

IN THE 19TH DISTRICT COURT
McLENNAN COUNTY, TEXAS

_____)	Cause No.
EX PARTE)	2011-1513-C1-A
Rickey Donnell Cummings,)	
APPLICANT)	
_____)	

**MOTION TO REQUEST ACCESS TO STATE'S MATERIALS,
PURSUANT TO ARTICLE 11.071, SECTION 3; PROPOSED ORDER**

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a writ of habeas corpus.” TEX. CODE CRIM. PROC. art. 11.071, § 3(a).

I.

LIMITED BACKGROUND AND PROCEDURAL HISTORY

On the night of March 28, 2011, a shooting occurred in the parking lot of an East Waco apartment complex; two were killed and two others were wounded. The State alleged that Cummings, his brother D’Arvis, and his friend Albert Love were responsible. A principal witness against Cummings was Nickoll Henry, who claimed that she saw Cummings with a gun moments after the shooting.¹ Despite the fact that no one else claimed to have witnessed Cummings participating in the shooting, and despite an absence of DNA, videotape, or gunshot residue evidence linking Cummings to it, he was convicted and sentenced to death on November 7, 2012. (2 CR at 266; 41 RR at 66.)²

After Cummings’s sentence was announced, and pursuant to Section 2(c) of Article 11.071 of the Code of Criminal Procedure, this Court appointed the OCW to represent Cummings in his state post-conviction litigation. (TEX. CODE CRIM. PROC. art. 11.071, § 2(c); 2 CR at 273.) State post-conviction counsel filed

¹ As is discussed in Claim One of Cummings’s Initial Application for Writ of Habeas Corpus, Henry did not mention seeing someone with a gun on the night of the shooting, or even on the following day, March 29, 2011. (*See App.* at 24, 40-41.)

² All references to “CR” are to the Clerk’s Record, which was filed on March 4, 2013, and is divided into two volumes but paginated consecutively. All references to “RR” are to the Reporter’s Record filed on June 4, 2013.

Cummings's Initial Application for Writ of Habeas Corpus ("Application" or "App.") on September 12, 2014; the Application raised multiple claims on Cummings's behalf, including a claim which concerns Henry's testimony. (*See generally* App. at 22-47 (Claim One).) The State filed its Answer on March 11, 2015. On March 31, 2015, this Court determined that "controverted, previously unresolved factual issues material to the legality of Cummings's confinement" existed, and it forwarded to the McLennan County District Clerk its order designating issues. An evidentiary hearing on those issues presently is scheduled for the fourth week of June.

II.

THE OCW'S INVESTIGATIVE EFFORTS

A. Requests for Missing Records

Prior to filing Cummings's Application, and pursuant to its duty to investigate Cummings's case, *see* Section III, *post*, the OCW requested access to the District Attorney's file. On June 13, 2014, the OCW received five discs of "electronic discovery" from the District Attorney's Office. The discs did not include several items, including recordings of witness interviews and 911 calls, photospread materials, and investigator notes from their meetings with witnesses.

Because the electronic discovery lacked materials related to the State's primary witness, Nickoll Henry, the OCW filed public information requests with

the Waco Police Department (“WPD”) and the City of Waco to obtain all records related to Henry, including “police reports, incident reports, witness statements, interview transcripts, audio and/or video recordings, officer and/or investigator notes, call logs, memoranda, and correspondence.” (Ex. A [Public Information Request Submitted to the WPD (June 24, 2014)]; Ex. B [WPD’s Response to OCW’s Public Information Request (July 28, 2014)].)

