

After taping Sherry's confession, Agents Dill and Cathey along with other officers interrogated Jessie again in the office of the Atoka County Sheriff at 9:27 pm (Appendix 23). This tape-recorded statement has never been disclosed to the defense, presumably because the prosecution felt it would be helpful to the defense. Its production is included in the discovery request that accompanies this Application (Addendum B).

N. Relevant Procedural History of Case

Felony Informations were filed on August 1, 1994, in Coal County District Court. Anita was charged with the first degree (malice) murder of Judy. Sherry was charged with the first degree (malice) murder to Melissa. Jessie was charged with two counts of first degree (malice) murder for the murder of Judy, acting in concert with Anita, and the murder of Melissa, acting in concert with Sherry (OR 4). Initial appearances were held that same day (OR 6), and counsel appointed for Mr. Cummings (OR 11).

On August 4, 1994, a Petition to Terminate Parental Rights was filed in Coal County, JFJ 94-11. It sought to terminate the parental rights of Jessie, Anita and Sherry to all three children: Robbie, Debbie and Ashley. On August 8, 1994, Anita was interviewed in the Bryant County jail by a DHS caseworker. During that interview, Anita does not discuss the murders, but makes many outlandish allegations about Jessie abusing Robbie and Shirley Cunningham's two children. Many of those allegations have been refuted by Sherry (Appendix 7). The Parental Rights proceedings resulted in all three parents voluntarily surrendering their rights (Appendix 44). Robbie and Ashley are in the custody of Anita's parents in Batesville, Arkansas. Debbie had several foster-home placements before being placed with a distant relative of Sherry who lives in Enid, Oklahoma. Although the children have been in counseling, there is evidence that Anita was fabricating many of her claims of alleged abuse.

Anita's fertile imagination continued to supply the authorities with tales of Jessie's alleged wrong-doings. In a statement handwritten by somebody else and signed by Anita on August 12, 1994, she provides a list of Jessie's alleged criminal activities. Anita apparently thought that any

terrible tale she told about Jessie would be believed. An example of Anita's fabrications is her claim that Sherry told Anita that Jessie had molested Shirley's daughter Natasha. However, during a recent interview with Sherry, she reported that Natasha's father, Henry Moody (Judy's son), had molested Natasha (Appendix 7).

Prior to trial Anita was kept in custody at the Bryant County jail. Sherry initially was kept at the Pittsburg County jail but soon wore out her welcome there and was transferred to the Atoka County jail. The Coal County Sheriff's Office was responsible for picking them up and transporting them to Coal County for court hearings, both in this case and the Parental Rights case. Not only were the women transported in the same vehicle, but they were also kept in the same cell in Coal County on court dates (see Appendix 7). On one occasion when they were together prior to the Preliminary Hearing, Anita and Sherry were permitted to visit together with Anita's parents (Appendix 42).

Prior to the Preliminary Hearing, the prosecution negotiated a plea agreement with Anita Cummings pursuant to which she was to plea guilty to Second Degree Murder in exchange for a Life sentence (Appendix 52, p. 8). The Preliminary Hearing commenced on November 29, 1994. Sherry, who was represented by attorney George Butner, waived her right to a Preliminary Hearing and she testified as a State witness. Anita was permitted to sit in the courtroom and heard Sherry's testimony (PH-1 240). Sherry was bound over for trial on first degree murder. That same day, a Felony Information was filed against her which alleged two counts of Accessory After the Fact for the murders of Judy and Melissa, and one count of Permitting a Child to be Abused, and a separate Felony Information filed accusing Sherry of abuse of a minor. After Jessie's trial, Sherry pled guilty to all three counts in the former Information, and was given three concurrent sentences of 35 years on each count.

The Preliminary Hearing was continued on December 8, 1994. Anita Cummings and OSBI Agent Jeffries testified for the State. The prosecution made an oral motion to add two counts of child abuse against Jessie (PH-1 369-70). Probable cause was found to bind both Anita and Jessie over for Judy's murder, which had taken place in Coal County. However, Count II of the

Information in Jessie's case was taken under advisement as to the venue issue, since Melissa was killed in Choctaw County. The Court also took under advisement Count III, alleging Child Abuse of Lahoma Yaws, and Count IV, alleging Child Abuse of Melissa (OR 42).

