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at _____

SEP 17 1993

LAVADA NORRIS, CLERK

IN THE CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS
CRIMINAL DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

No. CR-93-516,517,518 *A*

JESSIE LLOYD MISSKELLEY, JR.

DEFENDANT

BRIEF IN SUPPORT OF PETITION FOR CHANGE OF VENUE
AND AMENDED PETITION FOR CHANGE OF VENUE AND
MOTION CHALLENGING CONSTITUTIONALITY OF
ARKANSAS VENUE LAWS

I. INTRODUCTION

Jessie Lloyd Misskelley has been charged with three counts of Capital Murder. The defendant has filed a Petition and Amended Petition for Change of Venue and Motion Challenging Constitutionality of Arkansas Venue Laws. Due to the extreme amount of publicity generated by the original search for the victims, the discovery of the crime, the investigation of the crime, the arrest of the defendants, the initial hearings and the certainty of future publicity as the pretrial hearings continue, it would be impossible for the Defendant to receive a fair trial in Crittenden County, Arkansas. Furthermore, due to the pervasive nature of the media coverage of this case, it would not be possible for the defendant to receive a fair and impartial trial in any county in the Second Judicial District.

Attached hereto and made a part hereof by this reference are Affidavits signed by residents of every county in the

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Second Judicial District stating that it would not be possible for the defendant to receive a fair trial in the District. Additionally, attached hereto and made a part hereof by this reference, are Audit Reports for the Commercial Appeal (Memphis, Tennessee) and the Jonesboro Sun (Jonesboro, Arkansas) and coverage maps for WMC-TV (Memphis, Tennessee) and WHBQ-TV (Memphis, Tennessee). These Newspapers and Television Stations have given vast amounts of coverage to this case, creating much speculation among the communities of the Second Judicial Circuit in general, and Crittenden County in particular.

The Coverage Map II. MEDIA COVERAGE weekly circulation

As reflected in the exhibits attached hereto, the Memphis Commercial Appeal has extensive penetration in every county in the District. Page two of the Audit Report of the Commercial Appeal indicates that Crittenden County is not only within the ADI (Area of Dominant Influence) for the Commercial Appeal, but is within the Metropolitan coverage area. Furthermore, Poinsett and Mississippi Counties are within the ADI. of media coverage gathered, by the afore-

Page five of the report indicates that out of 17,200 occupied households in Crittenden County, the Commercial Appeal has an actual gross distribution of 6,188 on Sundays and 3,368 Monday through Saturday. Out of 20,300 occupied

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households in Mississippi County, the Commercial Appeal has an Actual gross distribution of 2,274 on Sundays and 1,258 Monday through Saturday. For Poinsett Counties 9,300 occupied households, the Sunday actual gross was 657 while Monday through Saturday 326. The report also indicates substantial circulation in Craighead, Clay and Greene Counties.

The Audit Report for the Jonesboro Sun, at page four, indicates a very high percentage of penetration in Craighead, Poinsett and Greene Counties with substantial penetration in Clay and Mississippi Counties.

The Coverage Map for WMC-TV indicates weekly circulation of between 75% and 100% for Crittenden, Poinsett, Craighead, and Mississippi Counties. Circulation of between 50% and 74% in Greene County and some circulation in Clay County. For WHBQ-TV, the map indicates that Crittenden County is within the Metro coverage area, while Poinsett and Mississippi Counties are within its ADI with substantial penetration in Craighead, Greene and Clay Counties.

The amount of media coverage gathered, by the aforementioned news organizations, as well as Radio, other television stations (notably KAIT-TV in Jonesboro and WREC-TV in Memphis) and other newspapers within the District, is clearly and obviously substantial. Coverage began when

the victims were still only missing, grew substantially once the bodies were discovered, continued at a frenzied pace during the investigation (noted by daily or almost daily news conferences by the investigating officers), exploded with the arrest of the defendants and continues with each filing in the court file or pre-trial hearing. The press attention has been so great that there has even been a meeting in Jonesboro, attended by both defense counsel and the prosecution, to discuss with the press, the coverage of the case. All parties freely admit that this matter has received more press coverage and attention than any other case in which they have previously been involved. In fact, it is quite possible that this case has attracted more media attention than any other criminal case in the history of the Second Judicial District and perhaps even the entire State. Attached to Defendants original Motion are a few examples of the newspaper coverage which has been attendant to this matter. Attached hereto are additional articles and examples of media coverage of this case.

