

1 JONESBORO ARKANSAS, FEBRUARY 22, 1994 AT 11:00 A.M.

2 (THE FOLLOWING PROCEEDINGS WERE HAD IN CHAMBERS)

3 MR. STIDHAM: Your Honor, the motion is fairly  
4 self-explanatory. It sets forth some things that I'm  
5 going to ask the Court for relief with regard to Mr.  
6 Misskelley.

7 It has come to my attention -- and of course it  
8 was brought to the Court's attention last Thursday --  
9 that Mr. Misskelley was brought from the Arkansas  
10 Department of Corrections. Mr. Crow and I are  
11 attorneys for record for Mr. Misskelley and our  
12 representation and the scope of the representation  
13 extends beyond his conviction on February the fourth.  
14 We are attorneys of record. Everyone involved --  
15 including the prosecutors, the Craighead County  
16 Sheriff's office -- everyone has known that Mr. Crow  
17 and I represent Mr. Misskelley since we were appointed  
18 by the Court on June 7, 1993.

19 We object -- we never had an opportunity to  
20 object because the order was presented to the Court ex  
21 parte -- to Mr. Misskelley being transported from the  
22 Department of Corrections to Mr. Calvin's office. We  
23 understand it is not unusual for a prisoner to be  
24 transferred from the Department of Corrections in  
25 order to testify at trial, but two circumstances

1 warrant what I believe rises to a level of  
2 prosecutorial misconduct in this matter.

3 The prosecution knew in no uncertain terms that  
4 Mr. Misskelley was not going to be testifying against  
5 his co-defendants, Mr. Echols and Mr. Baldwin. I  
6 notified the prosecutor's office of that. I made two  
7 trips to Pine Bluff to talk to my client regarding an  
8 offer that had been made by the prosecution. He  
9 rejected the offer and instructed me to pursue the  
10 appeal and that he would not be testifying against his  
11 co-defendants. That brings us back to him being  
12 transported from the Arkansas Department of  
13 Corrections.

14 While again in my brief I pointed out and in the  
15 motion itself that it is not unusual for a prisoner to  
16 be transferred, under Arkansas law the prosecution  
17 can't even call Mr. Misskelley once they've been  
18 notified that he would assert his Fifth Amendment  
19 privilege. They had no right whatsoever to pick him  
20 up at the Department of Corrections and transport him  
21 anyplace, much less the prosecuting attorney's office  
22 in Rector, Arkansas. I'm deeply disturbed by the  
23 conversation that took place between the Craighead  
24 County Sheriff's deputy, who I only know as Dickie. I  
25 don't know his last name. I think it may be Howell.

1           Mr. Misskelley has informed Mr. Crow and I of the  
2 conversation that took place. Basically they  
3 strongarmed him into believing it was in his best  
4 interests to testify. They even promised to bring his  
5 girlfriend to see him at the jail, Judge, and I think  
6 that is the most abhorrent, ridiculous, flagrant  
7 violation of my client's rights that I have ever seen.

8           Also, I believe, your Honor, that they poisoned  
9 his mind against his attorneys and I think that is a  
10 flagrant violation of his constitutional rights. As  
11 was pointed out in our motion, as was pointed out in  
12 our brief -- and I'll be glad to go under oath if  
13 that's necessary and I have an affidavit prepared as  
14 well. I received a phone call at home at  
15 approximately 6:15. Mr. Crow notified me that Mr.  
16 Calvin had Mr. Misskelley in his office.

17           Upon receiving this word, I called Mr. Calvin.  
18 Mr. Calvin also told me Mr. Misskelley was in his  
19 office -- this was on February 17th. I instructed him  
20 that he was not to talk to my client and that I was on  
21 my way to Rector.

22           At that point Mr. Crow and I arrived in Rector.  
23 We were allowed to talk to Mr. Misskelley in Joe  
24 Calvin's conference room. Mr. Misskelley was very  
25 reluctant to talk to us. Approximately fifteen

1 minutes into our conference with our client, Mr. Davis  
2 and Mr. Calvin burst into the conference room and  
3 announced that they were tired of waiting, that they  
4 were going to take a statement from our client  
5 irregardless of what we thought or believed and  
6 irregardless of the situation.