On December 15, 1994, the trial court dismissed Count II without prejudice to filing it in Choctaw County (OR 45). The next day the State filed its Notice of Intent to Appeal Under Rule 6 (OR 47), and an Application to Appeal (OR 54). Judge Jack Welch in Hugo was assigned to the matter (OR 58). On January 1, 1995, District Attorney James Thornely took office, replacing Theresa McGehee who had lost her reelection bid to Mr. Thornely. Two days later at Jessie's formal arraignment, trial on Count I was set for April 10, 1995 (OR 60).

On January 7, 1995, Judge Welch issued his decision which affirmed the Magistrate's order dismissing Count II (OR 62). Four days later an Information was filed in Choctaw County District Court, No. CRF 95-11, charging Jessie with the first degree malice murder of Melissa. On January 17, 1995, the State filed its Notice of Intent to Appeal Judge Welch's decision (OR 63). A certificate of Appeal was issued on March 14, 1995, by the Clerk of the Appellate Courts (OR 196).

On February 2, 1996, Judge Branam issued an order binding Jessie over on the Child Abuse charge relating to Melissa (OR 65), but not Lahoma, and directed the State to file an appropriate information by February 10 (OR 66). On February 9, 1995, an Amended Felony Information was filed against Jessie which alleged the same two counts of malice murder, despite the order dismissing Count II. The Amended Information also included Count 3, which charged Child Abuse of Melissa for allegedly committing lewd or indecent acts, including penetration (OR 68).

Prior to the Preliminary Hearings, Anita had told police Jessie allegedly raped Sherry's sister, Lahoma Yaws II, when she was 14 years old. During police interrogation of Sherry, she failed to corroborate this had happened (Appendix 21). Lahoma Yaws II herself failed to corroborate this had happened when she was first interviewed by the OSBI (T. 929-30). Subsequent to her denials, OSBI Agent Childers went to see Lahoma at school in order to interview her alone. Childers was able to elicit from Lahoma a claim that Jessie had raped her. Afterwards, the State filed a Bill of Particulars on February 14, 1995, which alleged two aggravating circumstances:

murder for the purpose of avoiding arrest; and a probability that Jessie would constitute a continuing threat to society (OR 72). No facts were alleged in support.

On March 13, 1995, the defense filed a Motion to Quash or Dismiss the Information (OR 187). It notes that Anita and Sherry are accomplices in the offenses with which Jessie was charged, and that the State failed to introduce any evidence to corroborate the women's testimony, and that the evidence at the Preliminary Hearing was insufficient. That motion was denied on March 16, 1995 (OR 202).

A new Bill of Particulars was filed on March 23, 1995 (OR 207), alleging the same two aggravating circumstances for both murder counts. The "avoiding arrest" aggravator was based on the alleged rape of Melissa, and also to prevent Melissa from providing evidence regarding the murder of her mother. The "continuing threat" aggravator was premised on a laundry list of 20 allegations of criminal activity based primarily on Anita's and/or Sherry's report.

The spurious nature of these allegations is illustrated by Anita's claim that Jessie burglarized the house trailer of their neighbor Stella Knight. The police interview of Stella did not confirm that allegation (Appendix 31), and Stella has indicated to Jessie's post-conviction counsel that the incident never took place (Appendix 7). Another example is the claim that Jessie had molested Shirley Cunningham's daughter, Natasha. Sherry indicted to the undersigned counsel that Natasha's father, Henry Moody, was the person who molested her (Appendix 7).

On March 28, 1995, the State filed in this Court an Application for Accelerated Docket (OR 235). It incorrectly alleged Melissa was raped in her residence in Coal County (Melissa lived in Atoka County at the time of her death). On April 8, 1995, the Felony Information filed in Choctaw County regarding Melissa's death was dismissed on the State's motion. The Coal County cases were stayed pending resolution of the Rule 6 appeal.