III. PROPER VENUE

The Constitution of the State of Arkansas states:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by impartial jury of the county in which the crime shall have been committed; provided that the venue may be changed to any other county of the judicial district in which the indictment is found, upon the application of the accused, in such

manner as now is, or may be, prescribed by law.
Ark. Const. art. 2 section 10.

Clearly the defendant has the right to request to have the venue changed from Crittenden County to another venue in the Second Judicial District. While, in the alternative, the defendant does request this relief, the defendant first and foremost requests the court to change the venue to a county outside the Second Judicial District.

A. Change of Venue Outside the District.

In Swindler v. State, 264 Ark 107, 569 S.W.2d 120 (1978), the Arkansas Supreme Court was faced with a very similar situation as to press coverage. In describing the coverage the Court stated:

The proof showed, without contradiction, that the news media had saturated the public with the fact that appellant had been released from Leavenworth prison just a week before killing Officer Basnett and that at the time of the killing he was wanted in South Carolina for the recent murder of two teenagers. The fact that appellant had been interviewed by the South Carolina authorities was also given widespread publicity. In addition to the publicity involving the killing and subsequent funeral of Officer Basnett, the Concerned Policemen's Wives Organization, some 45 strong, circulated petitions requesting two policemen to each patrol car. This organization wearing black arm bands collected between nine and ten thousand signatures. The people who signed the petition mentioned the policeman that was killed by appellant, and were told that the black arm band was worn in mourning and in respect of the fallen officer. Swindler, 569 S.W.2d at 122.

Similarly, in the concurrence written by Chief Justice Harris, it was stated:

From the outset, this homicide received tremendous publicity, as would be expected. The newspaper gave front page headlines, and television and radio likewise gave extensive publicity. It would have been almost impossible for people who read or listened to the reports not to have formed an opinion. Of course, the news media were entitled to give full reports of the slaying and of the arrest, and were entirely in order in using the pictures and stories appearing relative to the funeral, which were, after all, a tribute to a young officer performing his duties. But events included in some of the articles really had nothing to do with the slaying itself, and certainly could have been highly prejudicial. I refer to the fact that it was frequently mentioned that Swindler had allegedly committed two brutal murders of teenagers in South Carolina, and that South Carolina officers had come to Fort Smith. The fact that Swindler had a prison record was several times mentioned. In addition, stories pointed out that there were several guns in Swindler's car and that the car was stolen. Television and radio stations gave extensive coverage and personnel of those stations testified as to their "coverage;" for instance, KPFW television has a coverage of about 28,000 homes at 5:00 p.m. and 24,000 homes at 10:00 p.m.; radio station KWHN has AM and FM circulation of 59,000 to 60,000 persons and, all in all, the entire county was "saturated" with news concerning the killing, the stories embracing several weeks. Also, a detective magazine, "Inside Detective," distributed by S&S News Agency, Inc., and sold by Butterfield Trail newsstand in Fort Smith, carried a story entitled "God Help the Cop Who Stops This Guy." An article with pictures appears relative to the defendant's case. KISR radio station broadcast ads seven times a day for five days advertising this story.

* * *

I will just say that I served for a number of years in the prosecuting attorneys office and am now in my 22nd year on this court, and the prospective jurors knew more purported facts about the defendants background, and based on what had been heard in the news media, more had formed at least tentative

opinions as to guilt, than any case I have ever come into contact with.

Of course, what we are confronted with is the age-old problem of trying to work out a balance between the First (free speech) and Sixth (fair trial) Amendments.

* * *

I am not nearly so much concerned about publicity that arises after the trial has commenced. For one thing, the news releases are, in the main, based on what the witnesses actually said, i.e., hearsay or incompetent evidence is not a part of such a news story. Then, too, after all, the objective is to protect the jury from becoming aware of outside reports, and if necessary, a jury can be sequestered. But I am disturbed about newspaper stories and television releases that occur at the time, or soon after, the crime occurs, and for days and weeks thereafter, I suppose mainly because there are so few answers (if indeed there are adequate answers) to the problem. Let me make it very clear that I do not favor any "gag" rule and prior restraint is invalid - but though it were otherwise - I still would not favor it since I strongly support a free and unfettered press. Accordingly, I really only know of three things that, at least, constitute a partial answer. First, where publicity, including matters which could well be prejudicial to a fair trial for a defendant, runs rampant throughout the community, a change of venue would have to be granted.

* * *

Perhaps I can briefly summarize information that may well prove prejudicial. . . . I shall only mention those that I consider go to the "heart of the matter" and only insofar as they relate to the selection of an unbiased and unprejudiced jury. I agree that the following categories of information are prejudicial to a fair trial and they have been so declared in various court opinions.

"The prior criminal record (including arrests, indictments, or other charges of a crime), or the character or reputation of the defendant;

The existence or contents of any confession,

admission, or statement given by the defendant, or the refusal or failure of the defendant to make any statement;

The performance of any examinations or tests or the defendant's refusal or failure to submit to an examination or test;

The possibility of a plea of guilty to the offense charged or a lesser offense;

The defendant's guilt or innocence or other matters relating to the merits of the case or the evidence in the case"

Actually, if only the first two mentioned were omitted from news stories and broadcasts, I feel that a change of venue in many a case would be avoided. Swindler, 569 S.W.2d at 126-130 [Emphasis added, footnotes omitted].

Clearly, the facts of the media coverage of the Swindler case and in the current matter are very similar. Further, the fears of Chief Justice Harris as to the most prejudicial publicity (the printing of an alleged confession) have come true. In a Copywritten story, the Memphis Commercial Appeal published the alleged confession of the Defendant. This article was circulated to every county in the district. Later articles in the Commercial Appeal and every other newspaper (as well as broadcast media) have referred to the published alleged confession. Few individuals, if any, in the district are unaware of the alleged confession, and most are aware of its contents.

Additionally, the news media has continued to report on and refer to the occult in reference to this case. Due to this continued reference, the defendant is irrevocably

connected to the occult in the eyes of the Second Judicial District citizens. At least one media article has referred to the defendants as "less than human", see exhibit "E" attached hereto and made a part of by this reference. In addition, even more prejudice has attached to the defendant in the Second Judicial District with recent stories in the media of "Witches" and "Witch Marches" in Craighead County and grave desecrations in Greene County which local officials have attributed to "cult activity". These stories are almost always irrevocably associated with the defendant and this case.

In Swindler, the Court, without citing to any specific authority, reversed the trial court's refusal to grant a change of venue to outside the district. The Court simply stated, "we must hold that the trial court abused its discretion in denying the motion for change of venue. The voir dire of the jury corroborates the testimony of Alan Wooten, Tom Anderson and Robert Taylor that it would be very difficult to find twelve people who could put all the news media information aside." Swindler, 569 S.W.2d at 123.

Under the United States and Arkansas constitutions, a defendant is entitled to a fair trial. If, because of pretrial publicity, an impartial jury cannot be found, the

defendant's right to a fair trial is violated. Irvin v. Dowd, 366 U.S. 717 (1961); Raid & Van Denton v. State, 265 Ark. 875, 582 S.W.2d 341 (1979). This right is superior to the Arkansas constitutional and statutory requirement that the matter be heard in the same judicial district. See, Swindler, supra. Clearly if in order to obtain an impartial jury it is necessary to change venue to a county outside the district, the defendant's right to a fair trial must be held tantamount. In addition to the precedent set in Swindler, there is the long standing principal that the United States Constitution can and does provide rights that are broader and superior to those in the Arkansas Constitution. In Irvin v. Dodd, supra, the United States Supreme Court held that a change of venue was necessary, even though it was contrary to state law.

