consent or advance knowledge, that Mr. Cummings had raped Melissa before she was killed and had raped Lahoma Yaws II when she was 14 years old (T. 993, 994). Mr. Cummings had never told his counsel that he committed either of those rapes. At the conclusion of the guilt phase, the trial court had granted a directed verdict on Count III which was premised on the rape of Melissa. There was considerable evidence that could have been use to argue that the rape of Lahoma Yaws II was a fabrication that Anita started, which Lahoma II initially denied but subsequently agreed to say happened, because she is Sherry's younger sister. Lahoma II had never reported the rape to the police. Despite her claim that she became pregnant and had a miscarriage, she had never seen a medical doctor. Although jurors did not know this, Lahoma II had made sexual assault allegations against her mother's boyfriend the month before this alleged rape, which she recanted. Nor did jurors know that many of Lahoma's relatives do not even believe this rape ever happened, and they report that she was sexually active long before the alleged incident.

97. Conceding two murders and two rapes was tantamount to conceding the continuing-threat aggravators in this case. Trial counsel are professionally prohibited from making such concessions of guilt without the informed consent and advance knowledge of their client. Trial counsel are professionally prohibited from admitting guilt when the client has never admitted guilt to them. There can be no reasonably competent strategic reason for admitting guilt under the circumstances of this case.

98. At the sentencing stage of Mr. Cummings' trial, counsel was ineffective in failing to investigate, develop, present and argue relevant mitigating evidence and evidence to rebut the aggravating circumstances in this case (see *Averment of Facts, above*). Trial counsel's preparation for the penalty stage was haphazard and unfocused, depriving Mr. Cummings of his right to effective assistance of counsel in the determination of the appropriate sentence in this case and his right to a reliable sentencing decision free of arbitrary factors. Trial counsel failed to provide jurors with the tools needed in order to channel and guide their discretion and for jurors to give effect to

relevant mitigating circumstances.

99. Trial counsel failed to request a mistrial as to the sentencing stage when the trial court dismissed Count III (T. 855) which had been premised on Anita's allegations that Melissa had been raped. Trial counsel also should have filed a motion in limine prior to the sentencing phase to prohibit the prosecution from relying on or making any arguments regarding that claim which had been made by Anita to bolster her duress claim, but which was not corroborated by Sherry or any other evidence. There was insufficient indicia of reliability as to Anita's claim that Melissa had been raped by Mr. Cummings for that claim to be admissible. Moreover, the prejudicial value of the weak assertion by Anita about the rape substantially outweighed its probative value, and should not have been considered by the jury or argued by the prosecution. When the prosecution moved to incorporate at the sentencing stage all of the guilt-stage evidence, trial counsel also should have objected to incorporating Anita's testimony about the alleged rape of Melissa, and asked jurors to be admonished not to consider it, and the prosecution directed not to use it. Moreover, jurors should have been given a jury instruction which directed them not to consider that evidence, and/or to permit jurors to consider it only if jurors found sufficient evidence to corroborate the testimony of Anita, who was an accomplice to the alleged rape. Due to defense counsel's failure to protect Mr. Cummings' rights, the death sentences in this case are tainted by the prosecution's heavy reliance in closing arguments on the unsubstantiated allegation made by Anita Cummings that Melissa had been sexually assaulted by him before her death (T.990-92, 995-96).

100. Trial counsel failed to investigate and present available evidence to rebut State witness Lahoma Yaws II claim that Mr. Cummings had raped her in April 1991, failed to request a preliminary hearing, pursuant to OK Evid. Code §2105, to determine the admissibility of Lahoma's testimony, failed to object to her testimony at trial, failed to adequately impeach her, and failed to argue in closing arguments her motives to lie and all available inferences that she was lying.

101. Trial counsel failed to have Mr. Cummings evaluated by an appropriate mental health professional. As a result, jurors were denied relevant information about Mr. Cummings and his intellectual limitations, including the fact that he has an 81 I.Q. which places him in the borderline

retarded range of functioning (see Appendix 5).

102. Trial counsel failed to investigate, develop and present evidence, including expert testimony, regarding Mr. Cummings' addiction to Percodan as a result of multiple long-term painful medical conditions, and the effects of that addiction on his thought processes.

103. Trial counsel failed to request an over-night recess between the jury's verdict at the guilt phase and the commencement of the sentencing hearing (see Proposition 4).

104. At the sentencing stage, trial counsel only called a few witnesses who provided minimal information about Mr. Cummings and basically were called to ask the jurors to spare his life. The undersigned has uncovered an abundance of information about Mr. Cummings' childhood and development which is relevant to the aggravation and mitigation issues in this case. Trial counsel failed to ascertain and present this information. As a result jurors were denied relevant information about Mr. Cummings in particular the hereditary and environmental influences which prevented him from having meaningful options in his life.

105. Counsel failed to present the testimony of an expert with expertise in the White Trash culture relevant to this case. Such testimony was necessary to aid jurors in understanding the environment and values in which Mr. Cummings was raised. Without that information to aid jurors, they lacked a understanding of how the confluence of numerous cultural factors beyond his control limited Mr. Cummings choices in life.

106. Counsel also failed to consult with and present the testimony of a witness to testify regarding the conditions of confinement in prison for a person convicted of First Degree Murder in Oklahoma and sentenced to Life or LWOP, including the Department of Corrections classification system for keeping such persons in secure facilities. Without this information, jurors were unable to meaningfully assess the weight to be given to the "continuing threat" aggravating circumstance, or give appropriate consideration to the life-sentencing options. Lay persons who are unfamiliar with prisons have a misconception that prisons are country clubs where prisoners spend their days lolling around watching T.V., exercising in weight rooms, and playing basketball. People unfamiliar with prisons are unaware of the harsh conditions and severe restrictions under which maximum security

prisoners live, and the security measures used to prevent escapes and other problems. As a result, they fail to understand that Life and LWOP are extremely harsh and severe punishments.

107. Trial counsel failed to research, file and argue motions in limine and assert objections at trial to the prosecution's evidence in support of the continuing threat aggravating circumstance (see Proposition 6).

108. Counsel failed to make proper and timely objections to instances of prosecutorial misconduct at the sentencing stage (see, e.g., Proposition 3, below).

109. Trial counsel was ineffective in failing to ensure that jurors were properly, adequately and correctly instructed as to the relevant law at the sentencing stage of Mr. Cummings' trial (see Proposition 6).

Direct Appeal

110. Mr. Cummings is being represented on direct appeal by William H. Luker, Esq., Division Chief for the Capital Direct Appeals Division of the Oklahoma Indigent Defense System.

111. Appellate counsel was ineffective in failing to ensure a complete and proper record was filed on appeal, and in failing to properly raise and otherwise properly preserve as error meritorious issues affecting Mr. Cummings' fundamental rights where the circumstances presented clearly required that such action be undertaken in order to protect and preserve his rights.

112. As is more fully set forth in this Application, there are significant and obvious issues implicating the constitutionally and fundamental fairness of Mr. Cummings' trial that were not asserted on direct appeal by appellate counsel. Some of the issues asserted by appellate counsel are clearly significantly weaker than issues asserted in this post-conviction application. Hence, there could be no reasonably competent strategic decision by appellate counsel not to pursue available issues that would have required the reversal of Mr. Cummings' convictions and/or sentences on direct appeal.

113. This Court's decision in *Walker v. State*, 933 P.2d 327 (Okla. Cr. 1997) constituted a material and significant departure from what was the common understanding of the Bar of criminal appeals counsel in the State of Oklahoma as to the scope of their duty and responsibility to

investigate facts outside the "record on appeal" as defined by Rule 1.13(F), Rules of the Court of Criminal Appeals. Prior to the decision in *Walker*, appellate counsel did not have notice there would be such a substantial change in the responsibilities of appellate counsel in a capital case in Oklahoma. Hence, *Walker* denied OIDS and its Capital Direct Appeals (CDA) Division with a sufficient opportunity to restructure the staffing and resources available in the CDA Division in order to provide Mr. Cummings with representation which comports with *Walker*.

114. At all times material to this case, OIDS' CDA Division lacked sufficient personnel and resources, including money to consult with appropriate experts, to engaged in the wide-ranging investigation that has been conducted by the undersigned counsel. Due to lack of adequate resources, appellate counsel and the CDA Division had a conflict of interest in how their sparse resources were allocated between Mr. Cummings and their other clients.

115. To the extent the "record on appeal" put appellate counsel on notice to reasonably investigate any fact matter that is the basis for an issue in this Application, and appellate counsel failed to investigate it, Appellate Counsel denied Mr. Cummings effective representation on direct appeal in failing to conduct that investigation. To the extent the record on appeal did not put appellate counsel on notice to investigate such facts that have now come to light, then those facts were "unavailable" on direct appeal (see Proposition 1).

Prejudice

116. Mr. Cummings was prejudiced by counsel's errors and omissions both individually and cumulatively.

117. None of the errors and omissions of Mr. Cummings' prior counsel may fairly be attributed to a reasonable strategy. Had Mr. Cummings received the effective assistance of counsel, there is a reasonable probability that he would not have been convicted of First Degree Murder and sentenced to death, and the outcome of this Court's appellate review of his conviction and sentence would be different.

118. Mr. Cummings' Statement of Arguments and Authorities in Support of this Application are set forth in Addendum A, which is incorporated herein by reference.

III. MISCONDUCT BY THE PROSECUTION IN USING FALSE EVIDENCE, SUPPRESSING MATERIAL EVIDENCE, AND MAKING IMPROPER COMMENTS DENIED MR. CUMMINGS A FAIR TRIAL.

Claims for Relief

119. Misconduct by the prosecution deprived Mr. Cummings of his rights to a fair trial, a fair and reliable sentencing determination, and a fair and full appellate review, in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 2, §§2, 7, 9, 19, and 20 of the Oklahoma Constitution.

Factual Contentions in Support

120. 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* App. Brief, Propositions 4, 9 & 13).

121. The prosecution knowingly used false, misleading, and inaccurate evidence, testimony and arguments at trial, and knowingly permitted and created false impressions as to the evidence at trial, including the examples cited herein.

122. The prosecution failed to disclose to the defense all evidence in its possession and control, or that of its agents, that was favorable and material to the issue of guilt and/or punishment, including impeachment evidence and evidence which could have reasonably weakened or affected evidence introduced against Mr. Cummings.

123. It is fundamentally unfair and intentionally misleading to jurors for the prosecution to take inconsistent positions with co-defendants. At Mr. Cummings' trial, the prosecution took the position that Mr. Cummings was responsible for Anita shooting Judy, even though he was out of

town, based on the State's theory that he instilled such fear in Anita that she killed in defense of herself and/or her young son, because Mr. Cummings supposedly had threatened to kill them if she did not obey his alleged order to kill Judy. If the prosecution truly believed that Anita acted out of duress, that would have absolved Anita of all criminal responsibility for killing Judy. Nonetheless, the prosecution required Anita to plea guilty to murder in exchange for which she is serving a Life sentence, which is fundamentally inconsistent with Anita being legally non-responsible for Judy's death. Similarly, the prosecution took the position that Sherry's participation in these killings was the result of the duress arising from her claimed fear of Mr. Cummings. If she acted out of duress, that would absolve her of criminal responsibility. Nonetheless, she pled guilty to two counts of accessory after the fact for which she is serving concurrent 35-year sentences. The prosecution's position at Mr. Cummings' trial is fundamentally inconsistent with its position regarding the convictions and sentencing of Anita and Sherry. Moreover, jurors were not aware of these inconsistencies. Among other things, the jury charge did not provide jurors with meaningful instructions regarding the prosecution's burden of proving duress beyond a reasonable doubt (see Proposition 6).

124. The prosecution knew or should have known that Sherry had made accusations to law enforcement authorities that she had been raped by several males during her marriage to Mr. Cummings, and that those accusations were not found to be sufficiently reliable and credible to file charges against any of the men so accused (see Appendix 7 & 20). Sherry's unsubstantiated rape allegations were relevant to her credibility and truthfulness. This information was not disclosed to defense counsel prior to or during trial, in violation of *Brady*, and it has only recently come to light (*id.*).

125. The prosecution knew or should have known that there was no evidence to corroborate Anita Cummings' self-serving allegations about the supposed rape of Melissa Moody. Nonetheless, the prosecution went forward with presenting at trial this unsubstantiated accusation in order to prejudice Mr. Cummings in the eyes of jurors, and to obtain murder convictions and death sentences against Mr. Cummings based on unsupported and inadmissible "bad character" evidence. The

prosecution did not object when Mr. Cummings moved for a directed verdict at the close of the evidence, which resulted in the trial court dismissing that count (T. 855-56). Mr. Cummings was prejudiced because the unreliable rape testimony was not otherwise admissible at trial, and the prejudicial effect of that testimony outweighed its probative value. Mr. Cummings was prejudiced because it was impossible for the jurors to set aside and not consider Anita's testimony regarding those allegations during their deliberations.

126. The prosecution committed reversible error in relying on the alleged rape of Melissa during closing arguments at the guilt phase (see, e.g., T. 862, 869, 902 & 906) and the sentencing stage (see, e.g., T. 990, 991, 995-6) of Mr. Cummings' trial. Given the unsubstantiated nature of Anita's allegations about the rape, and Sherry's testimony which was inconsistent with Anita's version and impeached her allegations, the trial court correctly dismissed Count III. The prosecution knew that and nonetheless intentionally relied on a rape allegation that should not have been considered for any purpose.

127. The prosecution knew or should have known that Lahoma Yaws II, the youngest sister of Sherry Cummings and the only prosecution witness at the Sentencing Hearing, had a reputation for lying, had been sexually active before the alleged 1991 rape, and had in the past accused her mother's boyfriend of sexually abusing her then subsequently retracted that accusation. The prosecution knowingly used testimony at trial that the prosecution knew or should have known was unreliable and false, and/or the prosecution presented the testimony of Lahoma Yaws in a false light by keeping from the defense and jurors material information relevant to her reputation for truthfulness.

