

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: