IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND – BALTIMORE DIVISION

ALBERT SNYDER,
Plaintiff,
vs. Case No. 06-cv-1389-RDB

FRED W. PHELPS, SR.;
SHIRLEY L. PHELPS-ROPER;
REBEKAH A. PHELPS-DAVIS; and,
WESTBORO BAPTIST CHURCH, INC.,
Defendants.

MOTION FOR CHANGE OF VENUE OF DEFENDANTS FRED PHELPS, SR., AND WESTBORO BAPTIST CHURCH, JOINED BY PRO SE DEFENDANT SHIRLEY PHELPS-ROPER AND REBEKAH PHELPS-DAVIS

Defendants Fred Phelps, Sr. and Westboro Baptist Church ("Defendants") move the Court for a change of venue. Not changing venue in this case under the circumstances would be reversible error. **NOTE**: Pro se defendant Shirley Phelps-Roper informed undersigned counsel on October 18, 2007, that she and pro se defendant Rebekah Phelps-Davis join in this Motion.

This motion is made pursuant to 28 U.S.C. Section 1404 and all other applicable laws, rules and/or regulations, and in "the interests of justice" [28 U.S.C. Section 1404(a)]. Specifically, defendants move for a change of venue to another "district" far enough away from the greater Baltimore/Washington, D.C. metropolitan area ["BW area"] where defendants may obtain a fair and impartial trial without the circus-like

atmosphere created by media, and away from the passion and prejudice created by that intense media coverage.

The publicity about this case, and statements of plaintiff's counsel in the media, leading up to the October 15 hearing, may have been sufficient to make it impossible for defendants to receive a fair trial. See Attachment A for samplings of the comments of plaintiff's counsel in the media, all of which are highly prejudicial.[1]

Given the nature of this case, the assault upon religious beliefs that no one is pretending is otherwise in this case, and given the fact that as the Court itself noted emotions could run high; the Court had and has a constitutional duty to mitigate and give relief against the unfair prejudice that is inevitable. Plaintiff's counsel also have a duty not to inflame and fan the fires.

Instead, the opposite has occurred. Just since October 15 – right here on the eve of trial – numerous stories have been published in the BW area. See Attachment B. The most egregious includes the *Baltimore Sun* editorial, which places this pressure on jurors

[1] In a bizarre act, standing reality on its head, during the October 15, 2007 hearing, plaintiff counsel asked the Court to require defendants to be civil during trial, in the form of not referring to plaintiff's counsel, but only to plaintiff. Yet you see by the comments at Attachment A that plaintiff's counsel are as vocal in the media as plaintiff himself. This record is **saturated** with caustic comments by plaintiff *and* his counsel about defendants and their beliefs. Their pleadings are permeated with such commentary; their arguments to the Court have been full of personal and false attacks on defendants (many of which Phelps-Roper itemized to the Court during a phone conference on 9/12 and 9/14/07); their questioning during depositions has been mocking and challenging of the beliefs of defendants; and right up to the October 15 hearing, where the very same plaintiff's counsel who wants defendants to not refer to him, referred on the record to the signs at issue in this case as "nasty." The Court has permitted the courtroom to become the Star Chamber of 2007, where religious beliefs are being put on trial. The atmosphere in and out of the courtroom is thick with it, and the commentary in the media is the same. It is absolutely absurd to talk about being "civil" at this point, given the grotesque trampling of constitutional rights to believe something that the plaintiff, his counsel, and the Court do not agree with, which is occurring in this case.

in this case: **"Now it's up to a Maryland jury to send the message that in a civil society, parents of slain soldiers should be able to bury their sons and daughters in peace."** (See *Baltimore Sun* editorial of 10/18/07, at Attachment B.)

Further, plaintiff's sister fanned the flames by calling in to WBAL Radio and giving an interview which is now on that radio station's Web page to be published repeatedly. She told her audience it was a lie when defendants said they were a thousand feet away (the Court has seen the evidence and knows better); and stated several times that the purpose of this lawsuit is to stop the defendants from picketing (the Court knows this is not an injunction action). E.g., "**I mean, these people have got to be stopped somehow, someway,**" "**And if this what is, is what it takes to make these people stop,**" and, "**[T]hey'll think twice about it because this lawsuit is going to cost them money whether they win or lose.**" (See WBAL Radio Web page of 10/16/07 and transcript of radio interview with Bonnie Snyder, at Attachment B. The audio of the interview is available at http://wbal.com/../news/story.asp?articleid=64432 (last checked October 16, 2007)).