128. The prosecution knew or should have known that the OSBI report regarding its interview with James Moody was inaccurate in falsely asserting that James Moody had told the OSBI agent that Judy Moody had told James that Mr. Cummings was molesting her daughter. James Moody never told that to the OSBI agent, and Judy Moody never said that to James Moody (see Appendix 34 & 7).

129. The prosecution failed to produce to the defense all information regarding all interrogations and questioning of persons in this case by law enforcement officers. By way of example, defense counsel were not provided with information regarding interviews with Mr. Cummings by Agent Birchfield and others when Mr. Cummings' recanted his false confession. Another example is the prosecution's failure to produce the audio tape or any other record of the second tape-recorded interview of Mr. Cummings on July 30, 1994. Mr. Cummings gave two separate tape-recorded statements to the authorities at different times that day: one at the OSBI office in Antlers, and another in the Atoka County Sheriff's Office. Only the recording from the first taped interview has been produced to the defense to date. The prosecution knew or should have known that a second tape-recorded statement was taken from Mr. Cummings, but nonetheless the prosecution has failed to produce that statement and police reports regarding it.

130. The prosecution knew or should have known that State-witness Timothy Chancellor (aka Youngblood) had a prior felony record and that he had been treated for mental health problems which affected his memory (see Appendix 27). This information was relevant to his credibility and the reliability of his trial testimony. Nonetheless, the prosecution failed to disclose this information to defense counsel before or during trial.

131. The prosecution knew or should have know that witness Edward Fields was not a reputable minister, and therefore represented him to the jury at trial as a minister in a false light. The prosecution exploited this misimpression in order to bolster Anita Cummings' credibility by implying Anita "confessed" to Mr. Fields in his capacity as a minister and hence was feeling remorse for her actions, and hence must have been telling the truth.

132. The prosecution knew or should have known Anita Cummings had never been married before she married Jessie Cummings, and that her first child was conceived out of wedlock with a man to whom she had never been married. By way of example, Anita acknowledged this in the Custody Proceedings. Nonetheless, in reckless disregard for the truth, the prosecution stated in its opening statement at the guilt phase of Mr. Cummings' trial Anita had a child by a previous "marriage" (T. 371 & 372).

133. A major defect in the prosecution's case at trial is the absence of any motive by Mr. Cummings to want Judy or Melissa killed. Anita and Sherry Cummings testified that they did not know of any reason he would have to want Judy or Melissa dead (T. 541, 714). In order to fill in this crucial gap in the State's case, the prosecution knew or should have known that Anita Cummings was influenced by one or more state agents to manufacture a claim that Jessie had sex with Melissa before Melissa was killed. Anita did not embellish her confessions to the police with this claim until her July 30, 1994 Statement (Appendix 19), long after her arrest and after having been questioned numerous times. Similarly, Anita was induced by state agents to fabricate, months after her arrest, a false claim that Mr. Cummings had whispered in her ear a confession to having slit Melissa's throat (Appendix 17), despite telling police in her initial statements she had never been given any indication from Mr. Cummings' as to what happened to Melissa, and that Anita thought he made Sherry kill her (Appendix 19, p. 34).

134. The prosecution knew or should have known that Anita and Sherry Cummings had never been diagnosed as suffering from Battered Woman Syndrome or any analogous form of duress. The prosecution knew or should have known that the women's claims of being dominated and controlled by Mr. Cummings were not corroborated by credible evidence, and there were no medical records or police reports to corroborate their claims. The prosecution knew other people had lived in the Cummings' household, including Daniel Chick and Shirley Cunningham, and that the Cummings' house was frequented by many visitors on a regular basis, and that Anita and Sherry were not kept isolated from the outside world. Nonetheless, the prosecutor presented the testimony of Anita and Sherry in a false light to convey the impression they were the victims of Battered Women Syndrome or some analogous form of duress.

135. The prosecution purposely misled the defense about its theory that Anita and Sherry were battered women who acted out of duress in self-defense and/or to defend their children. The prosecution did not have on its witness list any mental health expert to testify about Anita and/or Sherry being battered women who acted out of duress. During opening statements, the prosecution did not reveal that to be its theory. It was not until closing arguments the prosecution laid out its

theory that these women were beaten into submission and were victims of constant fear through their household. At that point it was too late for defense counsel to appreciate the need to object to the prosecution inferring that the women were battered women without any expert testimony or meeting the criteria set forth by this court in *Bechtel v. State*, 840 P.2d 1 (Okl.Cr. 1992).

136. The prosecution knew or should have known that State-witness Anita Cummings was not telling the truth when she claimed that Mr. Cummings had confessed to her, by whispering in her ear during bondage sex, that he had stabbed and killed Melissa Moody. Anita did not embellish her account with this claim until just days before she testified at the December 1994 Preliminary Hearing, which was over five months after her arrest (Appendix 17). Anita embellished her accounts of the killings with this claimed admission against interest by Jessie in order to supply the prosecution with a motive for Jessie and as an attempt to provide some corroboration for Sherry's testimony, because Sherry claimed to be asleep and/or not hear anything when Melissa was killed.

137. The prosecution misrepresented to jurors during its opening statement at the guilt phase that there would be evidence that Mr. Cummings told Melissa Moody, when he allegedly left his home with her the day she died, that she was going to see her mother (T. 372). The only testimony offered was Anita saying that "somebody" allegedly told Melissa that, but Anita did not recall who (T. 704 & 748-9).

138. During arguments over a defense objection, the prosecution misrepresented to the trial judge there would be testimony that Judy Mayo's body was dragged to the pond with her arms being out (T. 394). No such testimony was offered or presented at trial.

139. The prosecution used evidence it knew to be false when it presented testimony Mr. Cummings had called home the day of the offense by placing a phone call to the neighbor who lived across the street from the Cummings' home, Stella Knight. The prosecution knew of Stella Knight informed police no phone calls were received by her that day for anyone at the Cummings' house (Appendix 31).

140. The prosecution failed to disclose to the defense the audio tapes seized from Mr. Cummings' residence and/or house trailer which Mr. Cummings had made in 1991, during his

133. A major defect in the prosecution's case at trial is the absence of any motive by Mr. Cummings to want Judy or Melissa killed. Anita and Sherry Cummings testified that they did not know of any reason he would have to want Judy or Melissa dead (T. 541, 714). In order to fill in this crucial gap in the State's case, the prosecution knew or should have known that Anita Cummings was influenced by one or more state agents to manufacture a claim that Jessie had sex with Melissa before Melissa was killed. Anita did not embellish her confessions to the police with this claim until her July 30, 1994 Statement (Appendix 19), long after her arrest and after having been questioned numerous times. Similarly, Anita was induced by state agents to fabricate, months after her arrest, a false claim that Mr. Cummings had whispered in her ear a confession to having slit Melissa's throat (Appendix 17), despite telling police in her initial statements she had never been given any indication from Mr. Cummings' as to what happened to Melissa, and that Anita thought he made Sherry kill her (Appendix 19, p. 34).

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135. The prosecution purposely misled the defense about its theory that Anita and Sherry were battered women who acted out of duress in self-defense and/or to defend their children. The prosecution did not have on its witness list any mental health expert to testify about Anita and/or Sherry being battered women who acted out of duress. During opening statements, the prosecution did not reveal that to be its theory. It was not until closing arguments the prosecution laid out its

theory that these women were beaten into submission and were victims of constant fear through their household. At that point it was too late for defense counsel to appreciate the need to object to the prosecution inferring that the women were battered women without any expert testimony or meeting the criteria set forth by this court in *Bechtel v. State*, 840 P.2d 1 (Okla. Cr. 1992).

136. The prosecution knew or should have known that State-witness Anita Cummings was not telling the truth when she claimed that Mr. Cummings had confessed to her, by whispering in her ear during bondage sex, that he had stabbed and killed Melissa Moody. Anita did not embellish her account with this claim until just days before she testified at the December 1994 Preliminary Hearing, which was over five months after her arrest (Appendix 17). Anita embellished her accounts of the killings with this claimed admission against interest by Jessie in order to supply the prosecution with a motive for Jessie and as an attempt to provide some corroboration for Sherry's testimony, because Sherry claimed to be asleep and/or not hear anything when Melissa was killed.

137. The prosecution misrepresented to jurors during its opening statement at the guilt phase that there would be evidence that Mr. Cummings told Melissa Moody, when he allegedly left his home with her the day she died, that she was going to see her mother (T. 372). The only testimony offered was Anita saying that "somebody" allegedly told Melissa that, but Anita did not recall who (T. 704 & 748-9).

138. During arguments over a defense objection, the prosecution misrepresented to the trial judge there would be testimony that Judy Mayo's body was dragged to the pond with her arms being out (T. 394). No such testimony was offered or presented at trial.

139. The prosecution used evidence it knew to be false when it presented testimony Mr. Cummings had called home the day of the offense by placing a phone call to the neighbor who lived across the street from the Cummings' home, Stella Knight. The prosecution knew of Stella Knight informed police no phone calls were received by her that day for anyone at the Cummings' house (Appendix 31).

140. The prosecution failed to disclose to the defense the audio tapes seized from Mr. Cummings' residence and/or house trailer which Mr. Cummings had made in 1991, during his

interviews with various persons regarding the deaths of Judy and Melissa. Those audio tapes contained material information, including an interview with somebody who had seen Sherry Cummings at the Dairy Queen the night Judy was shot. That not only impeaches Sherry's claim that she was at home all night, it also points to Sherry going there to signal to Anita that everything has been taken care of in terms of disposing of Judy and Melissa before Mr. Cummings returned from Oklahoma City that night.

141. The prosecution failed to disclose to the defense sexually explicit photos seized from the Cummings' household after the July 1994 arrests. Those photos depict adults in sexually explicit poses, including Mr. Cummings' wives and other women and men. Those photos were relevant to the women's credibility and identity of the person they recruited to assist them dispose of Judy and Melissa, and the photos should have been produced during pre-trial discovery.

142. The prosecution committed misconduct during closing arguments at both phases of Mr. Cummings' trial. By way of example, the prosecution improperly argued at sentencing stage that Mr. Cummings' had raped Melissa Moody (T. 990-992, 995-96). The evidence of that rape was so insufficient at trial that the trial court directed a verdict against the State on Count III (T. 855). Nonetheless, the prosecution asked jurors to believe the rape had taken place in deciding whether the prosecution had proven beyond a reasonable doubt the "continuing threat" aggravating circumstance.

143. The death sentences in this case are tainted by the prosecution's misstatement of the facts during closing arguments at the sentencing stage. Defense counsel had made a proportionality argument to jurors based on Anita getting a Life sentence and Sherry a sentence of 35 years (T. 994). The prosecution then incorrectly told jurors that Sherry was getting a Life sentence (T. 995). Subsequent to Mr. Cummings' trial, Sherry was given a 35-year sentence which was what had been agreed to with the State prior to Mr. Cummings' trial (Appendix 53).

144. The prosecution engaged in misconduct at the sentencing hearing in arguing to jurors to find the avoiding-arrest aggravating circumstance was proven by the alleged rape of Melissa Moody. This was improper argument because Mr. Cummings had been found not guilty of the Child Abuse count based on the alleged rape, and the prosecution knew their evidence was insufficient to

establish that a rape had occurred in order for jurors to consider it.

145. Mr. Cummings' Statement of Arguments and Authorities in Support of this Application are set forth in Addendum A, which is incorporated herein by reference.

IV. MR. CUMMINGS WAS DENIED A FAIR AND RELIABLE DETERMINATION OF THE APPROPRIATE SENTENCE IN THIS CASE, AND THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE AGGRAVATING CIRCUMSTANCES.

Claims for Relief

146. Mr. Cummings was denied a fair trial and a fair and reliable determination that death is the appropriate sentence in this case, and is being denied a fair and adequate appellate review of his death sentence, in violation of his rights under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 2, §§2, 3, 7, 9, 19 & 20 of the Oklahoma Constitution.

Facts in Support.

147. 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 Addenda and Appendix, 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 App. Brief, Propositions 6, 7 9, 10, 11, 12, 13, 14 & 15).

148. A death sentence in this case is manifestly unreasonable. It is the product of passion, prejudice and arbitrary factors, including discrimination on the basis of poverty and socio-economic class. It is not supported by the evidence. It is not the result of a fundamentally fair trial proceeding. It was not determined in a fundamentally reliable manner.

149. It is not possible to have confidence in the reliability of the outcome of Mr. Cummings' trial because it was tainted by inadmissible, unreliable, false and misleading, and prejudicial evidence, examples of which are included herein.

150. Newly discovered evidence and evidence not previously available (see Proposition I), create significant residual doubt about Mr. Cummings' role and participation in these offenses, rendering unreliable the results at the sentencing stage of his trial. Standing alone or in proportion to the sentences of Anita and Sherry, the death sentences for Mr. Cummings are not appropriate and should be modified to a lesser sentence.

151. At the sentencing stage before the jury, trial counsel without Mr. Cummings' consent conceded his guilt for the murders in this case. Only Mr. Cummings' could authorize his counsel to do that, and he did not. Mr. Cummings never told his counsel he participated in these offenses, but rather has maintained his innocence all along. Trial counsel conceding Mr. Cummings' guilt was inconsistent with the facts as reported by Mr. Cummings' and is the equivalent of perpetuating a fraud on the jurors and the court.

