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IN THE CIRCUIT COURT OF CLAY COUNTY, ARKANSAS
WESTERN DISTRICT, CRIMINAL DIVISION

STATE OF ARKANSAS — PLAINTIFF

VS. — NO. CR-93-47

JESSIE LLOYD MISSKELLEY, JR. — DEFENDANT

MOTION

Comes now the Defendant, Jessie Lloyd Misskelley, Jr., by and through his Court-appointed attorneys, Stidham & Crow, and for his Motion to the Court hereby states and alleges as follows:

1. That the Defendant is charged with three (3) counts of capital murder and is scheduled for trial January 18, 1994.

2. That the Defendant hereby specifically requests that the Court refrain from engaging in language or conduct, or permitting conduct in the presence of the jury, which would amount to a "comment on the evidence", as prohibited by the Arkansas Constitution.

3. That the Defendant specifically requests that the jury not be permitted to view the Defendant in handcuffs and/or leg shackles or other unreasonable security measures, as same would negate the presumption of innocence, be violative of the Defendant's due process rights and amount to a comment on the evidence,

by the Court.

4. That the Defendant respectfully requests that the Court refrain from any interrogation of witnesses, in the presence of the jury, that would negate the presumption of innocence, violate the due process right's of the Defendant and amount to a comment on the evidence by the Court.

WHEREFORE, the Defendant prays that the Court grant his Motion herein, and for all other proper relief which he may appear entitled in the premises.

JESSIE LLOYD MISSKELLEY, JR.,
DEFENDANT

By: _____

STIDHAM & CROW
ATTORNEYS AT LAW
Daniel T. Stidham
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203 N. Second Street
P.O. Box 856
Paragould, AR 72451
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BRIEF IN SUPPORT

In support of his Motion herein, the Defendant respectfully directs the Court to the Arkansas Constitution, Article 7, Section 23 which provides:

> Judges shall not charge juries with regard to matters of fact, but shall declare the law...
>
> [Arkansas Constitution, ART.7, 23]

The Arkansas Supreme Court has interpreted this section of the Constitution on many occasions. In Chapman v. State, 257 Ark. 415, 516 S.W.2nd 598 (1974) the Court stated that:

> "No principle is better settled than that a judge presiding at trial should manifest the most impartial fairness in conduct of the case."

In McMillan v. State, 229 Ark. 249 (1958), the Arkansas Supreme Court recognized that the:

> "...attitude, statements, and opinion of the Court probably make a more indelible impression upon the mind of the juror than any other factor during a trial."

In Sharp v. State, 51 Ark. 147, 10 S.W. 228 (1889), The Honorable Justice Battle pronounced that:

> "Any expression or intimation of an opinion by the judge, as to questions of fact or credibility of witnesses, necessary for them to decide in order

for them to render a verdict, would tend to deprive one or more of the parties of the benefits guaranteed by the constitution, and would be a palpable violation of the organic law of the state."

In addition, in the same case, Judge Battle further stated that:

"In the midst of doubt as to what their verdict should be as to appellant, it was natural for them to seize upon and adopt any opinion which they understood the judge to have expressed or intimated upon the questions they were required to decide.* * *"

Sharp v. State, 51 Ark. 147, 10 S.W. 228

In Oglesby v. State, 299 Ark. 403, 773 S.W. 2d 443 (1989), the Court further recognized the great influence a trial judge has on a jury, and further stated that the judge should refrain from remarks or comments which tend to influence the minds of the jury, thus, the Defendant submits that since the jury will be greatly influenced by any remarks or questions that the Court might direct to a witness, the Court should

refrain from questioning any witness as to matters of fact that would amount to a comment on the evidence.

While the Defendant admits that a trial judge has the right under Arkansas law (Arkansas Rules of Evidence 614) to interrogate witnesses, the Arkansas Supreme Court has clearly outlined that it is not usually necessary that the trial judge propose questions to witnesses, and to do so in certain instances could be improper and prejudicial. Sharp v. State, 51 Ark. 147, 10 S.W. 228 (1889); Ratton v. Busby, 230 Ark. 667, 326 S.W.2d 889 (1959), 76 ALR 2d 751; Jordan v. Guinn and Etheridge, 253 Ark. 315, 485 S.W.2d 715 (1972), 52 ALR 3d 1.

In addition, should the Court ask a question of a witness that is objectionable to either the prosecutor or the defense, this places an undue burden on the party to challenge the admissibility of something the court is attempting to introduce itself. This might cause the jury to place bias against a party who attempted to challenge the Court's own question. This could result in confusion to the jury and unfairness to the defendant, and a denial of due process.

The same rule of Evidence (ARE 614) which grants authority to the trial judge to interrogate witnesses

also recognizes the problem of objecting to the Court's own questions or introduction of an item of evidence. It provides that objections can be made at the next available opportunity when the jury is not present.

In addition, the defendant respectfully requests that the jury not be permitted to view the defendant in handcuffs, shackles, or leg irons during the course of the trial itself, or in any preliminary stage to the trial. Also, the defendant requests that any and all security measures taken by the Court not interfere with the presumption of innocence, or negate same, or not amount to a comment on the evidence.

In Moore v. State, 299 Ark. 532 (1989) the Arkansas Supreme Court recognized that it is within the perogative of the trial judge to determine the seating arrangements in the courtroom, however the judge may not take precautions in the name of security which result in prejudice to the defendant. The Court in Moore further noted:

> "We have found no case where we have held the actions of the court, as opposed to its words, amounted to a comment on the evidence. Here, however, we cannot ignore the truism that actions

speak louder than words. The motion to have the policemen moved behind the rail where they could sit with other spectators should have been granted, and we hold it was prejudicial error to have overruled it."

Thus, the defendant respectfully requests the Court refrain from engaging in any language, or conduct, that would amount to a "comment on evidence".

JESSIE LLOYD MISSKELLEY, JR.,
DEFENDANT

By: _____

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CERTIFICATE OF SERVICE

I, Daniel T. Stidham, Attorney for the Defendant herein, do hereby certify that I have served a copy of the foregoing pleading upon John Fogleman, Deputy Prosecuting Attorney, P.O. Box 1663, West Memphis, AR 72303, and all other attorneys of record, by placing same in the U.S. Mail this 6th day of January, 1994

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with sufficient postage attached to ensure delivery, or

by personally delivering same to them.

Daniel T. Stidham
Attorney at Law