Further, plaintiff's counsel fanned the flames, talking to the *Baltimore Examiner* for a 10/18/07 story, saying **"We just want them to stop damaging other people," "If these people would fold their tent tomorrow and stop victimizing innocent families, this case could probably be resolved,"** and **"This case has very little to do with money. It's to send a message to [*sic*] that this type of conduct is unacceptable in our society today, and people aren't going to put up with it."** The Court knows injunctive relief is not part of this case, and so do plaintiff's counsel.

Numerous other stories have been running, quoting the Court saying the deceased son of plaintiff was a **"courageous Marine,"** (no evidence has been presented on this issue in this record, and it's a matter of opinion and beside the point[2]); criticizing defendants for not **"simply protesting a war" but instead "'celebrating the death of a soldier;'"** criticizing defendants repeatedly with, **"It is one thing to protest a war. It is another thing to carry placards celebrating the death of a soldier;'"** and, **"[a]t times being incensed over what he described as long-winded theological speeches"** by pro se defendant Phelps-Roper. (See samples of these items that have been published in the BW area at Attachment B. Note that these are just a few examples of what could be found and printed, without access to all media outlets or TV stories, in a short period of time, during which defendants are also preparing for trial.)

All this combined tells the potential jurors in this case that this case gives them an opportunity to silence a religious message they hate, and which the Court has criticized. This is the opposite of safeguarding the rights of the defendants to a fair trial, which is the constitutional duty of the Court. It is little wonder the rank-and-file bloggers are bragging that this lawsuit is going to stop the picketing of these defendants (see small sampling at Attachment C).

[2] The only way the issue of whether the deceased son of plaintiff is a "hero" is relevant is if the Court is creating a new rule of law in this country, in this case, to wit, you can not say anything the family might take as critical about anyone in uniform within an unspecified distance or time period. That may explain how it's possible to reach the conclusion that "You're Going to Hell" *is* actionable, while Pope in Hell is not.

WBAL claims 4-to-6 million page views per month, and that it is "consistently one of Maryland's most listened-to radio stations." The *Baltimore Sun* is one of the largest newspapers in the country, and boasts 26.4 million page views in seven days. The *Baltimore Examiner* has a circulation of 250,829 spread over Carroll, Harford, Baltimore, Howard and Anne Arundel counties and Baltimore City, and is also available online, *see* www.bostonexaminer.com. (See Attachment D.)

Defendants moreover move for a full evidentiary hearing with regard to this motion prior to the selection of any jury and the commencement of any trial so that the parties will be able to make a full record of the adverse media saturation and concomitant prejudicial impact to these defendants.

In further support hereof, defendants show the Court:

It is impossible to imagine that jurors can render a fair decision under these circumstances. Jurors undoubtedly will fear for their safety and property were they to render any verdict on behalf of defendants.

The United States Supreme Court has spoken to these questions often. For example, in *Irvin v. Dowd*, 366 U.S. 717 (1961) we find this law:

> England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English. Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a State's criminal procedure, *Fay* v. *New York*, 332 U.S. 261; *Palko* v. *Connecticut*, 302 U.S. 319, every State has constitutionally provided trial by jury. See Columbia University Legislative

Drafting Research Fund, Index Digest of State Constitutions, 578-579 (1959). In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257; *Tumey* v. *Ohio*, 273 U.S. 510. "A fair trial in a fair tribunal is a basic requirement of due process. " *In re Murchison*, 349 U.S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville*, 362 U.S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds* v. *United States*, 98 U.S. 145, 155. * * * *

Here the build-up of prejudice is clear and convincing. **An examination of the then current community pattern of thought as indicated by the popular news media is singularly revealing.** For example, petitioner's first motion for a change of venue from Gibson County alleged that **the awaited trial** of petitioner **had become the *cause celebre*** of this small community -- **so much so that curbstone opinions, not only as to petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations**. A reading of the 46 exhibits which petitioner attached to his motion indicates that **a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial**. The motion further alleged that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and that, in addition, **the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents.** ****

It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County. In fact, on the second day devoted to the selection of the jury, the newspapers reported that "strong feelings, often bitter and angry, rumbled to the surface," and that "the extent to which the multiple murders -- three in one family -- have aroused feelings throughout the area

> was emphasized Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pretrial opinions ...." A few days later the feeling was described as "a pattern of deep and bitter prejudice against the former pipe-fitter." Spectator comments, as printed by the newspapers, were "my mind is made up"; "I think he is guilty"; and "he should be hanged."

366 U.S. at 721, et seq. (emphasis added).

Similarly, in *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) the High Court wrote this:

> For we hold that it was a denial of due process of law to refuse the request for a change of venue, after **the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle** of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial -- at which he pleaded guilty to murder. **Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.** (Emphasis added).

An excellent discussion regarding balancing the freedom of press coverage of legal proceedings with the rights of defendants is set forth in *Sheppard v. Maxwell,* 384 U.S. 333, 349-352 (1966) as follows:

> The principle that justice cannot survive behind walls of silence has long been reflected in the "Anglo-American distrust for secret trials." *In re Oliver*, 333 U.S. 257, 268 (1948). A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for "what transpires in the court room is public property." *Craig* v. *Harney*, 331 U.S. 367, 374 (1947). The "unqualified prohibitions laid down by the framers were

intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society." *Bridges* v. *California*, 314 U.S. 252, 265 (1941). And where there was "no threat or menace to the integrity of the trial," *Craig* v. *Harney*, *supra*, at 377, we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.

But the Court has also pointed out that **"legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."** *Bridges* v. *California*, *supra*, at 271. And the Court has insisted that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers* v. *Florida*, 309 U.S. 227, 236-237 (1940). **"Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."** *Pennekamp* v. *Florida*, 328 U.S. 331, 347 (1946). **But it must not be allowed to divert the trial from the "very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures."** *Cox* v. *Louisiana*, 379 U.S. 559, 583 (1965) (BLACK, J., dissenting). Among these "legal procedures" is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in *Marshall* v. *United States*, 360 U.S. 310 (1959), we set aside a federal conviction where the jurors were exposed "through news accounts" to information that was not admitted at trial. We held that the prejudice from such material "may indeed be greater" than when it is part of the prosecution's evidence "for it is then not tempered by protective procedures." At 313. At the same time, we did not consider dispositive the statement of each juror "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles." At 312. Likewise, in *Irvin* v. *Dowd*, 366 U.S. 717 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction holding:

"With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . ." At 728.

The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907):

"The theory of our system is that the conclusions to be reached in a case will

be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

Moreover, "the burden of showing essential unfairness . . . as a demonstrable reality," *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281 (1942), need not be undertaken when television has exposed the community "repeatedly and in depth to the spectacle of [the accused] personally confessing in detail to the crimes with which he was later to be charged." *Rideau* v. *Louisiana*, 373 U.S. 723, 726 (1963). In *Turner* v. *Louisiana*, 379 U.S. 466 (1965), two key witnesses were deputy sheriffs who doubled as jury shepherds during the trial. The deputies swore that they had not talked to the jurors about the case, but the Court nonetheless held that,

"Even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association . . . ." At 473.

Only last Term in *Estes* v. *Texas*, 381 U.S. 532 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:

"It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." At 542-543.

And we cited with approval the language of MR. JUSTICE BLACK for the Court in *In re Murchison*, 349 U.S. 133, 136 (1955), that "our system of law has always endeavored to **prevent even the probability of unfairness."** (Emphasis supplied).

Certainly, these defendants are not suggesting that the BW area media be restricted or limited in any fashion. Indeed, we think all can agree that defendants are strong advocates of the First Amendment freedoms, including those for the press. But where – as here – it has been widely reported and recognized that this is a case first in the history

of this nation where a church and some of her members are placed on trial for exercising others of those precious First Amendment freedoms (speech; religion), the court should take special care to assure that such prejudicial media coverage does not result in the denial of a fair trial.

Defendants cannot receive a fair trial in Baltimore or anywhere near Baltimore.

WHEREFORE, all Defendants move that venue be changed, and affirmative and proactive steps be taken to ensure the jury pool in the new district is not contaminated.

Respectfully submitted,

/s/
Jonathan L. Katz
D.Md. Bar No. 07007
1400 Spring St., Suite 410
Silver Spring, MD 20910
Ph: (301) 495-4300
jon@markskatz.com

NOTE: *Pro se* defendant Shirley Phelps-Roper informed undersigned counsel on October 18, 2007, that she and *pro se* defendant Rebekah Phelps-Davis join in this Motion.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion was served by the CM/ECF filing system (and by mail to the pro se defendants) on October 18, 2007, to:

Sean E. Summers, Esq.
Paul W. Minnich, Esq.
Craig Tod Trebilcock, Esq.

Ms. Becky Phelps-Davis
1216 Cambridge
Topeka, KS 66604

Ms. Shirley Phelps-Roper
3640 Churchill Road
Topeka, KS 66604

___/s/_____
Jonathan L. Katz