152. There is no competent strategic reason for defense counsel to have conceded Mr. Cummings' guilt at the sentencing stage. One of the mitigating circumstances in this case was residual doubt as to guilt (Instr. #8, OR 465). Conceding guilt to the murders resulted in a waiver of that mitigating circumstance, which was one of the most important ones in this case because there was no evidence to corroborate the women's claims about Mr. Cummings' participation. In addition, it is perfectly reasonable and acceptable for a trial attorney to acknowledge to jurors that the defense respects their guilt-phase verdicts even if counsel disagrees with it. Politely explaining to jurors that the defense respects their guilty verdicts, and knows that jurors were conscientious in arriving at it, is an effective strategy to ask jurors to consider the possibility the women were in fact lying and Mr. Cummings may not have done the things the women claimed. It is the only reasonable strategy in this case, because conceding guilt to two ostensibly cold-blooded murders, including one of a young child, and arguing proportionality was doomed to failure.

153. To make things worse, defense counsel during closing argument also conceded, without Mr. Cummings' consent or advance knowledge, he had raped Melissa before she was killed and had raped Lahoma Yaws II when she was 14 years old (T. 993, 994). Mr. Cummings had never told his counsel he committed either of those rapes. At the Preliminary Hearing, the trial court had

found the evidence insufficient to support the prosecution's oral motion to amend the Information with a Child Abuse count based on the alleged rape of Lahoma Yaws (P.H.-I, p. 369-73). At the conclusion of the guilt phase at trial, the trial judge granted a directed verdict on Count III which was premised on the rape of Melissa. In addition, there was considerable evidence which could have been use to argue that the rape of Lahoma Yaws was a fabrication that Anita started, which Lahoma initially denied but subsequently agreed to say happened, because Lahoma is Sherry's younger sister. Lahoma had never reported the rape to the police. Despite Lahoma's claim she became pregnant and had a miscarriage, she had never seen a medical doctor. Although jurors did not know this, Lahoma had made sexual assault allegations against her mother's boyfriend the month before this alleged rape, which she recanted. Nor did jurors know that many of Lahoma's relatives do not even believe this rape ever happened, and they report she was sexually active long before the alleged incident.

154. Conceding two murders and two rapes was tantamount to conceded the continuing-threat aggravators in this case. Trial counsel are professionally prohibited from making such concessions of guilt without the informed consent and advance knowledge of their client. Trial counsel are professionally prohibited from admitting guilt when the client has never admitted guilt to them. There can be no reasonably competent strategic reason for admitting guilt under the circumstances of this case.

155. The death sentences in this case are tainted by the prosecution's heavy reliance in closing arguments on the unsubstantiated allegation made by Anita Cummings that Melissa had been sexually assaulted by Mr. Cummings before her death (T.990-92, 995-96). Once the trial court dismissed Count III premised on that rape allegation (T. 855), trial counsel should have moved for a mistrial as to the guilt phase and/or the sentencing phase. Trial counsel should also have filed a motion in limine prior to the sentencing phase to prohibit the prosecution from relying on or making any arguments regarding that claim which had been made by Anita to bolster her duress claim, but which was not corroborated by Sherry or any other evidence. There was insufficient indicia of reliability as to Anita's claim that Melissa had been raped by Mr. Cummings for that claim to be

admissible. Moreover, the prejudicial value of the weak assertion by Anita about the rape substantially outweighed its probative value, and should not have been considered by the jury or argued by the prosecution. When the prosecution moved to incorporate at the sentencing stage all of the guilt-stage evidence, trial counsel also should have objected to incorporating Anita's testimony about the alleged rape of Melissa, and asked jurors to be admonished not to consider it, and the prosecution directed not to use it. Moreover, jurors should have been given a jury instruction which directed them not to consider that evidence, and/or to permit jurors to consider it only if jurors found sufficient evidence to corroborate the testimony of Anita, who was an accomplice to the alleged rape (OUJI CR 9-25 - 9-32).

156. Mr. Cummings' death sentences were tainted by the uncorroborated and unreliable allegation by Lahoma Yaws II that she had been raped by Mr. Cummings in April 1991, while Anita and Sherry Cummings supposedly held her down, which resulted in a pregnancy and miscarriage. Lahoma is Sherry's younger sister, and as such had a motive to testify falsely against Mr. Cummings. Not only is there no evidence such a rape took place, in the form of physical evidence, a police report or medical records, there is considerable evidence Lahoma has a reputation for lying in general and for lying about being sexually molested in particular, and even close relatives and friends believe she lied about being raped by Mr. Cummings (see Appendix 7 & 38).

157. At the guilt stage of the trial, jurors were exposed to Anita's and Sherry's self-serving, uncorroborated and unreliable allegations of spouse abuse and child abuse, and Anita's perjury when she claimed she did not know that Mr. Cummings and Sherry were married when she married Mr. Cummings. There is abundant proof that Anita knew this, including: Sherry's presence at the wedding ceremony; Anita's claim to the contrary during a DHS home visit in 1994 (Appendix 43); Sherry's concession to the undersigned counsel Anita lied about that; and many people reporting Anita had been living with Sherry and Mr. Cummings when Anita and Mr. Cummings got married. Mr. Cummings' death sentences are partly the result of juror disapproval of the bigamous relationship he had with Anita, and many rumors circulated in Coal County about the Cummings' household. It is fundamentally unfair to hold it against Mr. Cummings he had a bigamous

relationship with Anita and Sherry when jurors were unaware that the women were bisexual lovers and they both encouraged this pluralistic marriage in order to be with each other.

158. Mr. Cummings' death sentences are tainted by jurors prejudices and inaccurate stereotypes about Poor White Trash, and their lack of understanding of relevant information about that socio-economic group (see *Averment of Facts, Part I, above* and Appendix 4), and jurors' exposure to rumors and gossip rampant in Coal County about the Cummings' household.

159. Jurors were denied relevant and material information about Anita and Sherry Cummings (see, e.g., *Averment of Facts, Parts C, F & G, above*). By way of example, jurors did not know they were bisexual lovers, which was material and relevant to their motive to conspire to frame Mr. Cummings. Jurors did not know Anita lied when she testified under oath she did not know that Sherry and Mr. Cummings already were married when she married him. They did not know Sherry could hold her own in a fight with Mr. Cummings. See also, *Averment of Facts, Parts F & G, above*.

160. Jurors were given the inaccurate impression Anita and Sherry Cummings were battered wives who were so dominated and controlled by Mr. Cummings they committed these crimes under duress out of self-defense (see *Averment of Facts, Part C, above*, and Appendix 6).

161. The jury verdicts with regard to sentencing were further tainted by improper, incomplete, misleading and confusing jury instructions (see Proposition 6) and improper acts and omissions of the trial court (see Proposition 5).

162. The continuing-threat aggravating circumstance, on its face and as applied in this case, is vague and overbroad, and failed to channel and guide juror discretion. In support of this aggravating circumstance the prosecution relied on improper and irrelevant information, including information that had a prejudicial effect which outweighed its probative value, including the alleged rape of Melissa Moody and the alleged rape of Lahoma Yaws.

163. There was insufficient evidence to support the continuing-threat aggravator in this case. The jury's finding of the "continuing threat" aggravating circumstance, and hence the balance of aggravators with mitigators, was tainted by exposing jurors to improper evidence and innuendo

about Mr. Cummings, and improper arguments by the prosecution. This problem was compounded by the lack of a proper limiting instruction to guide juror discretion.

164. Juror discretion was not properly limited in the evidence to be considered in support of this aggravator. By way of example, in questioning a witness the prosecution brought up Anita's claim that it was not unusual for Jessie to put kids in handcuffs (T. 982-3). Anita's claim about the use of handcuffs (T. 740) was directly contradicted by Sherry, who had testified under oath none of the kids had ever been handcuffed in the house before Melissa was killed (PH-1 35). Moreover, jurors did not know Anita's hyperactive son Robbie is the only child alleged to have had handcuffs used on him, and then only at bedtime after Robbie was discovered to have a sharp knife in his bed, which caused concern he might hurt somebody while the household was asleep.

165. There is no meaningful way to predict an individual's future dangerousness in the prison setting if given a LWOP sentence which requires one to spend the rest of their life in prison. Any competent mental health professional will acknowledge there are no tests or criteria accepted within their profession for measuring future dangerousness. In fact, Mr. Cummings has made a good adjustment to prison life and has not posed a danger. The use of the continuing threat aggravator in this case is as standardless as reading tea leaves or flipping a coin. As a result, jurors are permitted to base their decision on a purely emotional gut reaction to their biases and prejudices regarding the value of the life of a borderline mentally retarded Poor White Trash male raised in poverty.

166. Even if there may have been some other admissible evidence to support this aggravator, the prejudice to Mr. Cummings is not cured. Jurors weigh the relative weight of each aggravating circumstance; and the "heavier" or more substantial a particular aggravator is, the heavier it weighs against mitigating evidence. Given that the jurors were provided a large range of evidence which should not have been properly considered in support of this aggravator, coupled with an inadequate limiting and guiding jury charge, the jury's finding of this aggravator must be vacated, and a new sentencing hearing ordered.

167. The avoiding arrest aggravating circumstance, on its face and as applied in this case, is vague and overbroad, and failed to channel and guide juror discretion. In support of this aggravating

circumstance the prosecution relied on improper and irrelevant information, including information that had a prejudicial effect which outweighed its probative value, including the alleged rape of Melissa Moody and the alleged rape of Lahoma Yaws.

168. The avoiding arrest aggravating circumstance is not supported by the evidence (see Proposition 1) and the jury charge at the sentencing stage failed to adequately guide jurors' discretion with regard to that aggravating circumstance (see Proposition 5).

169. The death sentences in this case are tainted by the prosecution's misstatement of the facts during closing arguments at the sentencing stage. Defense counsel had made a proportionality argument to jurors based on Anita getting a Life sentence and Sherry a sentence of 35 years (T. 994). The prosecution then incorrectly told jurors that Sherry was getting a Life sentence (T. 995). Subsequent to Mr. Cummings' trial, Sherry was given a 35-year sentence which was what had been agreed to with the State prior to Mr. Cummings' trial (Appendix 53).

170. The death sentences in this case were tainted by Anita Cummings' false claim Mr. Cummings' whispered a confession in her ear, several weeks after the offenses during bondage sex, about how Melissa had died. There is no evidence Mr. Cummings' ever engaged in bondage sex with Anita or any other female. The undersigned has interviewed other sex partners who engaged in sex with Mr. Cummings, with or without Anita present, and they refute Anita's claims regarding his engaging in bondage sex. In addition, Anita did not volunteer this embellishment on her version of events until long after her arrest, and it is clearly one more example of her willingness to lie when she perceives it to her advantage. This purported "whispered confession" is even less reliable than the infamous "dream confessions" used by unscrupulous police officers, because it comes so late after her arrest and because it does not comport with the physical evidence about Melissa's death. She alleges he admitted to slashing Melissa's throat to kill her, when the evidence at trial was Melissa died from four stab wounds to the chest and the autopsy did not find the presence of injuries to the neck consistent with her throat being slashed (Appendix 15).

171. The jurors were denied relevant evidence regarding Mr. Cummings and his background (see, e.g., Avertment of Facts, Part E, above). By way of example, jurors did not know that his I.Q. is

about Mr. Cummings, and improper arguments by the prosecution. This problem was compounded by the lack of a proper limiting instruction to guide juror discretion.

164. Juror discretion was not properly limited in the evidence to be considered in support of this aggravator. By way of example, in questioning a witness the prosecution brought up Anita's claim that it was not unusual for Jessie to put kids in handcuffs (T. 982-3). Anita's claim about the use of handcuffs (T. 740) was directly contradicted by Sherry, who had testified under oath none of the kids had ever been handcuffed in the house before Melissa was killed (PH-I 35). Moreover, jurors did not know Anita's hyperactive son Robbie is the only child alleged to have had handcuffs used on him, and then only at bedtime after Robbie was discovered to have a sharp knife in his bed, which caused concern he might hurt somebody while the household was asleep.

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166. Even if there may have been some other admissible evidence to support this aggravator, the prejudice to Mr. Cummings is not cured. Jurors weigh the relative weight of each aggravating circumstance; and the "heavier" or more substantial a particular aggravator is, the heavier it weighs against mitigating evidence. Given that the jurors were provided a large range of evidence which should not have been properly considered in support of this aggravator, coupled with an inadequate limiting and guiding jury charge, the jury's finding of this aggravator must be vacated, and a new sentencing hearing ordered.

167. The avoiding arrest aggravating circumstance, on its face and as applied in this case, is vague and overbroad, and failed to channel and guide juror discretion. In support of this aggravating

circumstance the prosecution relied on improper and irrelevant information, including information that had a prejudicial effect which outweighed its probative value, including the alleged rape of Melissa Moody and the alleged rape of Lahoma Yaws.

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171. The jurors were denied relevant evidence regarding Mr. Cummings and his background (see, e.g., Averment of Facts, Part E, above). By way of example, jurors did not know that his I.Q. is

81, which places him in the borderline retarded range of intellectual functioning (Appendix 5). Nor were they provided with evidence that he lacks the cognitive and intellectual sophistication to dominate and control others (*id.*), much less the independent and willful Sherry Cummings and her lover Anita Cummings.

172. Jurors were biased against Mr. Cummings by Anita Cummings' false testimony regarding Melissa's inadmissible hearsay testimony she had engaged in sexual activities before in Arkansas (T. 702). This allowed jurors to speculate those sexual activities were with Mr. Cummings, when they were not. Jurors did not know Melissa's father and brothers had molested her older siblings, and they would be the most likely persons to have molested her (Appendix 7).

173. Jurors were prejudiced against Mr. Cummings due to inadmissible testimony that he had cost the county a good deal of money for his medical expenses (T. 955-56), and the prosecution's innuendo that Mr. Cummings' was merely faking his illness (T. 956). Mr. Cummings does in fact have genuine medical problems, including glaucoma (Appendix 45 & 46). However, costs of medical care should not be a factor in determining who should live and who should die.