7 I informed the prosecutors in a very spirited  
8 debate that they were violating my client's  
9 constitutional rights and I objected to him being  
10 there in the first place and them bursting in and  
11 demanding to take a statement from my client. They  
12 were kind enough to leave momentarily and again they  
13 entered the room and demanded in the presence of my  
14 client to take his statement and also demanded or  
15 stated in the presence of Mr. Misskelley that they  
16 were concerned that Mr. Crow and I would talk him out  
17 of giving them a statement.

18 At that point Mr. Misskelley stood up in the  
19 conference room and said, I'm giving a statement and  
20 walked out and he declined to further discuss the  
21 matter with us.

22 At that time your Honor was called and apprised  
23 of the situation, and I declared to the Court my  
24 opinion as to Mr. Misskelley's mental competency. At  
25 that point, your Honor, I demanded -- or requested, I

1 should say, a mental evaluation. That request was  
2 denied by the Court and as the Court knows, the Court  
3 permitted that an offer of use immunity be granted to  
4 Mr. Misskelley, and he was permitted to give a  
5 statement despite Mr. Crow and I's adamant objection.

6 The statement was given. Mr. Misskelley was then  
7 transported to Piggott to the county jail and in  
8 conversations that I have had with Mr. Misskelley  
9 Senior, he traveled from West Memphis to Piggott to  
10 talk to his son, and he was denied access to his son,  
11 still has been denied access to his son as we speak  
12 here today.

13 Yesterday, Mr. Misskelley contacted Mr. Crow at  
14 our office and informed Mr. Crow that he had talked to  
15 the prosecutors Sunday. Without our knowledge and  
16 consent, the meeting took place. They spoke to Mr.  
17 Misskelley without even bothering to inform us that  
18 that is what they were doing.

19 Mr. Crow learned yesterday from Mr. Davis that  
20 they had also talked to him on Saturday and also on  
21 Friday, and we informed the prosecutor again in no  
22 uncertain terms on Friday, February the 18th, that  
23 they were not to have any contact whatsoever with our  
24 client.

25 They have refused to obey this request, and they

1 have proceeded to violate both Mr. Misskelley's Fifth  
2 Amendment rights and his Sixth Amendment rights.

3 As I pointed out in my brief, your Honor, this  
4 offer of use immunity they're going to -- I anticipate  
5 the prosecution will say, now that he's been offered  
6 use immunity, we can do whatever the hell we want.

7 I think it is absolutely abhorrent and a mockery  
8 of justice for these prosecutors to allege that by the  
9 offer of use immunity and the circumstances that it  
10 was granted that, therefore, they can do whatever they  
11 want to with our client.

12 Mr. Misskelley informed Mr. Crow, your Honor,  
13 that they were at the jail yesterday with trial  
14 exhibits, going over trial exhibits with our client  
15 without our knowledge and our consent. That highly  
16 prejudices our ability to represent our client,  
17 interferes with our attorney-client relationship. It  
18 also harms irreparably in our opinion our ability to  
19 pursue a new trial on a remand if we are successful on  
20 appeal.

21 Mr. Misskelley informed Mr. Crow that he had  
22 doubts about his testifying against his co-defendants  
23 yesterday, and we object, and we have asked for  
24 specific relief in our motion.

25 My primary concern is that the prosecutor be

1 ordered not to talk to Mr. Misskelley anymore, and I  
2 don't think that the Court should condone a violation  
3 of his Sixth Amendment rights just so the prosecutor  
4 will have an opportunity to formally offer use  
5 immunity and, therefore, circumvent his Fifth  
6 Amendment rights. I think it is abhorrent, and we  
7 would ask that the prosecution be held in contempt in  
8 addition to them being ordered not to communicate with  
9 our client, and we'd also ask that the Court appoint a  
10 special prosecutor to investigate this matter.

11 THE COURT: Do you want to respond?

12 MR. FOGLEMAN: Your Honor, the only thing I want  
13 to respond to that I know about personally is  
14 paragraph eight where he alleges that when I talked to  
15 Jessie Senior that I asked him to talk his son into  
16 testifying and that Jessie Senior told me he would not  
17 be testifying. That is not correct. That is not  
18 true. Jessie Senior did not tell me that he would  
19 not be testifying against his co-defendants. To the  
20 contrary, he told me he didn't know whether he was  
21 guilty or not at that time.

22 I'm sure that Brent will want to have more  
23 specific responses to some of the other things in  
24 there. I would like to say this: Number one, his  
25 request for a special prosecutor to investigate these

1 acts -- there's nothing in here alleged that is  
2 alleged to be criminal so I don't know where he gets  
3 off asking for a special prosecutor.