On January 11, 1996, this Court heard oral arguments on the Rule 6 appeal. At the conclusion of the arguments, the Court informed the parties it was affirming the Magistrate's dismissal of Count II (OR 237). A Second Amended Information was filed on February 9, 1996 (OR 290), alleging three counts:

- Count I: malice murder of Judy Moody, ^{Mayo} acting in concert with Anita Cummings;
- Count II: malice murder of Melissa ^{Moody} Mayo, acting in concert with Sherry Cummings, and/or in the alternative, felony murder based on an alleged kidnapping from Coal County of Melissa, using guile and deceit by telling her that she was being taken to see her mother;
- Count III: Child Abuse of Melissa Murder by means of sexually abuse, including touching and actual penetration of private parts while responsible for her welfare.

At the formal arraignment on March 13, 1996, defense counsel filed a motion to remand Count II for a further preliminary hearing (OR 297). Judge Gabbard remanded the motion for hearing on March 21, 1996, which resulting in Judge Branam setting a preliminary hearing for April 9, 1996. At the Second Preliminary Hearing held on April 9, the prosecution incorporated the testimony from the first one. Defense counsel called Sherry and Anita as witnesses. A Bindover Order was issued on Count II at the conclusion of the hearing (OR 315).

On April 10, 1996, a Bill of Particulars was filed as to Count II (OR 316), which alleged the same two aggravators and evidence in support used for Count I (cf. OR 207 with OR 316). On May 6, 1996, the defense filed a Motion to Strike the Bill of Particulars Due to Insufficient Evidence (OR 365). It objected to almost all of the evidence alleged on the basis of lack of notice and lack of specificity. This motion was not addressed until after the guilt phase, and there is no record of the hearing held on that motion (see T. 915; Appellee's Brief, p. 74).

On April 17, 1995, defense counsel filed a Motion for Severance of Count I (OR 325). It noted that there was no similarity between the two alleged offenses, that they occurred up to 12 hours apart, and there was no common scheme or plan. The prosecution's response was filed on April 23 (OR 334). The motion was denied by the trial court (T. 16-17).

The jury trial commenced on May 6, 1996. An all-white jury of 12 and two alternates were selected and sworn in. The next day, May 7, after brief opening statement, the prosecution called it's witnesses. The prosecution rested the next day, and a defense motion for a direct verdict was denied on all three counts. The prosecution's case included a litany of allegations by Anita and

Sherry regarding Jessie abusing them and their children. Jurors did not know, however, that the wives were bisexual lovers who engaged in consensual sex with a variety of women and men during their marriage to Jessie.

During opening statements, defense counsel admitted that Jessie was guilty of being an Accessory After the Fact, without having obtained Jessie's prior consent to make that admission. The defense began calling its witnesses. On May 9, the defense called one witness and rested. The prosecution called one rebuttal witness and rested at 9:40 a.m. (T. 853). Outside the presence of the jury, the trial court dismissed Count III (T. 856).

The jury was instructed and heard closing arguments. The prosecution argued that Anita and Sherry were battered spouses who acted out of duress under the domination of Jessie, despite the fact there was no testimony or evidence to corroborate the women's claims of being battered and controlled by Jessie, and no expert testified they were battered spouses. The jurors were asked to infer, from the women's uncorroborated claims they were abused, they were battered and dominated by Jessie to the point of acting at his command, from which they were asked to infer the wives killed out of fear of Jessie, from which they were asked to infer Jessie ordered the wives to kill, even though there was no evidence of a motive on his part to want his sister or niece dead. After about an hour of deliberations, the jury returned verdicts finding Jessie guilty on both Count I and Count II.