In response to these requests, neither the department nor the city provided the OCW with the photospread administered to Henry, the notes taken by WPD personnel during their meetings with Henry, and any recordings of interviews of Henry by WPD personnel. Moreover, none of the materials provided to the OCW pertained to Henry’s role in local law enforcement’s investigation into the March 28, 2011, shooting. (See Ex. C [Ltr. from the WPD to the OCW (Aug. 13, 2014)].) And whereas the WPD recordkeeping system organizes information by case number and permits users to classify individuals in the database based on their status as a “Witness,” an open records processor with the WPD confirmed that (1) Henry is not listed under the departmental case number for the March 28, 2011, shooting; and (2) to the extent Henry does appear in WPD’s system, she is classified not as “Witness” but as “Other.” (Ex. D [E-mail Exchange between the WPD and the OCW (Aug. 11-13, 2014)].)

WPD’s open records processor also advised the OCW to contact Stephen

January—the lead investigator of the shooting who had since retired from the WPD—because “[e]verything with this case has been turned in to the McLennan County DA’s office where McLennan County District Attorney Investigator Steve January is currently employed.”³ (Ex. D [E-mail Exchange between the WPD and the OCW (Aug. 11-13, 2014)].) WPD Sergeant J.R. Price later confirmed that Investigator January and Assistant District Attorney Greg Davis transferred all of the “original evidence” to the District Attorney’s Office before Cummings’s trial and that any “original disks would have been taken by [January] and Greg Davis.” (Ex. E [E-mail Exchange between Sergeant J.R. Price and Christina McPeak (Sep. 25, 2014)].) Following this exchange, the OCW directly asked Mr. January for his notes, but he stated that further inquiries would have to go directly to the State’s attorney. (*See* App. Ex. 19 at ¶ 23.) The State’s attorney in turn told the OCW that he would attempt to locate the records regarding Nickoll Henry and would get back in touch with the OCW the following week. (*Id.*) Despite repeated follow-up attempts, the OCW has not received any reply to this inquiry. (*Id.*)

While attempting to obtain the missing records from the WPD and the City of Waco, the OCW also requested the following materials from the District Attorney’s Office:

1. The photospread which Waco Police Detective Stephen January

³ Mr. January began working at the District Attorney’s Office in March 2012, five months before Cummings’s trial began.

administered to Nickoll Henry on March 30, 2011.

2. Notes taken by Detective January or other WPD personnel during his or their meetings with Nickoll Henry.
3. Video or audio recordings of interviews with Nickoll Henry by Detective January or other WPD personnel.

The State replied that “what we gave you on the [five discs] was everything we had regarding this case” and that “we don’t have a copy of the photo lineup.” (Ex. F [E-mail Exchange between the McLennan County District Attorney’s Office and the OCW (Aug. 5, 2014)].)

Later that same month, the OCW also asked for copies of the 911 calls; on September 29, 2014, the State maintained that the 911 calls “can’t be found.” (Ex. G [E-mail Exchange between the McLennan County District Attorney’s Office and the OCW (Sept. 11-29, 2014)]; *see also* Ex. H [Ltr. from McLennan County District Attorney’s Office to the OCW (Sept. 29, 2014)].) The State confirmed that recordings of the 911 calls were missing in a letter dated September 29, 2014, adding: “You had previously suggested that you or one of your colleagues might want to come look at our case materials, and we would certainly agree to this or any other reasonable suggestions you might have.” (Ex. H [Ltr. from McLennan County District Attorney’s Office to the OCW (Sept. 29, 2014)].) Based on the State’s representations that it did not have the requested materials, and in view of the fact that Cummings’s Application had been filed, the OCW did not make arrangements to review the District Attorney’s case materials at that time.

In its April 2015 oral argument before the Court of Criminal Appeals in *Albert Leslie Love, Jr. v. State of Texas*, the State referred to a file “archive” kept by the McLennan County District Attorney’s Office where a subpoena and order critical to one of appellant’s claims—and which both parties had, to that point, failed to locate—recently had been found.⁴ No. AP-77,024 (Tex. Crim. App. filed Sept. 30, 2014). Reference to this archive prompted the OCW to revisit the matter of the missing evidence. The OCW sent a letter to the District Attorney’s Office requesting that it review the “office’s archive for the photospread, notes, video and audio recordings, and 911 calls which were the subjects of [the OCW’s] requests last August and September.” (Ex. I [Ltr. from the OCW to the McLennan County District Attorney’s Office (Apr. 23, 2015)].)