174. Mr. Cummings' death sentence for the murder to Judy is disproportionate to the straight Life sentence that was given to Anita Cummings, who is the admitted shooter and who killed Judy while Mr. Cummings was out of town.

175. The trial court failed to meaningfully respond to the jury note about whether the greater sentence would be served if two different sentences were imposed (T. 1004). This jury note is another variation on the numerous times capital juries have sent out notes inquiring about the meaning of Life Without Parole. While lawyers experienced with capital cases know LWOP means what it says, Life Without Parole, jurors are not sure of that and doubt it means what it says. Jurors should have been instructed they should assume Mr. Cummings would serve the sentence handed down on each count, whether they were the same or different, that each sentencing option means what it says, and the harshest sentence would be imposed first if the sentences were different.

176. Another arbitrary factor infecting the sentencing in this case was Lahoma Yaws II breaking down on the witness stand, being removed from the courtroom, and collapsing in the

hallway during the recess called when she lost her composure. To make things worse, Lahoma was 9 months pregnant at the time (she gave birth to a daughter about two weeks later).

177. The sentencing hearing in this case was fundamentally unfair because it commenced only 20 minutes after the guilty verdicts were announced (T. 915). A minimum of an over-night recess is needed between the guilt phase and penalty phase of a capital murder trial. This provides a cooling-off period within which the defendant can regain his composure after the shock of being found guilty. His family and other witnesses also need time to deal with the stress of the guilty verdicts before being asked to take the stand and publically lay bare family secrets, while still in shock over the guilty verdicts. This explains why Mr. Cummings' sister, Debbie Smith, was unable to say very much while testifying about the extreme abuse inflicted on them by their mother (T. 937-48). Defense counsel are generally worn out by the time the guilt-phase verdict is returned, and need time to collect their thoughts and organize witnesses. Jurors, too, need time to remove themselves from their guilt-phase deliberations in order to more objectively and dispassionately deal with the life and death decision with which they are faced at the sentencing stage.

178. The death sentences in this case are tainted by the trial court's improper exclusion of evidence by denying defense pre-trial motions (*see* OR 152).

179. It is fundamentally unfair for the prosecution to have used against Mr. Cummings his lack of remorse, over a defense objection (*see* OR 150), for having participated in these killings (T. 947-48) in light of the fact Mr. Cummings' was maintaining his innocence and his defense was an alibi, which is his constitutional right to maintain. This was an impermissible comment on Mr. Cummings' right to not testify. A defendant cannot be required to choose between two conflicting constitutional rights, such as the right to maintain his presumption of innocence, the right to remain silent, and the right to a sentencing determination which is not tainted by inaccurate and misleading information. Otherwise, every time a defendant maintains his innocence at the guilt phase, he is subjecting himself to the peril of being accused of lacking remorse at his sentencing, which is a fundamentally unfair and constitutionally intolerable choice.

180. Mr. Cummings is being denied a full and fair appellate review of his death sentences

because the record on appeal does not contain material information relevant to this Court's sentencing review of direct appeal, and it contains inaccurate and misleading evidence that will prejudice Mr. Cummings' in this Court's sentencing review.

V. FUNDAMENTAL ERRORS IN THE JURY INSTRUCTIONS DENIED MR. CUMMINGS A FAIR TRIAL AND A RELIABLE DETERMINATION OF THE APPROPRIATE SENTENCE IN THIS CASE.

Claims for Relief

181. Fundamental errors in the jury instructions in his case denied Mr. Cummings due process, equal protection, a fair trial, a fair and reliable determination that death is the appropriate sentence in this case, and freedom from cruel and unusual punishment, in violation of his rights secured by the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and Article 2, §§2, 7, 9, 19 & 20 of the Oklahoma Constitution.

Factual Contentions in Support

182. 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 App. Brief, Propositions 3, 8, 11, 12, 14 & 15).

183. Trial counsel were ineffective in failing to ensure that Mr. Cummings' jury was instructed with complete, accurate and proper jury instructions.

184. The trial court had a duty to correctly and completely instruct the jury as to the applicable law, and it failed to do so.

185. The jury charges as a whole are so vague, misleading, inconsistent and incomprehensible as to encourage jurors to ignore them completely and vote on the basis of gut feelings rather than on evidentiary proof.

A. Defective Guilt-Phase Instructions

186. Jurors were given an inadequate, confusing and misleading jury instruction regarding the meaning and effect of the trial court's dismissal of Count III (T. 855). Count III in the Amended Felony Information (OR 290-1) alleged in pertinent part that the defendant willfully and intentionally sexually abused M.M., a minor child 11 years of age, by willfully or maliciously committing lewd or indecent acts, including touching her body and actual penetration of the child's private parts. This was read to jurors at the commencement of the guilt phase (T. 364). At the conclusion of the evidence, this Count was dismissed due to insufficient corroboration of Anita's self-serving allegations that this had taken place (T. 855). However, the jury charge described a totally different offense:

Child Abuse is the wilful or malicious injuring, torturing, maiming or use of unreasonable force upon a child under the age of 18 by one under a legal duty to render aid to the child. At the request of the Defendant, and without objection by the State, the Court has found as a matter of fact and law that the Defendant is Not Guilty of the crime of COUNT 3 CHILD ABUSE, has dismissed same, and you are so instructed. You should not consider this charge for any purpose in your deliberations as to COUNT 1 MURDER FIRST DEGREE in the death of Judy Ann Moody Mayo or COUNT 2 MURDER FIRST DEGREE in the death of Melissa Moody.

(OR 388) (emphasis added). This instruction was inadequate to remind jurors that Count III had been based on the alleged rape of Melissa, and failed to clearly inform jurors the alleged rape should not be considered by them during their deliberations. This error was compounded by the prosecution repeatedly relying on the alleged rape during closing arguments (see, e.g., T. 862, 869, 902 & 906).

187. The guilt-phase final jury charge was defective in failing to provide jurors with meaningful instructions regarding the prosecution's theory that Anita and Sherry Cummings acted under duress in participating in these offenses. It was undisputed that Jessie was in Oklahoma City when Anita shot and killed Judy. The prosecution did not argue Jessie and Anita and/or Sherry were co-conspirators, but rather Jessie had such control over Anita and Sherry that he overcame their will such that they acted under duress in killing Judy and participating in the death of Melissa.

188. An important material finding of fact the jurors needed to make in order to convict Jessie was that Anita and/or Sherry acted under duress in causing the death of Judy and Melissa. Nonetheless, jurors were not given a legal definition of duress, who had the burden of proving that Anita and/or Sherry acted under duress, and what was that burden of proof. As a result, one or more jurors were misled to believe the burden was on Jessie to prove his defense that the women did not act the duress of any domination by him.

189. Jessie was entitled to have the jury instructed on his theory of the defense, which was not only an alibi but also the women were not acting at his command under duress. Hence, the trial court should have instructed jurors the prosecution had the burden of proving, beyond a reasonable doubt, that Anita acted under duress in shooting Judy, and that Anita and Sherry acted under duress in their participation in the death of Melissa, and they must return not-guilty verdicts if they do not find the government met its burden of proof on this issue. The jury was not so instructed.

190. The jury instructions regarding the law of principals was hopelessly confusing and unintelligible to a lay jury. Petitioner and his counsel did not have the funds and time necessary to retain an expert in linguistics in order to obtain an expert's analysis of the jury instructions in preparing this Application. However, Petitioner intends to offer such expert opinion at the evidentiary hearing on this Application.

191. In addition, on its face the jury charge is incomplete, inaccurate and conflicting with regard to the law of principals and accomplices. By way of example, Instruction No. 7 (OR 392) tells jurors that all "principals" are equally liable for the commission of an offense. It then explains there are two ways to be a principal: (1) to directly and actively commit the "criminal act"; (2) to "knowingly and with criminal intent" aid or abet the commission of the crime. No further guidance or information is provided regarding accomplice liability options in this instruction. That Instruction also defines "criminal intent" as committing acts whose probable consequences are criminal, which constitutes an unconstitutional mandatory irrebutable presumption.

192. One or more jurors could have incorrectly understood this instruction in several ways. One is that committing the "criminal act" is something other than all of the elements of first degree

murder, and hence can be something less. Another improper interpretation is that an accomplice only need possess general intent to be convicted of first degree murder, regardless of the intent of the person(s) he is an accomplice with regarding the offense. Hence, while the person who actually killed Judy could be convicted of first degree murder based only on the specific intent of malice aforethought, the accomplice could be convicted -- and subject to the death penalty -- based on a lesser criminal, and merely general, intent. That produces the anomaly of the prosecution having a lesser burden of proof with regard to the actual shooter than for the aider.

193. These structural errors in the jury charge require Mr. Cummings' convictions to be vacated and his case remanded for a new trial.

B. Defective Sentencing-Stage Jury Charge

194. The jury charge as a whole failed to properly channel and guide juror discretion, thereby producing an arbitrary, discriminatory and/or capricious result, and a result that is not free from passion and prejudice.

195. The jury charge failed to instruct jurors they were limited to considering only the aggravating circumstances alleged in the Bill of Particulars by the State.

196. Jurors were given a vague and constitutionally inadequate definition of "mitigation circumstance" (Instr. No. 8; OR 465), which precluded jurors from giving effect to mitigating factors that exist in this case. That instruction misled one or more jurors to believe that mitigation is limited to something that is directly related to the offense, such as matters which constitute a legal "excuse" for the offense. Jurors should have been instructed they could consider in mitigation any aspect of Mr. Cummings' character or record, including those unrelated or only indirectly related to the offense, as well as any of the circumstances of the offense that in fairness and mercy should be considered in support of a sentence less than death. Without a constitutionally adequate and expansive definition of mitigating circumstances, one or more jurors were misled to believe they could not consider matters unrelated to the offense, such as Mr. Cummings' disadvantaged background, his lack of education, and his childhood maltreatment by an alcoholic and abusive

parent.

197. The jury charge gave jurors complete and unlimited discretion to determine what constitutes a mitigating circumstance: "The determination of what are mitigation circumstances is for you as jurors to resolve..." (Instr. No. 8, O.R. 465). This permitted one or more jurors to refuse to consider a circumstance which must be constitutionally considered if proven to exist. It is not the jurors' duty to determine what constitutes a mitigating circumstance. Jurors are judges of the facts, not judges of the law. Jurors should have been instructed they are to determine whether the mitigating circumstances relevant to this case were proven to exist and, if so, what weight each juror individually believes should be given to each mitigating circumstance the juror found to exist.

198. Jurors were told to consider mitigation circumstances that "existed" (Instr. No. 8, OR 465, & Instr. No. 9, OR 466). This misled one or more jurors to freeze in time the day of the offense what they would consider in mitigation, and to disregard mitigation evidence based on post-offense evidence.

199. The jury charge misled one or more jurors to believe that the death penalty could be imposed if any aggravating circumstance they found to exist outweighed any one of the mitigating circumstances which existed in this case (Instr. No.9, OR 466). The jurors should have been informed that they are required to balance the cumulative weight of the aggravating circumstances proven to exist against the cumulative weight of mitigating circumstances, not weigh them one by one. 22 O.S.1991, §701.11.

200. In explaining how to conduct the balancing of aggravators and mitigators, jurors were given an instruction that is incomprehensible and confusing to the average lay person (Instr. No. 9, OR 466). Research on comprehensibility of language shows that more grammatically complex sentences are more difficult to process and understand than less complex ones. The number of clauses embedded in a sentence contributes to difficulty in comprehension. Research also indicates that the maximum number of words creating optimum comprehensibility for the average person is thirteen words per sentence. The "weighing" instruction violates those precepts and is difficult to decipher.

201. Jurors were not informed they did not unanimously have to find the existence of a mitigating circumstance in order for it to be considered by one or more jurors in the balancing process. Further, jurors were not told that a mitigating circumstance did not have to be proven beyond a reasonable doubt in order for it to be considered by one or more jurors. Based on the totality of the instructions, one or more jurors incorrectly assumed that "beyond a reasonable doubt" was the standard of proof.

202. The jury charge included vague, over broad, duplicitous and over-lapping aggravating circumstances, and failed to provide jurors with a constitutionally limiting instruction regarding the "continuing threat" aggravator and the "avoiding arrest" aggravating circumstance.

203. The jury charge failed to provide jurors with a constitutionally adequate definition of the "continuing threat" aggravating circumstance in this case (Instr. 6, OR 463). Hence, jurors were given unrestricted discretion to use character evidence and prior bad act evidence for improper purposes in making their "continuing threat" determination. Mr. Cummings was particularly prejudiced by this error because jurors were provided with an abundance of uncorroborated and unspecific "bad character" allegations. In addition, the jury charge failed to specify at what point (i.e., at the time of Mr. Cummings' trial, not the day of the offense) the prosecution had to prove Mr. Cummings to be a continuing threat.

204. The jury charge failed to provide jurors with a constitutionally adequate definition of the "avoiding arrest or prosecution" aggravating circumstance in this case (Inst. 5, OR 462). In order to limit the vague and over broad application of the "avoiding arrest" aggravating circumstance, the jury charge failed to inform jurors of the nature of the allegations the prosecution had to prove and against which Mr. Cummings had to defend himself. By way of example, the jury charge did not specify the separate offense the prosecution alleged was the basis for alleging this aggravator regarding the death of Melissa Moody. For example, the jury had convicted Mr. Cummings' of felony murder in the course of kidnapping. One or more jurors could have understood the jury charge to permit them to use the kidnapping as the "separate offense," which it was not. The trial court had directed a verdict against the prosecution on Count III which was represented on Anita

parent.