After a 20 minute recess, the sentencing stage commenced. The defense renewed all of its previous motions and objections, which were overruled (T. 916). After a brief opening statement, the prosecution incorporated the guilt-phase evidence. The trial court *sua sponte* struck the "avoiding arrest" aggravating circumstance as to Count I (T. 919). The prosecution called as its sole witness, Lahoma Yaws II, over defense objection (T. 915), and then rested. The defense presented a brief opening statement and called seven witnesses who all testified very briefly: three relatives of Jessie; two friends of his; the family minister, and Coal County Sheriff Bill Ward. Their testimony covers less than 50 pages of trial transcript (T. 937 - 84).

The jury charge was read and closing arguments heard. The prosecution was permitted to argue to jurors that Jessie had raped Melissa Moody (T. 991), despite the fact that Count III had

been dismissed for insufficient evidence and there was no evidence corroborating Anita's claims regarding that allegation.

During jury deliberations, the jurors sent out two notes. The first asked if they could hear again the transcript of Mr. Cummings taped-statement [the False Confession] (T. 997-99). Initially defense counsel agreed, and then objected (T. 997). The jury was brought into the courtroom and the tape replayed while jurors read the transcript of the tape, over a defense objection (T. 999-1001). The jury also returned the verdict forms, because they incorrectly stated Melissa's last name as Mayo instead of Moody, which was corrected by interlineation (T. 1002).

The jury returned to the jury room. Awhile later it sent out another note, asking: "If two different sentences are handed down, will the greater sentence be served?" (T. 1004). The response given was that jurors had all of the instructions that they needed, and they were to consider nothing else (OR 473; T. 1004). After deliberating a total of two hours, the jury sentenced Mr. Cummings to death on both counts, finding the one aggravating circumstance (continuing threat) as to Count I and finding as to Count II the two alleged aggravators (continuing threat and avoiding arrest). A Pre-Sentence Investigation Report was ordered (OR 1009), but defense counsel subsequently spoke with the trial court by phone and waived its preparation (OR 1020).

On May 20, 1996, Sherry Cummings pled guilty to two counts of Accessory after the Fact and one count of permitting Child Abuse. She was given three concurrent sentences of 35 years. On May 24, 1996, Anita pled guilty to Second Degree Murder in exchange for a Life Sentence.

Prior to Jessie's May 30, 1996 sentencing, he filed *pro se* a motion for new trial in which he notes that he does not know if he still has an attorney (OR 477-79). He notes that: there were people on his jury who knew him; a witness was allowed to testify about a rape without any corroboration; there was no headboard on his bed to handcuff Melissa to; Melissa's arms were too small to fit in handcuffs; he owned handcuffs as part of his job; and he was not guilty of moving Judy's body despite what his attorneys said in court. The motion was denied at the sentencing hearing (T. 1020), and the trial court imposed the death sentences (T. 1022-23).

The trial court prepared a Capital Felony Report of Trial Judge (T. 494), and sent to the

Governor the letter notifying him of Jessie's death sentence, as required by 22 O.S. §1002 (OR 51). In the letter to the Governor, it is clear the trial court was biased against Jessie by Anita's and Sherry's unsupported allegations of abuse: "The evidence at trial established that Cummings lived with two 'wives' whom he beat and kept in constant state of terror." (*Id.*).

Jessie Cummings has appealed his convictions and death sentences. He is being represented on appeal by OIDS attorney Bill Luker. On July 7, 1997, Mr. Luker filed Appellant's Brief which was accompanied by a Disclaimer regarding circumstances which have affected his representation of Mr. Cummings. It was also accompanied by a Rule 3.11 Application for an Evidentiary Hearing. Attached to it is an Affidavit of Dr. Ray Hand, Ph.D. Dr. Hand conducted a comprehensive psychological assessment of Jessie and found him to be borderline retarded with a full scale I.Q. of 81, an eighth-grade reading level, and lacking in sophisticated intellectual planning skills:

I found no evidence indicating that he had either the intelligence or the interpersonal skills to manipulate or control the behavior of others for an extended period of time, or to cause other persons to commit serious crimes against their will.

(Appendix 5). Oral arguments in the pending direct appeal were heard March 10, 1998, and the matter is under advisement.