On May 15, 2015, the State contacted the OCW to let Cummings’s counsel know that “a box of recordings” had been located which “had been misfiled with a different case.” (Ex. J [E-mail Exchange between the McLennan County District Attorney’s Office and the OCW (May 15, 2015)].) Although the message only mentioned a “box of recordings” and was not specific as to the contents of those recordings, the State did offer that “they likely contain what you’re looking for.” (*Id.*) In response, the OCW requested an opportunity to review the recordings, the

⁴ Specifically, the subpoena and order were critical to appellant’s claim that law enforcement had illegally seized his cell phone records. In his oral argument before the Court of Criminal Appeals, appellant’s counsel stated that he had engaged in exhaustive efforts to locate them.

State's file pertaining to the Cummings case, and the file in which the recordings had been misplaced. (*Id.*) The parties later discussed the OCW's request in a series of telephone conversations, and, on May 22, 2015, the State informed the OCW that it would not allow Cummings's post-conviction counsel to review either the recordings or the files.⁵ (*See* Ex. K [Ltr. from the District Attorney's Office (May 22, 2015)].)

B. Request for Records Pertaining to Retired Detective January

Through the course of its investigation, the OCW learned that Mr. January may have engaged in questionable investigative practices. For example, Brittany Snell, a State's witness, testified that Mr. January told her that she would be charged with a crime if she did not talk to him. (33 RR at 39, 44.) Likewise, Jasmine Davison, a witness for the defense, testified that Mr. January told her that he would charge her with a felony if she did not speak with him. (35 RR at 103.) Henry herself told an OCW attorney that Mr. January gave her cigarettes and sent men bearing boxes of groceries to her and her mother on two separate occasions, in the period from August to October 2012, during which time Mr. January was employed by the District Attorney's Office. (*See* App. Ex. 19 at ¶13.) Police

⁵ The OCW separately submitted public information requests for non-case specific files. In conversations with the OCW, and in its letter dated May 22, 2015, the State explained that it did not appreciate the fact that the OCW was using different mechanisms to obtain information from its office. (*See* Ex. K [Ltr. from the District Attorney's Office (May 22, 2015)].)

reports further reveal that Mr. January interviewed suspects even when he believed that they were under the influence of drugs. (Interview by Det. Stephen January with Albert Love, Jr. (Apr. 5, 2011); Interview by Det. Stephen January with Kennedy Hardaway (Apr. 14, 2011).)

III. ARGUMENT

The OCW is required by statute to “investigate . . . the factual and legal grounds for the filing of an application for writ of habeas corpus.” TEX. CODE CRIM. PROC. art. 11.071, § 3(a). The professional standards against which all capital trial counsel, appellate counsel, and post-conviction counsel are measured⁶ likewise require counsel to “make efforts to secure information in the possession of the prosecution or law enforcement authorities.” Am. Bar Ass’n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1020 (2003) (“*ABA Guidelines*”) (Guideline 10.7 cmt.). The *ABA Guidelines* also specify that, “[w]here necessary, counsel should pursue such efforts through formal and informal discovery.” *Id.* Moreover, capital

⁶ The U.S. Supreme Court repeatedly has assessed the reasonableness of counsel’s performance by looking to “[p]revailing norms of practice as reflected in [the] American Bar Association standards.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *see also Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (noting that the *ABA Standards* “may be valuable measures of the prevailing professional norms of effective representation”); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (“[W]e long have referred [to the *ABA Standards for Criminal Justice*] as guides to determining what is reasonable.” (internal quotations omitted)).

counsel's "duty [to investigate] is intensified (as are many duties) by the unique nature of the death penalty[.]" *Id.* at 1016.