In Swindler v. State, 267 Ark. 418, 592 S.W.2d 91 (1979) [Swindler II], the Arkansas Supreme Court cited with approval to the Irvin opinion and stated that, there, a change of venue was "obviously necessary." Swindler II, 592 S.W.2d at 96.

Lastly, clearly under the Due Process clause of the United States constitution, the defendant cannot have his life or liberty taken without the proper safeguards. Here, where there has been such a pervasive and

substantial media coverage through out the entire district, the defendant's right to a fair trial would be circumvented, if the venue were not changed out of the Second Judicial District.

Therefore, the defendant respectfully requests that the Arkansas venue provisions as to change of venue out of the district be held unconstitutional and this cause be heard in an appropriate location outside of the pervasive media coverage area.

B. In the Alternative, Change of Venue Inside the Second Judicial Circuit

While the defendant maintains and reaffirms his position that a fair trial can only be had outside the Second Judicial Circuit, the defendant requests that in the event the court refuses to grant such relief, that the venue be moved from Crittenden County. As demonstrated by the affidavits of citizens of the county and coverage reports of the local media, Crittenden County has been completely saturated with pretrial publicity. Due to the nature of the case, the constant media attention and the strong feelings of the community (as evidenced by the fact that both the defendant and his family have received numerous death threats and harassing communications), it would be absolutely impossible for the defendant to

receive even the semblance of an impartial jury in Crittenden County. Clearly, all of the arguments discussed in the prior portion of this brief apply to this request for change of venue. The defendant realleges those arguments here in lieu of repeating them.

Therefore, the defendant respectfully request that the venue be changed from Crittenden County.

IV. CONCLUSION

The amount of media attention given to this crime is clear. From the time the victims disappeared the media surge has built. During the investigation there were daily press conferences and the corresponding daily headlines. After the arrest the attention only grew. With the printing of the defendant's alleged confession major damage was inflicted on the ability of the defendant to receive a fair trial anywhere in Eastern Arkansas.

In Swindler, the Arkansas Supreme Court implicitly authorized the trial courts to grant a change of venue to a county outside of the judicial district. In Swindler II, the court quoted with approval from a United States Supreme Court case in which a venue change was ordered in violation of state law. Finally, In Irvin, the United States Supreme Court explicitly held that regardless of state law, a criminal defendant is entitled to an

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impartial jury, and if necessary to achieve that goal,
state law as to venue must be ignored.

In the event that this court does not change venue to
a location outside of the district, the defendant, for all
the reasons put forth above request that the venue be
changed from Crittenden County.

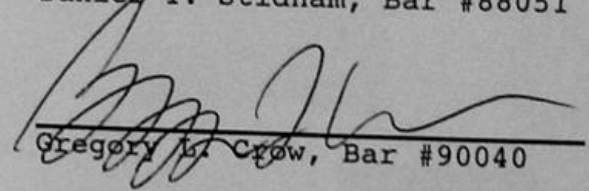
Respectfully submitted,

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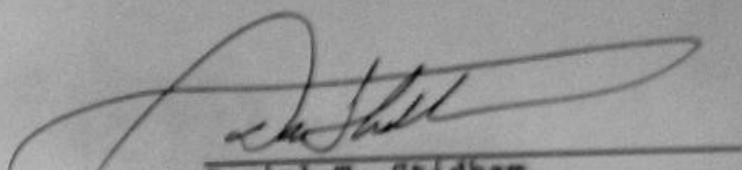

Gregory L. Crow, Bar #90040

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 Brief in Support of Petition for Change
of Venue and Amended Petition for Change of Venue upon
John Fogleman, Deputy Prosecuting Attorney, P.O. Box 1666,
West Memphis, Arkansas 72303, and all other attorneys of

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record, by placing same in the U.S. Mail this 17 day
of September, 1993, with sufficient postage attached to
ensure delivery.


Daniel T. Stidham

Weekly Household Circulation Percentage

Age Group	Percentage
0-14	24%
15-24	28%
25-34	34%
35-44	38%
45-54	42%
55-64	46%
65-74	50%
75-84	54%
85+	58%

14.