4 Number two, Jessie has indicated from my  
5 information that he wanted to testify and that Mr.  
6 Stidham and Mr. Crow despite knowing that he had  
7 relevant information that could assist Mr. Misskelley,  
8 they have instructed him not to testify despite the  
9 fact that he wants to. I think an attorney needs to  
10 be appointed to represent Jessie Junior in advising  
11 him about testifying. I cannot imagine a situation  
12 where a client wants to testify, has told Mr. Stidham  
13 that he was involved in this, has told his daddy that  
14 he was involved in this in Mr. Stidham's presence, and  
15 still Mr. Stidham won't do anything to help his  
16 client. He could still have his appeal. Nothing that  
17 he does in this trial could affect his right to  
18 appeal. I'm sure Mr. Davis wants to respond more  
19 specifically to the other allegations.

20 MR. DAVIS: Judge, I'd like to clarify one thing  
21 while we are on the subject. In discussing it -- and  
22 we did -- I talked to Jessie Misskelley on Friday  
23 afternoon. On that morning I called Greg Crow and  
24 told him, "I'm going down there to talk with him. It  
25 will be under the same conditions I talked with him



1 Thursday night. If you want to be there, you're  
2 welcome to be there, but I'm going to go talk with  
3 Jessie Misskelley."

4 When I arrived at the jail, Greg Crow was not  
5 there. I brought two witnesses into the jail cell. I  
6 advised Jessie Misskelley that his attorney, Greg  
7 Crow, had advised him not to talk with anyone, that if  
8 he desired to talk with me, it would be against the  
9 wishes of his attorney. And he advised me at that  
10 time that he had been the one who told me on Thursday  
11 night that he wanted me to come down Friday and talk  
12 to me, that he certainly wanted to talk with me and  
13 indicated that he did not want to follow the advice of  
14 his attorneys and wanted to talk with me on that  
15 afternoon.

16 Again on Saturday when I talked with him -- and I  
17 have a copy of the document signed and witnessed by an  
18 individual at the sheriff's department. He indicated,  
19 I advised him if he talked with us, it would be  
20 against the advice of his attorneys, that his  
21 attorneys advised him not to talk with me and if he  
22 talked with me, it would be against their advice and  
23 based on his own personal wishes. He again told me he  
24 wanted to speak with me. I talked with him on that  
25 day.

1           Again on Sunday the exact same procedure was  
2 followed. Mr. Fogleman was there that time. He was  
3 advised that Mr. Crow had said it was their advice not  
4 to talk with us. He said he desired to waive their  
5 advice, so to speak. I don't remember the exact  
6 language -- wanted to talk with us, and he did so on  
7 that date.

8           To clarify some incorrect statements that Mr.  
9 Stidham made, originally we went down to the  
10 Department of Correction on Tuesday, which would have  
11 been the Tuesday after Mr. Misskelley was convicted.

12           It was our information that on the way down to  
13 the Department of Corrections on Friday, that he had  
14 spoken, talked continuously for a period of two to  
15 three hours, however long it took to get there,  
16 describing his involvement and even indicating to the  
17 officers that he was not shocked by what the jury did  
18 because he basically deserved the punishment he  
19 received. He talked constantly about what -- his  
20 involvement in the case. The officers advised me of  
21 that information and that's when I contacted Dan  
22 Stidham to see if we should go down there to discuss  
23 his client's options and if he did in fact want to  
24 testify.

25           We then rode down to the Department of

1 Corrections on Tuesday. Mr. Stidham rode with me.  
2 Mr. Fogleman and Mr. Gitchell met us at Brinkley, and  
3 we went to Pine Bluff. At that time, Mr. Stidham  
4 talked with him for approximately ten or fifteen  
5 minutes, at which point he came out of the room,  
6 grabbed a Bible, went back in and -- this is my  
7 personal observation -- but approximately 30 to 45  
8 minutes later Mr. Stidham exited. He was very upset,  
9 unnerved, just kept mumbling things -- "I don't know  
10 what I'm supposed to do now. I don't know what to do  
11 now."

12 And after thirty minutes of conversation, it  
13 became apparent at that point that his client had  
14 indicated that he was involved in the murders and had in  
15 fact witnessed and played a part in the murders.