The State Bar of Texas also has promulgated standards applicable to capital counsel representing "all persons facing the possible imposition or execution of a death sentence by any State of Texas jurisdiction." State Bar of Tex., *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B.J. 966, 967 (2006) ("*Texas Guidelines*") (Guideline 1.1(A)). The *Texas Guidelines* explicitly state that "[h]abeas corpus counsel cannot rely on the previously compiled record, but must conduct a thorough and independent investigation," and they prohibit such counsel from "rely[ing] on the work of, or representations made by, prior counsel to limit the scope of post-conviction investigation." *Id.* at 976 (Guideline 12.2(B)(1)(b)).

To satisfy these obligations, the OCW must review the contents of the District Attorney's Office's complete file pertaining to Cummings's case and its other files which may contain relevant material. The OCW has not, however, had a meaningful opportunity to conduct this review. As discussed above, the discs forwarded to the OCW by the District Attorney's Office do not include important materials which are relevant to the claims raised in Cummings's Application and which cannot be reasonably characterized as work product. (*See, e.g.*, App. at 27 n.10, 41-43 (discussing the missing materials in connection with the Application's Claim One).) In particular, most of the missing evidence pertains to Nickoll

Henry—the most important witness presented by the State—and its content, if known to the jurors empaneled to decide Cummings’s culpability, might well have persuaded them to disbelieve Henry’s testimony.

Furthermore, the misfiling of evidence strongly suggests that the five discs provided to the OCW on June 13, 2014, do not contain all of the materials relating to the Cummings case. By allowing counsel access to these files, this Court will better ensure that Article 11.071’s purpose—providing for the timely and thorough review of all cases in which a sentence of death has been imposed—will be met.⁷

Finally, the OCW’s obligations to Cummings cannot be satisfied absent its review of Mr. January’s personnel file. As is discussed throughout Section II, *ante*, there are areas of concern regarding his investigative techniques while a detective with the WPD. In addition, the District Attorney’s Office itself may have indicated its own reservations with respect to Mr. January’s investigation of the

⁷ The OCW recognizes that the State is entitled to withhold material protected by the attorney work product privilege. Although District Attorney investigators’ notes and recordings arguably are covered by the work product doctrine, none of Mr. January’s Cummings-specific notes and recordings should be protected from disclosure on this (or any other) basis. Likewise, any other records of Mr. January’s interviews of witnesses or case-specific investigative activities should be subject to disclosure. As mentioned, *see* Section II-A, *ante*, Mr. January was the lead detective in the investigation that led to Cummings’s arrest. Mr. January left the WPD and joined the District’s Attorney’s Office several months before Cummings’s trial, but he remained involved in the case—for example, Mr. January and a woman from the District Attorney’s Office met with Nickoll Henry several times prior to her testimony. (*See* App. Ex. 19 at ¶14.) In view of his dual role in Cummings’s case, Mr. January’s work thereon must be fully accessible to Cummings’s counsel.

case against Cummings through its decision not to call Mr. January as a witness—this despite the fact that Mr. January was the lead investigator on the case. Mr. January’s personnel file may contain information concerning his work habits and investigative techniques, and it also may contain complaints relevant to the substance of Cummings’s Application. Because Mr. January had significant contact with Henry both while he was a detective and while he has been employed by the District Attorney’s Office, information within his personnel file may bear on the reliability of her testimony and, therefore, should be disclosed to post-conviction counsel.⁸

⁸ The OCW has submitted a public information request for Mr. January’s files. The District Attorney’s Office has since requested a ruling from the Office of the Attorney General regarding disclosure. Because obtaining this ruling could take as many as fifty-five days, *see* TEX. GOV’T CODE §552.306(a), the OCW has opted to ask this Court to order disclosure of the file independent of the public information request.

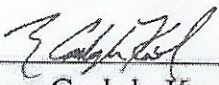
IV.

CONCLUSION

For the foregoing reasons, Cummings requests this Court grant the instant Motion and enter the attached Order.

Respectfully submitted,

DATED: May 22, 2015

By 

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Post-Conviction Attorney