197. The jury charge gave jurors complete and unlimited discretion to determine what constitutes a mitigating circumstance: "The determination of what are mitigation circumstances is for you as jurors to resolve..." (Instr. No. 8, O.R. 465). This permitted one or more jurors to refuse to consider a circumstance which must be constitutionally considered if proven to exist. It is not the jurors' duty to determine what constitutes a mitigating circumstance. Jurors are judges of the facts, not judges of the law. Jurors should have been instructed they are to determine whether the mitigating circumstances relevant to this case were proven to exist and, if so, what weight each juror individually believes should be given to each mitigating circumstance the juror found to exist.

198. Jurors were told to consider mitigation circumstances that "existed" (Instr. No. 8, OR 465, & Instr. No. 9, OR 466). This misled one or more jurors to freeze in time the day of the offense what they would consider in mitigation, and to disregard mitigation evidence based on post-offense evidence.

199. The jury charge misled one or more jurors to believe that the death penalty could be imposed if any aggravating circumstance they found to exist outweighed any one of the mitigating circumstances which existed in this case (Instr. No.9, OR 466). The jurors should have been informed that they are required to balance the cumulative weight of the aggravating circumstances proven to exist against the cumulative weight of mitigating circumstances, not weigh them one by one. 22 O.S.1991, §701.11.

200. In explaining how to conduct the balancing of aggravators and mitigators, jurors were given an instruction that is incomprehensible and confusing to the average lay person (Instr. No. 9, OR 466). Research on comprehensibility of language shows that more grammatically complex sentences are more difficult to process and understand than less complex ones. The number of clauses embedded in a sentence contributes to difficulty in comprehension. Research also indicates that the maximum number of words creating optimum comprehensibility for the average person is thirteen words per sentence. The "weighing" instruction violates those precepts and is difficult to decipher.

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202. The jury charge included vague, over broad, duplicitous and over-lapping aggravating circumstances, and failed to provide jurors with a constitutionally limiting instruction regarding the "continuing threat" aggravator and the "avoiding arrest" aggravating circumstance.

203. The jury charge failed to provide jurors with a constitutionally adequate definition of the "continuing threat" aggravating circumstance in this case (Instr. 6, OR 463). Hence, jurors were given unrestricted discretion to use character evidence and prior bad act evidence for improper purposes in making their "continuing threat" determination. Mr. Cummings was particularly prejudiced by this error because jurors were provided with an abundance of uncorroborated and unspecific "bad character" allegations. In addition, the jury charge failed to specify at what point (i.e., at the time of Mr. Cummings' trial, not the day of the offense) the prosecution had to prove Mr. Cummings to be a continuing threat.

204. The jury charge failed to provide jurors with a constitutionally adequate definition of the "avoiding arrest or prosecution" aggravating circumstance in this case (Inst. 5, OR 462). In order to limit the vague and over broad application of the "avoiding arrest" aggravating circumstance, the jury charge failed to inform jurors of the nature of the allegations the prosecution had to prove and against which Mr. Cummings had to defend himself. By way of example, the jury charge did not specify the separate offense the prosecution alleged was the basis for alleging this aggravator regarding the death of Melissa Moody. For example, the jury had convicted Mr. Cummings' of felony murder in the course of kidnapping. One or more jurors could have understood the jury charge to permit them to use the kidnapping as the "separate offense," which it was not. The trial court had directed a verdict against the prosecution on Count III which was represented on Anita

Cummings' unsupported allegation that Melissa had been raped. Despite the insufficiency of the evidence as to that alleged criminal act, one or more jurors could have understood the jury charge to permit them to use that as the separate offense, even though there was insufficient evidence to prove it had taken place.

205. The jury charge failed to provide adequate information regarding the three sentencing options, and in particular the option of Life Without the Possibility of Parole [LWOP], despite a defense motion for the same (see OR 119 & 431, 432, 435). As will be shown at the evidentiary hearing on this Application, it is a common misperception among lay people, including the jurors in this case, that LWOP does not mean a person will spend the rest of his life in prison. This is a misperception fostered by the media and statements of prosecutors that are quoted in the media. The average person is unaware the Oklahoma Constitution would have to be amended before a prisoner serving a LWOP sentence could be released. A constitutionally adequate LWOP instruction is needed particularly in cases such as this where the prosecution is relying on a future dangerous argument in support of its request for a death sentence.

206. Jurors were told that all previous instructions given at the first part of Mr. Cummings' trial "apply where appropriate," but were not given any guidance in determining what instructions were appropriate to consider (Stage II Instr. No. 11, OR 433).

207. The jury charge failed to inform jurors what would happen in the event they were unable to reach a unanimous verdict. (OUJI CR 4-83).

208. Mr. Cummings' Statement of Arguments and Authorities in Support of this Application are set forth in Addendum A, which is incorporated herein by reference.

VI. THE ACTS AND OMISSIONS OF THE TRIAL COURT DENIED MR. CUMMINGS HIS FUNDAMENTAL RIGHTS, A FAIR TRIAL, AND A FAIR AND RELIABLE DETERMINATION OF THE APPROPRIATE SENTENCE.

Claims for Relief

209. Mr. Cummings was denied his fundamental rights, a fair trial, a fair and reliable sentencing determination, and due process by improper treatment of evidence, improper evidentiary rulings, and other improper conduct, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and Article 2, §§2, 7, 9, 19 & 20 of the Oklahoma Constitution.

Factual Contentions in Support

210. 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* App. Brief, Propositions 1, 2, 4, 5, 6, 7, 8, 11, 12, 13, 14 & 15).

211. The trial court committed fundamental errors in its improper rulings, in failing to notice and correct errors affecting Mr. Cummings' substantive and fundamental rights, and failing *sua sponte* to take appropriate curative action to protect Mr. Cummings' rights when the circumstances made it appropriate and necessary for the trial court to do so, and in its other improper conduct at his trial.

212. The trial court erred in failing to ensure that the jurors who sat on Mr. Cummings' jury were properly qualified to serve in this case. During jury selection, the trial court did not ask questions of the jury pool to determine if everyone met all of the statutory and constitutional requirements for service on this jury. As a result, one or more jurors who rendered the verdicts at Mr. Cummings' trial was not qualified to serve (*see* Proposition 7).

213. The trial court had a duty to limit the scope and amount of prejudicial uncorroborated evidence admitted at trial, including inadmissible bad character and prior bad acts evidence. Before

exposing jurors to some of this evidence, the trial court *sua sponte* should have held a hearing out of the presence of the jury to determine whether the prosecution would sustain its burden of proof by a preponderance of the evidence that these incidents had in fact occurred.

214. The trial court failed to admonish and instruct jurors to disregard Anita Cummings' testimony regarding the alleged rape of Melissa Moody in light of the trial court's dismissal of Count III at the conclusion of the evidence (T. 855) and in light of the absence of any corroboration that such a rape had taken place. While the trial court did instruct jurors to disregard Count III (Inst. 3, OR 388), the jury was told only to disregard the "charge", not the uncorroborated evidence admitted in support of it. In addition, that jury instruction defined "Child Abuse" in terms different from the elements of Child Abuse as alleged in the Second Felony Information which was read to jurors at the commence of the case. Hence jurors failed to understand they were being instructed to disregard the evidence of the alleged rape.

215. The trial court failed to *sua sponte* grant a mistrial when it dismissed Count III. A mistrial was necessary to ensure that Mr. Cummings had a fair trial because there was no way jurors could disregard Anita Cummings' testimony regarding the alleged rape of 11 year-old Melissa Moody. Not only was the alleged rape uncorroborated by Sherry or other evidence, Anita's claims were inherently improbable in light of the other evidence and what now is known about Melissa (see Averment of Facts, Part D, above). Whatever peripheral probative value Anita's testimony about the alleged rape may have had, once it was found to be insufficiently reliable to sustain the prosecution's burden of proof, that probative value was substantially outweighed by its prejudicial effect.

216. The trial court erred in permitting Count III to go to trial in the first instance, because it was foreseeable from the testimony at the Preliminary Hearings that Anita's testimony regarding the alleged Child Abuse was not going to be corroborated by sufficient evidence for that count to go to the jury.

217. The trial court erred in sustaining objections by the prosecution at trial. By way of example, the trial court sustained an objection during trial counsel's closing arguments which precluded trial counsel from arguing inconsistencies between Anita's trial testimony and her pre-trial

statement to the police (T. 880). Since Anita had been confronted at trial, during cross examination, with the inconsistencies in her pre-trial statement, counsel was arguing facts in evidence in referring to the statement, and should not have been precluded from making that argument.

218. The trial court erred in overruling defense objections at trial. By way of example, the trial court overruled the defense objection to Lahoma Yaws II testifying at the penalty phase (T. 915; *see also* OR 99).

219. The trial court failed to take necessary steps to protect Mr. Cummings' right to a sentencing determination free of passion, prejudice or any arbitrary factor. By way of example, the trial failed to take appropriate curative action, including declaring a mistrial, when State-witness Lahoma Yaws II broke down on the witness stand, making it necessary to take a recess, and then collapsed in the hallway within the view and awareness of jurors (T. 927).

220. The trial court erred at the sentencing stage before the jury in granting the prosecution's motion to incorporate all of the evidence from the first phase of the trial (T. 922). As a result jurors were allowed to consider the uncorroborated testimony of Anita about the alleged rape of Melissa, despite the fact that Count III, which was based on that alleged rape, had been dismissed due to insufficiency of the evidence (T. 855).

221. The trial court erred in denying the defense requests to sever Count I from Counts II and III (T. 16-17). The two homicides were unrelated in time, manner, motive and alleged accomplices. There is no evidence of any common scheme or plan on Mr. Cummings' part with respect to these homicides, because there was no motive for Mr. Cummings to want either his sister or his niece dead. The joint trial on these counts only resulted in a confusion of the issues and the evidence in minds of the jurors, and the prejudicial effect to Mr. Cummings far outweighed any interest the State may have had in a joint trial.

222. The trial court erred in denying the defense Motion to Quash or Dismiss (OR 187 & 202) based on the sufficiency of the evidence, and in denying the defense demur to Counts I and II, because the prosecution had failed to sustain its burden of proving beyond a reasonable doubt that Mr. Cummings was guilty of either of these homicides (*see* Proposition I, *above*).

223. The trial court failed to ensure that Mr. Cummings' jury was instructed with complete, accurate, clear and proper jury instructions.

224. The trial court erred in denying a defense request to present evidence regarding the meaning and effect of a LWOP sentence (*see, e.g.*, OR 152).

225. Mr. Cummings' Statement of Arguments and Authorities in Support of this Application are set forth in Addendum A, which is incorporated herein by reference.

VII. MR. CUMMINGS' JURY WAS IMPROPERLY CONSTITUTED WHICH IS A STRUCTURAL ERROR REQUIRING REVERSAL AND A NEW TRIAL.

Claims for Relief

226. Newly discovered evidence not previously available shows that one of the jurors who sat on Mr. Cummings' jury that was not qualified to serve on the jury, in violation of his rights under the Sixth, and Fourteenth Amendments to the United States Constitution, Article 2, §§19 & 20 of the Oklahoma Constitution, and 28 O.S.1991, §911, and 38 O.S.1991, §28.

Factual Contentions in Support

227. 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.

228. One of the jurors who sat on Mr. Cummings' jury was Sandra Shores. At the time of Mr. Cummings' trial, Ms. Shores was a 21 year old resident of Pontotoc County living in Ada, Oklahoma, where she worked at the local K-Mart. Prior to that she had done an internship with the Probation and Parole office in Ada while studying for a degree in Criminal Justice at East Central University (Appendix 7). Because Ms. Shores was not a resident of Coal County at the time she presided at Mr. Cummings' trial, his jury was not properly constituted and his convictions must be reversed.

229. The fact that Ms. Shores was not qualified to serve on Mr. Cummings' jury was not known until recently. Because the trial court failed to conduct a proper inquiry into juror

qualifications, this fact was not known at trial and trial counsel never became aware of it. The undersigned counsel have had insufficient time to contact all of the jurors. It is possible that other jurors also were not qualified and should not have decided this case, given the trial court's failure to question the jury panel to ensure they all were qualified to sit in this case.

230. Under the laws, statutes and constitution of the State of Oklahoma, Mr. Cummings was entitled to a jury consisting of 12 persons residing in Coal County, where he was tried, and was entitled to a unanimous verdict of 12 residents of Coal County. The lack of qualifications of one of these jurors effectively reduced his jury to 11 qualified county residents. That would have required a mistrial if known at the time of the jury's verdict, and now requires that his convictions be vacated.

231. There was no indication prior to now that Ms. Stone was not a resident of Coal County. Hence, there was no reason for trial counsel to have objected to her at trial on that basis. Moreover, appellate counsel was unaware of any facts to put him on notice that inquiry should have been made into this juror's residency. That information was learned by happenstance when the juror volunteered the information to post-conviction counsel who had called her to ask an unrelated question.

232. The presence of a unqualified juror at Mr. Cummings' trial was a structural defect going to the trial mechanism. As a result, it cannot be said that a unanimous jury verdict of 12 qualified jurors was rendered in this case. This issue renders moot all other claims asserted in this Application and in Mr. Cummings' pending direct appeal. Mr. Cummings' convictions must be vacated and this case remanded for a new trial.

233. Mr. Cummings' Statement of Arguments and Authorities in Support of this Application are set forth in Addendum A, which is incorporated herein by reference.

VIII. MR. CUMMINGS IS BEING DENIED AN ADEQUATE APPELLATE AND CORRECTIVE COLLATERAL REVIEW PROCESS.

Claim for Relief

234. The laws, statutes, court rules and jurisprudence of the State of Oklahoma and the United States with respect to the appellate and collateral review of capital-murder convictions and death

sentences, as applied to Mr. Cummings, are depriving him of a meaningful and adequate corrective process, meaningful and effective assistance of counsel during collateral review and on direct appeal, due process, equal protection, and a full and fair review of the constitutionality of his convictions and sentences, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 2, §§2, 3, 6, 7, 9, 10, 19 & 20 and Art. 5 §46 of the Oklahoma Constitution.

Facts in Support

235. 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 and Addenda, and information to be produced at an evidentiary hearing on this Application.

236. Mr. Cummings is being denied an adequate appellate and collateral review process and a full and fair review of the constitutionality of his conviction and death sentence through the passage and application of the Post-Conviction Procedure Act, 22 O.S.1995, §1089 and the Rules of the Court of Criminal Appeals. The appellate and collateral review process available to Mr. Cummings in the State of Oklahoma fails to provide him with a meaningful and adequate opportunity to investigate, develop and present all facts, matters and issues relevant to the constitutionality of his conviction and death sentence.

237. Effective November 1, 1995, Oklahoma's Post-Conviction Procedure Act [the "Amended PC Act"], 22 O.S.1995, §1980 *et seq.*, and the Rules of this Court [see Rule 9.7, Rules of the Court of Criminal Appeals] were amended to accelerate the collateral review of capital-murder convictions. This accelerated process requires an expedited review of capital cases which is different from collateral review in non-capital cases.

238. The Amended Act also limits the scope of issues that can be raised for review on the merits in post-conviction proceedings. 22 O.S.1991, §§1989(C) & (D). These provisions on their face

and as applied by this Court deprive Petitioner of a constitutionally adequate review of violations of his Sixth Amendment rights to effective assistance of counsel at trial and on direct appeal.

239. Decisions of this Court construing the provisions of the Amended Act and the Rules of the Court of Criminal Appeals have applied them in a conflicting, inconsistent and contradictory manner, such that there now exists a procedural maze which cannot be deciphered by a reasonably competent attorney. The application of the new requirements in those decisions to the instant Application and Mr. Cummings' pending direct appeal unfairly results in the imposition of new and adverse legal consequences to decisions made by Mr. Cummings and his appellate counsel without adequate notice and a meaningful opportunity to comply.

240. Decisions issued by this Court impose on direct appeal new and unconstitutional quantities and qualities of proof with regard to claims of ineffective assistance of trial and appellate counsel.

241. The Amended PC Act on its face does not require appellate counsel to engage in fact finding outside the direct appeal record, 22 O.S.Supp.1995, §1089(D)(4)(b)(1). Nonetheless, this Court appears to now require appellate counsel to raise on direct appeal all claims of error, and facts in support, related to claims of ineffective assistance of trial counsel that the Court deems "available", despite the fact that the information was not physically part of the direct appeal record. In other words, this Court appears to impose on appellate counsel a requirement to engage in a wide-ranging factual investigation of the case well beyond the appellate record as defined by Rule 1.13(F), Rules of the Court of Criminal Appeals. This new rule was announced without adequate notice and opportunity for Mr. Cummings to comply with it, and it is an unrealistic and unreasonable burden, and amounts to a denial of due process, equal protection and adequate access to the courts.

242. At all pertinent times the Capital Direct Appeal Division of the Oklahoma Indigent Defense System ["OIDS"] has not had the resources, time or access to discovery to engage in an

adequate and competent investigation outside the record on appeal (see Disclaimer). In order to keep up with that Division's heavy caseload, there is a limited amount of time that can be spent working on a particular case without infringing on the time available to work on cases of other clients. In addition, the Division's budget for investigative and expert expenses is woefully inadequate. A requirement that direct appeal counsel perform extra-record investigation amounts to a denial of effective assistance of counsel on direct appeal, particularly when such a requirement is announced after the fact.

243. The heavy workload and lack of resources at OIDS results in inherent conflicts of interest with regard to how OIDS' sparse resources are allocated. When an attorney has insufficient time, resources and money to competently and adequately represent all clients assigned to him, then choices have to be made. Those choices place counsel in an untenable and unethical position of having to use time and resources needed to represent some clients in order to provide them to other clients.

244. Due to these inherent conflicts of interest at OIDS, appellate counsel in this case was required to forego the kind of investigation outside the direct appeal record that this Court now appears to require under the Amended PC Act. In addition, this Court now requires such an investigation without having provided adequate notice to Mr. Cummings and his appellate counsel to meet those requirements in this case.

245. Appellate counsel for Mr. Cummings did not have the time and resources to engage in a wide-ranging extra-record investigation of all of the facts and circumstances pertinent to this case that has been the traditional role of post-conviction counsel in the State of Oklahoma. In addition, appellate counsel did not have access to discovery and compulsory process in order to secure information in the possession of persons who are uncooperative and unwilling to voluntarily provide information. As a result, appellate counsel were unable to properly preserve as error meritorious issues affecting Mr. Cummings' fundamental and substantive statutory rights.

246. Given the circumstances of appellate counsel's representation of Mr. Cummings, facts outside the record filed with this Court on direct appeal which support the claims in this Application are facts that were outside the scope of information available to appellate counsel at the time of Mr. Cummings' direct appeal. However, should this Court find that such facts were "available" as defined by this Court's new decisions, appellate counsel's representation of Mr. Cummings was deficient due to counsel's failure to make a reasonable investigation and in failing to make reasonable decisions with regard to the investigative needs in this case.

247. In addition, OIDS' Capital Post-Conviction Division [the "CPC Division"] and the undersigned counsel have been unable to provide Mr. Cummings with adequate, competent and conflict-free representation. At all times relevant to undersigned's representation of Mr. Cummings, OIDS has been burdened by a backlog of cases.

248. Due to the filing deadline in this case and the caseload at OIDS, there are numerous individuals with knowledge relevant to this case that the undersigned post-conviction counsel did not have the time and resources to contact. There is legal research that was not pursued. There are records that were not obtained and reviewed. Affidavits and other documents in support of this Application were not developed. Due to lack of funds, there are experts that could not be consulted that should have been consulted, including an expert on the effects of long-term use of Percodan; and an expert on "continuing threat" issues, including the conditions of confinement in the Oklahoma Department of Corrections.

249. Mr. Cummings is being denied an adequate, fair and reliable post-conviction process because there is no adequate and meaningful mechanism for discovery needed in light of the unique factual circumstances of this case (see Addendum B). While there is a right to file with a post-conviction application a request for leave to conduct discovery, that right is illusory. This Court has

never granted such a request. In the collateral review context, this Court has limited discovery requests to issues challenging compliance with trial court discovery orders. This Court had stated that discovery requests filed in advance of a post-conviction application are "premature", and has stated that discovery motions are to be filed with a petitioner's post-conviction application, not before. As a result, Mr. Cummings has been denied access to material information relevant to his factual innocence in this case and his innocence of the death penalty. In addition, this Court imposes on a petitioner an obligation to show by clear and convincing evidence that discovery is needed before a discovery request will be granted. That standard is so unrealistically high that it can rarely if ever be met. If a petitioner possessed sufficient information to meet the standard for showing the need to obtain discovery, that information would essentially render unnecessary the discovery sought. In addition, even if a petitioner were granted discovery after his application was filed, he would be unable to use the material discovered, because there is no mechanism for Mr. Cummings to amend or supplement this Application.

250. There is a need for discovery and an evidentiary hearing in this case (see Proposition 1 & Addendum B). Nonetheless, Mr. Cummings does not have meaningful access to discovery or an evidentiary hearing in this post-conviction proceeding. Unless this Court remands his case to the District Court for an evidentiary hearing, Mr. Cummings does not have access to subpoenas duces tecum or any other form of compulsory process to obtain relevant information in the possession, custody or control of uncooperative, hostile or adverse persons. By way of example, Anita Cummings claimed at trial that she had been abused by Mr. Cummings during five years of marriage to him. During that time, Anita had frequent contacts with doctors and other health care practitioners. The undersigned is unable to access her medical records to rebut Anita's self-serving claim of abuse without subpoenas to third parties to produce them to the undersigned. The undersigned has also attempted without success to obtain the DHS records for the children who lived in the Cummings' household, and needs an order from

this Court to obtain those records, which are relevant to rebut Anita's and Sherry's claims about treatment of those children. Another example of relevant records and information that are not available without a court order or compulsory discovery are records pertaining to lethal injection executions in the State of Oklahoma.

251. This Application is being filed at this time because Mr. Cummings has run out of extensions, and it would be futile to request additional time. This Application is not being filed at this time because the investigation and research needed in this case is complete, or because the undersigned has had an adequate opportunity to research, prepare and write this Application. Many witnesses were not interviewed that should have been. Many relevant records were not reviewed or sought that should have been. Significant legal research has not been undertaken that should have been. This Application and the Addenda attached to it were written without adequate time to ensure that every relevant factual and legal contention have been included. Given the complexity of this case, coupled with the limited resources available at OIDS while it was being prepared, Mr. Cummings is not being accorded a full and fair review of all facts and issues relevant to the constitutionality of his conviction and death sentence.

252. Mr. Cummings' Statement of Arguments and Authorities in Support of this Application are set forth in Addendum A, which is incorporated herein by reference.

IX. OKLAHOMA'S CLEMENCY SCHEME ON ITS FACE AND AS APPLIED DENIES DEATH SENTENCED PETITIONERS BASIC DUE PROCESS.

Claims for Relief

253. Oklahoma's clemency process denies Mr. Cummings substantive and procedural due process, equal protection, and a fair and reliable determination of the appropriateness of clemency in his case, in violation of rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 2, §§2, 7,, 9, 19 & 20, and Article 6, §10 of the Oklahoma

Constitution.

Factual Contentions in Support

254. 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.

255. In the event Mr. Cummings is not granted relief on his challenges against the validity of his convictions and sentence, he is now, and will be, by the time that judicial review of convictions and sentences has been completed, an appropriate candidate for the Governor to exercise his power to grant clemency by commuting his death sentence to a sentence of Life, with or without the possibility of parole.

256. By way of example, Mr. Cummings is the father of two daughters who, along with Mr. Cummings' other relatives, will be permanently traumatized by the government putting him to death. Mr. Cummings has been a model prisoner and he does not present a danger to the prison society in which he will live for the rest of his life. Mr. Cummings is borderline retarded and has low intellectual functioning. Nonetheless, he has many skills and talents that can be put to good use in the prison society, including his exceptional mechanic skills in repairing vehicles. There is considerable residual doubt about his guilt, and clemency will preserve his life until accurate evidence surfaces to prove his innocence.

257. Deficiencies in the clemency process in the State of Oklahoma will deny Mr. Cummings a full, fair and meaningful review of the appropriateness of clemency in his case.

258. There does not exist in the State of Oklahoma meaningful rules, procedures, criteria and standards to guide the discretion of the decision makers in the clemency process.

259. The clemency process fails to provide meaningful and adequate notice of what is required

in order to obtain clemency, and hence denies a meaningful opportunity to be heard.

260. The clemency process in Oklahoma is politicized to the point of rendering it a meaningless ritual devoid of any semblance of due process.

261. The Governor of the State of Oklahoma has repeated indicated that he will not consider granting clemency in any capital case, and hence he has prejudged Mr. Cummings and his case for clemency, thereby denying him of a fair and impartial decision maker.

262. Mr. Cummings' Statement of Arguments and Authorities in Support of this Application are set forth in Addendum A, which is incorporated herein by reference.

X: THE DEATH PENALTY CONSTITUTES UNNECESSARY CRUEL AND/OR UNUSUAL PUNISHMENTS.

Claims for Relief

263. The execution of the death penalty in this case constitutes unnecessary cruel and/or unusual punishment, in violation of the Eighth and Fourteenth Amendments of the United States Constitution, and Art. 2, §2, 7, 9 & 20 of the Oklahoma Constitution.

Facts in Support:

264. 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 and information to be produced at an evidentiary hearing on this Application.

265. The Eighth Amendment of the United States constitution is applicable to the State of Oklahoma's decision to use the death penalty as a punishment.

266. When the death penalty is an option for punishment, it must either be imposed fairly, and with reasonable consistency, or not at all. The death penalty is imposed in the State of Oklahoma, in the United States and in this case unfairly, unreliably, without adequate procedural safeguards, and with

Constitution.

Factual Contentions in Support

254. 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.

255. In the event Mr. Cummings is not granted relief on his challenges against the validity of his convictions and sentence, he is now, and will be, by the time that judicial review of convictions and sentences has been completed, an appropriate candidate for the Governor to exercise his power to grant clemency by commuting his death sentence to a sentence of Life, with or without the possibility of parole.

256. By way of example, Mr. Cummings is the father of two daughters who, along with Mr. Cummings' other relatives, will be permanently traumatized by the government putting him to death. Mr. Cummings has been a model prisoner and he does not present a danger to the prison society in which he will live for the rest of his life. Mr. Cummings is borderline retarded and has low intellectual functioning. Nonetheless, he has many skills and talents that can be put to good use in the prison society, including his exceptional mechanic skills in repairing vehicles. There is considerable residual doubt about his guilt, and clemency will preserve his life until accurate evidence surfaces to prove his innocence.

257. Deficiencies in the clemency process in the State of Oklahoma will deny Mr. Cummings a full, fair and meaningful review of the appropriateness of clemency in his case.

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in order to obtain clemency, and hence denies a meaningful opportunity to be heard.

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265. The Eighth Amendment of the United States constitution is applicable to the State of Oklahoma's decision to use the death penalty as a punishment.

266. When the death penalty is an option for punishment, it must either be imposed fairly, and with reasonable consistency, or not at all. The death penalty is imposed in the State of Oklahoma, in the United States and in this case unfairly, unreliably, without adequate procedural safeguards, and with

arbitrariness, discrimination, and capriciousness.

267. The death penalty is cruel and unusual punishment in this case, because of the deficiencies in the proceedings which produced Mr Cummings's death sentence, which render his conviction and death sentence unfair and unreliable.

268. No deterrent purpose can possibly be served by the execution of the sentence of death with such irregularity and such infrequency. The irregularity and infrequency of executions demonstrate that the death penalty is unnecessary as a retributive device and is inconsistent with societal standards of decency.

269. Executions set socially sanctioned examples of and provide an inducement to violence, and do not serve any legitimate state purpose in decreasing the number of homicides.

270. The process by which jurors and judges are asked to decide whether a death sentence should be imposed results in psychological trauma and the infliction of emotional stress on jurors and judges.

271. There is no penal purpose served by the execution of Mr. Cummings which is not more effectively, less expensively and more efficiently served by a sentence of life with or without parole.

272. Before Mr. Cummings can be subjected to a death penalty, the State of Oklahoma must exercise great care to be certain the method of imposing the punishment keeps to a minimum any risk factors, including the risks of needless pain, violence to the inmate, or mutilation of his person. A punishment sanctioned by the State which involves torturing the condemned inmate, or forces the inmate to endure a painful, lingering death is an unworthy goal of a civilized society.

273. Execution constitutes unnecessary cruel and unusual punishment, because the State of Oklahoma cannot professionally carry out the execution of a sentence of death without unnecessarily inflicting torture and pain upon the condemned prisoner.

274. The death penalty as actually imposed in the State of Oklahoma, in the United States, and in this case, constitutes the purposeless infliction of pain and suffering unjustified by any valid state interest.

275. Unless respondent can minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment, the state would not be conducting a constitutional act of executing Mr. Cummings.

276. Persons sentenced to death in Oklahoma are to be executed by means of lethal injection. 22 O.S.1991, §1014(A).

277. Lethal injection is an unconstitutional method of execution without any procedural safeguards to prevent prolonged and intense pain and suffering.

278. The execution of death sentences by lethal injection is a torturous, inhuman and cruel procedure. Even when properly conducted, lethal injection involves the infliction of excruciating pain on the individual executed.

279. Victims of lethal injection die of asphyxiation and heart failure. Even when persons executed by lethal injection are first paralyzed, it has not been demonstrated that they become unconscious of their pain and their impending death.

280. The Oklahoma Department of Corrections has not adopted rules and procedures for the implementation of executions by lethal injection which adequately safeguard against botched executions.

281. 22 O.S.1991, §1014, gives discretion to the Department of Corrections and the Warden regarding its implementation, and fails to guide and limit their discretion in many important respects. By way of example, the statute fails to provide any guidance or limitation as to: what lethal substances can be used and in what dosages and in what combination; the criteria for making those decisions; the manner in which the lethal chemicals are to be used; who will inject the lethal chemicals into the

arbitrariness, discrimination, and capriciousness.

267. The death penalty is cruel and unusual punishment in this case, because of the deficiencies in the proceedings which produced Mr Cummings's death sentence, which render his conviction and death sentence unfair and unreliable.

268. No deterrent purpose can possibly be served by the execution of the sentence of death with such irregularity and such infrequency. The irregularity and infrequency of executions demonstrate that the death penalty is unnecessary as a retributive device and is inconsistent with societal standards of decency.

269. Executions set socially sanctioned examples of and provide an inducement to violence, and do not serve any legitimate state purpose in decreasing the number of homicides.

270. The process by which jurors and judges are asked to decide whether a death sentence should be imposed results in psychological trauma and the infliction of emotional stress on jurors and judges.

271. There is no penal purpose served by the execution of Mr. Cummings which is not more effectively, less expensively and more efficiently served by a sentence of life with or without parole.

272. Before Mr. Cummings can be subjected to a death penalty, the State of Oklahoma must exercise great care to be certain the method of imposing the punishment keeps to a minimum any risk factors, including the risks of needless pain, violence to the inmate, or mutilation of his person. A punishment sanctioned by the State which involves torturing the condemned inmate, or forces the inmate to endure a painful, lingering death is an unworthy goal of a civilized society.

273. Execution constitutes unnecessary cruel and unusual punishment, because the State of Oklahoma cannot professionally carry out the execution of a sentence of death without unnecessarily inflicting torture and pain upon the condemned prisoner.

274. The death penalty as actually imposed in the State of Oklahoma, in the United States, and in this case, constitutes the purposeless infliction of pain and suffering unjustified by any valid state interest.

275. Unless respondent can minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment, the state would not be conducting a constitutional act of executing Mr. Cummings.

276. Persons sentenced to death in Oklahoma are to be executed by means of lethal injection. 22 O.S.1991, §1014(A).

277. Lethal injection is an unconstitutional method of execution without any procedural safeguards to prevent prolonged and intense pain and suffering.

278. The execution of death sentences by lethal injection is a torturous, inhuman and cruel procedure. Even when properly conducted, lethal injection involves the infliction of excruciating pain on the individual executed.

279. Victims of lethal injection die of asphyxiation and heart failure. Even when persons executed by lethal injection are first paralyzed, it has not been demonstrated that they become unconscious of their pain and their impending death.

280. The Oklahoma Department of Corrections has not adopted rules and procedures for the implementation of executions by lethal injection which adequately safeguard against botched executions.

281. 22 O.S.1991, §1014, gives discretion to the Department of Corrections and the Warden regarding its implementation, and fails to guide and limit their discretion in many important respects. By way of example, the statute fails to provide any guidance or limitation as to: what lethal substances can be used and in what dosages and in what combination; the criteria for making those decisions; the manner in which the lethal chemicals are to be used; who will inject the lethal chemicals into the

convicted person; what training and experience is required of the persons who will inject the substances; what equipment is to be used; what procedural safeguards are required to ensure the equipment and lethal chemicals are stored, handled and used correctly.

282. Due to the absence of appropriate written rules and statutory limitations on the use of lethal injection as a form of execution, there are inadequate safeguards and precautions in existence against the many ways in which death by lethal injection can be incompetently administered, thereby resulting in a cruel, unusual and inhumane death.

283. Mr. Cummings is being denied his due process rights to notice and an opportunity to be heard with respect to whether an execution by lethal injection comports with the United States Constitution, the Constitution of the State of Oklahoma, and other applicable law.

284. 22 O.S.1991, §1014, does not preclude the use of untrained and/or improperly skilled persons from performing the lethal injection. The administration of a lethal injection by untrained or unskilled persons greatly increases the risk of unnecessarily severe physical and/or mental pain and/or the possibility of a botched execution.

285. The risks of an unnecessarily painful execution are greatly due to the failure of 22 O.S.1991, §1014 to set forth, and the failure of the Department of Corrections and Respondent to adopt, any minimal training standards for those persons performing lethal injections, or to require that medically qualified persons prepare and administer the lethal chemicals.

286. Another factor that creates a high risk of unnecessarily severe physical and/or mental pain and/or the possibility of a botched execution is the failure of 22 O.S.1991, §1014, the DOC and Respondent to provide for adequate equipment to be used for executions by lethal injection, and the failure to provide for personnel trained in the use of that equipment.

287. Other factors also create a high risk of unnecessarily severe physical and/or mental pain and/or the possibility of a botched execution, including the improper choice of 1) the actual chemicals to be used; 2) the dosages of each chemical; 3) the combination of chemicals; 4) the order and timing of the administration of the chemicals. Improper storage and/or handling of the chemicals also greatly increases the risk of negating the chemicals effectiveness, thereby greatly increasing the risk of unnecessarily severe physical and/or emotional pain or the chance of an unsuccessful execution.

288. For example, an improper dose of the chemicals used, or an improper combination of chemicals, greatly increases the risk that the condemned person will be paralyzed, conscious and under severe physical and/or emotional pain prior to death, or in lieu of death. If the chemicals lose potency as a result of improper storage and/or handling, the chemicals will not work properly. This results in a risk of a failed execution, and the condemned person will suffer a greatly increased risk of unnecessarily severe pain. Improper administration of the I.V. catheter greatly increases the risk that the chemicals will be absorbed far more slowly than intended, impeding or negating the intended effect of the chemicals, and greatly increasing the risk of unnecessarily severe pain and the possibility of a failed execution.

289. The absence of safeguards and precautions against deliberate cruelty or negligence in his execution has and will cause him additional mental anguish and anxiety that an execution by lethal injection will prolong or increase suffering.

290. Lethal injection is a method of execution in which negligent or intentional errors can cause the person executed prolonged and intense suffering. In many instances of execution by lethal injection, the onset of death has been prolonged and painful.

291. A significant number of the persons executed by lethal injection in other states have suffered extremely painful and prolonged deaths due to the incompetence of the persons carrying out

the executions and incompetent procedures which are subject to misadministration or maladministration. Based on eyewitness accounts of such executions, coupled with available scientific evidence regarding the hazards of lethal injection, lethal injection is an inherently unreliable method of executing persons.

292. Information regarding botched executions by lethal injection are attached hereto in Appendix 49 and incorporated by reference. See also, Denno, Deborah W.: "Getting to Death: An Eighth Amendment Analysis of Execution Methods" 82 Iowa Law Review (December 1996), Appendix 1.C.; Radelet, Michael L., "Post-Furman Botched Executions," <http://www.essential.org/dpi/botched.htm>.

293. It is unknown what lethal substances will be used by Respondent to execute Mr. Cummings. Lethal injection drugs by their very nature, however, are extremely hazardous and can cause complications, even when administered correctly. Hence, an execution by lethal injection exposes Mr. Cummings to substantial and grave risks of prolonged pain and extreme infliction of pain if the drugs are not correctly administered.

294. Causing death by lethal injection constitutes the wanton infliction of extreme mental and physical pain and suffering, and is cruel and unusual punishment.

295. There are more humane and less unreliable methods of execution available today which are not prone to the failures inherent in using lethal injection.

296. There is a substantial risk that the injection of lethal substances into Mr. Cummings's body will cause him to suffer extreme physical pain and psychological torture, will result in a prolonged and lingering death, a death which is unnecessarily cruel and wantonly unusual. Such a death is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

297. In the event lethal injection is held to be an unconstitutional method of execution, then a sentence of death shall be carried out by electrocution. 22 O.S.1991, §1014(B).

298. In application, Oklahoma uses an electric chair to electrocute persons pursuant to 22 O.S.1991, §1014(B). Death by electrocution in the electric chair also presents the hazard of a slow and painful death, constituting wanton torture in excess of the means necessary to extinguish human life.

299. The electric chair is an inherently unreliable method, of executing persons sentenced to death. It is a method prone to error. Historically the use of the electric chair has been characterized by repeated failures to execute swiftly. See *Glass v. Louisiana*, 471 U.S. 1080, 1089 (1985) (J. Brennan dissenting from denial of certiorari). There have been many horrifying episodes resulting from human error and neglect. The numerous incidents of mechanical failure and human error are evidence of the inherent problems with using an electric chair to execute people. Use of the electric chair fails to satisfy the statutory requirements that the current of electricity be continuous and of "sufficient intensity to cause death."

300. There are numerous documented executions by electrocution that have been "botched". A recent incident involved the botched execution of Pedro Medina in the State of Florida on March 25, 1997. The electrocution of Medina caused flames to shoot from his head for ten seconds. At the evidentiary hearing on this issue, evidence will be presented with respect to botched executions in Oklahoma and in other states.

301. Based on this pattern of malfunctioning of the electric chair, it is foreseeable that an electric chair will malfunction again. A punishment is constitutionally offensive if it involves the foreseeable infliction of suffering. When there are repeated malfunctions or operational errors, it is appropriate to consider whether an element of cruelty exists within the chosen method of carrying out an already barbaric practice, at least in the eyes of a majority of our world's civilized governments. The State of Oklahoma is incapable of assuring that the execution of Mr. Cummings will be carried out professionally in such a manner that it will not unnecessarily inflict torture and pain.

302. The mandate of federal law under the Eighth Amendment of the United States constitution must be examined by what has previously been described as "the evolving standards of decency" of our population. In interpreting its applicability, courts must recognize flexibility and improvement in standards of decency as society progresses and matures as reflected by attitudes of contemporary society and comparative law.

303. Legislation is an objective indicator of contemporary values that can be relied upon in determining when a punishment has become cruel and unusual. There is a growing national consensus that killing people by means of electrocution is cruel and unusual punishment. Most states that formerly authorized the use of the electric chair have enacted legislation to use alternative means of execution. Of the thirty-eight states and jurisdictions that have statutes authorizing the death penalty, only a small minority permit the use of electrocution to carry out a death sentence.

304. The United States is the only country in the world that uses electrocution to carry out government-sanctioned death sentences.

305. Euthanasia of animals by electrocution is not permitted in this country, or any other civilized country of the world, because of the likelihood that killing animals by electrocution results in extreme suffering.

306. At the evidentiary hearing on this issue, Mr. Cummings will present expert testimony of nationally recognized neuroscientists who study the brain and are knowledgeable concerning the effects of electricity on the nervous system. These experts are of the opinion that intentional electrocution by means of the electric chair is probably intensely painful.

307. *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890), is the decision on which all cases rely in upholding electrocution by using the electric chair as a constitutionally sound means of execution. However, the precedential value of *Kemmler* has eroded for a number of reasons. First,

Kemmler was decided in 1890, before anyone had been executed using an electric chair. Hence, there was no factual basis on which to determine how it would function. In addition, courts no longer defer to state legislatures the way the New York state courts and the United States Supreme Court deferred to the New York legislation in *Kemmler*. Moreover, *Kemmler* applied a "beyond doubt" standard that execution in the electric chair was not cruel and unusual, while today courts apply a preponderance of the evidence standard for 8th Amendment claims. Furthermore, scientific knowledge and technology have made great strides since 1890, and the electric chair must now pass scrutiny by current standards.

308. The legal conclusions in *Kemmler* are still sound. Punishments are cruel when they involve "torture or a lingering death." 136 U.S. at 447. However, the key factual assumptions made by the *Kemmler* court -- that electrocution does not involve torture or a lingering death -- is not correct. Hence, this Court is not bound by *Kemmler* to uphold electrocution in Oklahoma's electric chair.

309. With the assistance of knowledgeable experts, Mr. Cummings is prepared to prove what modern science now knows about electrocution in the electric chair. This knowledge includes, for example, the excruciating pain suffered by the persons being executed as they actually burn and cook during the electrocution process. In 1890, "experts" were unaware of this phenomenon. It was also presumed that the inmate was instantly unconscious as the electricity was applied, an assumption which Mr. Cummings's experts have shown to be false. Our understanding of electricity was in its infancy in late 19th century, and medical science has advanced exponentially over 100 years. The constitutionality of Oklahoma's electric chair now must be scrutinized using the available modern body of knowledge.

310. Electrocution in an electric chair involves passing electrical current through the human body until the condemned person is dead. In 1890, this method was heralded as providing an instantaneous and humane method of execution. Over 100 years of history, scientific advancement and moral development have superseded that judgment. It is neither instantaneous nor painless, but rather

it is tantamount to being cooked alive.

311. Electrocution therefore harkens back to the barbarous practices of boiling in oil and burning at the stake, both of which were outlawed by the adoption of the Eighth Amendment.

312. The amount of electrical current (measured in amperes or amps) applied to the condemned person depends on the amount of voltage generated and the resistance (measured in ohms) offered by his body. This follows from Ohm's law that voltage equals current multiplied by resistance, a corollary of which is that current equals voltage divided by resistance. If the voltage applied to a resistor is too great, the resistor will burn out or explode.

313. The objective in executing a person in an electric chair is to kill him without causing his body to explode. The condemned person is strapped into the chair at the arms, trunk and legs, and a mask is placed over his face to shield witnesses from the seeing on his face the effects of the current. The person is equipped with a diaper due to the effects of the electrical charge on his bladder and bowels. One electrode is applied to the condemned person's head, which has been shaved. A sponge soaked in a briny solution is placed between the head and the electrode. The head's electrode is to pass current against the scalp and the sponge is to secure the contact and theoretically to alleviate burning of the scalp, and the brine is to improve the conductivity of the sponge. A second electrode is placed on one of the subject's legs.

314. The continuous and repeated application of electricity to a conscious human body is extremely painful. To apply electricity in such a manner intentionally would constitute cruel and unusual punishment within the meaning of the Eighth Amendment. Therefore, the avowed objective of the State of Oklahoma is to pass sufficient current through the body and brain of the condemned person to render him brain dead, or at least instantaneously unconscious, without unduly disfiguring the body. However, no one knows the amount of voltage needed to render the person instantaneously

unconscious. The law of the State of Oklahoma leaves it up to the Warden or his designee to determine the amount of voltage to use.

315. Physical size and apparent strength are not reliable indicators of physiological resistance. No testing is done to determine the resistance of the body of the person to be electrocuted. Hence, the Warden or his designee must guess at the amount of voltage to apply to the condemned person.

316. The human skull is a very poor conductor of electricity. Human skin is also a poor conductor, but sweat on the outside of the skin is an excellent conductor, given that it is essentially salty water. It is foreseeable that most if not all persons strapped into an electric chair to be executed will sweat.

317. Electric current seeks the path of least resistance. Therefore, a far greater portion of electrical current passes along the prisoner's skin than through his skull, body and brain, as it travels to the electrode on his leg. Hence, despite the voltage applied, relatively little current goes through the prisoner's brain. As a result, the condemned person's skin is burned at extreme temperatures while he is awake and conscious for an indeterminate period. Photos of persons executed in electric chairs demonstrate the burns that it is foreseeable an electric chair will inflict severe burns on the prisoner.

318. Because it is medically and scientifically certain that death by electrocution is not instantaneous, the condemned person retains consciousness long enough to feel pain. In order for consciousness to be lost, or nerve sensitivity destroyed, the electrical current would have to penetrate the brain. The resistance between the two electrodes and the brain is very high compared with the resistance of the skin wetted by perspiration containing water and salts. By comparing the electrical activity recorded on the surface of the scalp (the electroencephalograph), only 1/20th to 1/10th of the voltage generated in the brain can penetrate to the outside (the scalp). Therefore, a similar proportion of the voltage applied to the outside of the scalp from the electrode during electrocution will penetrate

to the brain. The remainder will pass across the skin to the other electrode.

319. The heat generated by the passage of current across the body eventually brings the blood to a boil, and results in the brain being cooked. The prisoner ultimately dies from asphyxia and cardiac arrest.

320. Autopsies of men executed by electrocution bear witness to the extensive external burns to the head, while the internal organs reveal that the brain is far less affected than the skin by the application of the current during the execution. The burns appearing inside the scalp are small compared with those to the skin.

321. Sufficient current can be applied to a human being to kill him instantaneously. However, the amount of current would be so great that the body would be very badly burnt and might well explode. Although it is widely believed that the person being electrocuted loses consciousness and the sensation of pain as soon as the electrocution starts, there is no scientific evidence to support this belief. Because the nervous and motor systems of the body are separate, the muscles can be rendered immobile while the nervous system retains its ability to register pain.

322. During the application of electricity, the condemned person's nervous system and brain remain relatively intact, allowing him to feel pain. His muscles, however, are fully contracted by the electrical shock. Thus the prisoner cannot react by any further movement, even when the current is turned off for a short period and the heart is still beating. It is usually thought that the failure of the convict to move is a sign that he cannot feel. Although the prisoner is paralyzed, he can still feel the pain.

323. This involuntary contraction of the condemned person's muscles itself causes intense pain. After he hunches forward with the initial jolt of electricity, he cannot move, because all of his muscles are contracting maximally, but he can still feel the indescribable pain inflicted by the electrical current.

traveling over and through his body.

324. The pain experienced by condemned persons who are executed in an electric chair is evidenced by: third-degree burns to the flesh; drooling and vomiting; defecation and urination; convulsions; grimaces and dilated pupils.

325. Due to the gruesome and horrific aspects of electrocution, Mr. Cummings and other condemned prisoners facing electrocution suffer extreme psychological, emotional and physical distress and anxiety prior to being executed. *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (analyzing the extreme psychological anxiety and distress of a punishment in determining that it was unconstitutional).

326. The technology of electrocuting people by administering jolts of electricity externally to the head is antiquated. The State of Oklahoma and Respondent cannot know and cannot demonstrate that the condemned person is rendered unconscious by the first jolt of electricity. The State of Oklahoma and Respondent are aware of numerous botched executions, both within the State of Oklahoma and in other states. The State of Oklahoma and Respondent are aware that the use of the electric chair has resulted in gruesome executions causing the condemned persons to die prolonged, lingering, agonizing deaths, as observed by eye-witnesses and reflected by the physical evidence. See Denno, Deborah W., "Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century." *Wm. & Mary L.Rev.* Vol. 35: 551 (1994).

327. The operating and testing procedures of the State of Oklahoma are primitive and antiquated. Moreover, electrocutions in Oklahoma's electric chair would be necessarily be carried out by persons without appropriate expertise and training.

328. There are more humane and less violent methods of execution available today which are not prone to the failures inherent in using the electric chair. Many states have abandoned electrocution

on humanitarian grounds.

329. In the event electrocution is held unconstitutional, then a sentence of death shall be carried out by firing squad. 22 O.S.1991, §1014(C).

330. This method of execution violates contemporary standards of human decency, as is reflected by the fact that it remains an option only in Utah and Idaho.

331. Use of the firing squad is an unconstitutional method of execution without any procedural safeguards to prevent prolonged and intense pain and suffering.

332. Mr. Cummings' Statement of Arguments and Authorities in Support of this Application are set forth in Addendum A, which is incorporated herein by reference.

XI. THE CUMULATIVE EFFECT OF THE ERRORS VIOLATING MR. CUMMINGS' RIGHTS CONSTITUTE A DENIAL OF DUE PROCESS AND FUNDAMENTAL FAIRNESS.

Claim for Relief.

333. The cumulative effect of the errors in all prior proceedings have deprived Mr. Cummings a fundamentally fair trial and a fair and reliable sentencing determination in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 2, §§2, 7, 9, 10, 19, 20, 21 of the Oklahoma Constitution and the laws of the State of Oklahoma. If Mr. Cummings had not been denied his constitutional and substantive rights, there is a reasonable probability that the outcome of prior proceedings, including both phases of his trial and his pending direct appeal, would have been different.

Facts in Support.

334. All other claims, facts and allegations in this Application, and/or his pending direct appeal, are realleged and incorporated by reference in this proposition as the factual basis for this claim, as well as the information in the Appendix and information to be produced at an evidentiary hearing on this Application.

335. At the guilt stage of Mr. Cummings' trial, the jury was exposed to uncorroborated and unreliable allegations about Melissa having been sexually abused. Although the evidence in support of those allegations was so lacking in substance that the trial court dismissed Count III at the conclusion of the evidence (T. 855), the jurors were not instructed to disregard Anita's unsupported testimony about the alleged child sexual abuse, nor were they instructed that they could not consider Anita's testimony regarding that sexual abuse unless they found it to be sufficiently corroborated. Not only was Anita's testimony uncorroborated, it was contradicted by Sherry's testimony. Additionally, the alleged rape was something Anita came up long after she was arrested and had given many other statements that did not mention it. In addition, the prosecution specifically asked jurors during closing arguments to sentence Mr. Cummings' to death based on his claim that Melissa had been raped. In addition, jurors were exposed to Anita's self-serving claim, that she came up with months after her arrest, that Mr. Cummings' had whispered in her ear during sex a confession on how Melissa was killed, which is totally inconsistent with her previous statements in which she said he had never indicated to her what had happened to Melissa (Appendix 19, p. 34).

336. Jurors were also asked to find Mr. Cummings guilty based on the State's theory that Anita and Sherry were battered women, without any corroboration for such a claim in terms of medical testimony, police reports, expert testimony, documented bruises and injuries, or the testimony of anyone who saw or heard any abuse or injuries. While jurors are familiar with the concept of Battered Women Syndrome, they lack the skills to diagnosis it. Hence, it was pure speculation that the women were battered women who lost the will to resist a command to kill. That speculation was the shaky basis on which the prosecution asked jurors to infer that these women would not commit these killings unless commanded to do so, and hence infer that Mr. Cummings, who had no motive for wanting the victims killed, must have commanded the women to kill. The insufficiency of the evidence, coupled with all of the errors set forth in this application, destroys confidence in the reliability of Mr. Cummings' convictions.

337. The sentencing stage also was tainted by the spill-over effect of the errors and flaws from the guilt phase, and was further corrupted by the defects in that proceeding, not the least of which was

defense counsel conceding Mr. Cummings' guilt to both homicides and both of the alleged rapes, despite the fact that Mr. Cummings never admitted his guilt to his counsel and never consented to such admissions of guilt. Under the totality of the circumstances, it is not possible to say that Mr. Cummings' sentences were not the result of passion, prejudice, inadmissible and unreliable evidence, and other arbitrary factors.

338. Petitioner's Statement of Arguments and Authorities in Support of this Application is set forth in Addendum A, which is incorporated herein by reference.

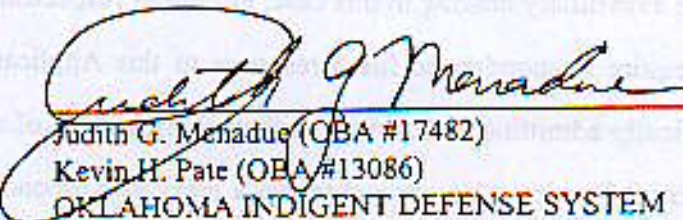
REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons and such others as may appear to this Court or be adduced at the evidentiary hearing in this case, Petitioner respectfully requests this Court to:

- (a) Require Respondent to file a response to this Application, pursuant to 22 O.S., §1083, specifically admitting or denying the factual allegations of this Application;
- (b) Permit Petitioner by counsel to file a reply to Respondent's response, responding to any affirmative defenses raised by the response;
- (c) Permit Petitioner to utilize the processes of discovery set forth in 12 O.S. 1989, §3224-3, to the extent necessary to fully develop and identify the facts supporting this Application and any defenses raised by Respondent's Response;
- (d) Remand this case for an evidentiary hearing, after appropriate discovery, to resolve any factual disputes raised by Respondent's response to this Application, or by Petitioner's reply to any affirmative defenses raised by Respondent;
- (e) Permit Petitioner a period of 90 days within which to supplement this Application with affidavits and other materials not available to Petitioner at the time this Application was filed;
- (f) Permit Petitioner to amend this Application at any time prior to entry of judgment, to include any additional allegations, claims and/or material facts not presently available to him or his counsel and which become available through investigation, discovery and proceedings on this Application;

- (g) Order that Petitioner's pending Direct Appeal be deemed amended to include all of the allegations, claims and facts in this Application, including the information in the Addenda and Appendices and information to be produced at an evidentiary hearing on this Application;
- (h) Vacate and set aside the judgment and sentence in this case and remand this case for further proceedings, or modify his death sentences to sentences less than death;
- (I) Order Respondent to release Petitioner from custody, unless he is given a new trial, or new proceedings are conducted to cure constitutional defects in the trial-court proceedings which resulted in Petitioner's present convictions and sentences; and
- (j) Grant Petitioner such further and additional relief as may be just and equitable.

Respectfully submitted,



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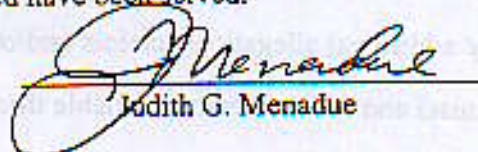
Phone: 405/364-6204

Fax: 405/447-2293

COUNSEL FOR MR. CUMMINGS

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 1998, a true and correct copy of Mr. Cummings' foregoing Verified Original Application for Post-Conviction Relief, with all Addenda and Appendices attached, was delivered to the Office of the Clerk of the Court to be delivered to the Office of the Attorney General; and all parties required to be served have been served.



Judith G. Menadue