16 Mr. Stidham then went back into the room, at  
17 which time he did not allow us, nor did we request or  
18 insist on having contact with his client. He went  
19 back inside and talked for another hour and came back  
20 and to paraphrase indicated that his client's story  
21 matched with the facts much better and there were a  
22 few things we needed to do to be able to corroborate  
23 his statement.

24 At that point we got in our vehicles, and one of  
25 the things to corroborate his client's statement was

1 to determine if there was an Evan Williams whiskey  
2 bottle under an overpass in West Memphis.

3 To quote Mr. Stidham, I believe at that time, "If  
4 we can find a bottle like he says, then that will  
5 convince me that it happened." At 9:30 or 10:00 at  
6 night we drive -- ten o'clock in the evening -- we  
7 proceed, the four of us, to roam underneath the  
8 overpasses of West Memphis and lo and behold find a  
9 broken bottle in the location indicated by his client.

10 We then take the bottle to a local liquor store  
11 where we proceeded to spend the better part of an hour  
12 matching the bottle with certain items, and lo and  
13 behold it matches with the brand name bottle Mr.  
14 Stidham had indicated that we should be looking for in  
15 the first place.

16 At that point Mr. Stidham says that wasn't good  
17 enough to convince him. Additional efforts were made.  
18 He then -- there was a week hiatus where there was no  
19 contact apparently.

20 On Tuesday evening -- on Tuesday he apparently  
21 went with Jessie Senior to the Department of  
22 Corrections. They had contact with Jessie down there.  
23 I received information through my secretary that Dan  
24 had come through town, stopped, played a portion of  
25 the tape and said that his client was indicating at

1 this point he was not there and that he would not be  
2 testifying.

3 On Wednesday morning I called Dan's partner, Greg  
4 Crow, another defense attorney, talked to Mr. Crow and  
5 at that time was somewhat surprised to find out  
6 initially when they went in to speak with the  
7 defendant, that he indicated that he in fact was there  
8 and was present when this happened and that it was  
9 after his father made some remark as if, you couldn't  
10 be there, you couldn't possibly be there, before there  
11 was a change in attitude.

12 At that point I indicated to Greg that, "I think  
13 Dan has lost his objectivity. I think he has lost the  
14 best interest of his client."

15 I said, "If we can make arrangements to get your  
16 client up here, would you be agreeable to letting me  
17 talk to him and you be present when that occurred."

18 At that point Greg said, "I would be inclined to  
19 do that." Yesterday he informed me that what he  
20 recalled saying was, "I need to talk to Dan." My  
21 impression was he would be inclined to do it, but he  
22 didn't know exactly how he was going to do it without  
23 discussing it with Dan.

24 I make no bones to the Court -- I was dealing  
25 with Mr. Crow because I thought Mr. Stidham had lost

1           objectivity as to what was in his client's best  
2           interest, what actually to do in order to get to the  
3           bottom of the truth.

4           Mr. Crow was then -- we prepared the order. The  
5           Court signed it. I have had witnesses brought back a  
6           thousand times and never have asked permission of  
7           defense attorneys or counsel for that person or anyone  
8           else to bring a person back from the Department of  
9           Corrections as a witness.

10           He was brought back on Thursday. I was called by  
11           Joe Calvin. He had just talked to Greg Crow. He then  
12           called Greg back and advised Greg that Jessie  
13           Misskelley, Junior was on the way back from the  
14           Department of Corrections and would he meet us either  
15           at the jail or at Joe's office. Greg said he thought  
16           it would be better to meet at Joe's office. At that  
17           point Greg said he would be there by 4:15 or 4:30 and  
18           he would meet us there.

19           We transmitted that information to the deputy  
20           that was bringing him back and told him to bring him  
21           straight to Joe's office. I left anticipating we  
22           would meet Greg Crow there.

23           When I arrived at the office, Joe said he had  
24           talked with Greg, that Greg said he had talked with  
25           Dan and Dan was upset and that Dan would not come down

1 there. That Greg told Joe, "If when he gets there and  
2 he wants to give a statement, call us and we will be  
3 there."

4 When Officer Howell arrived with Jessie  
5 Misskelley, Junior, he brought him inside the law  
6 office. There was one question asked. Did he desire  
7 to give a statement. He said yes. We told him to  
8 stop. We picked up the telephone, called Greg Crow.  
9 Greg was then allowed to listen over the telephone as  
10 his client told him that, yes, he wanted to talk to  
11 us.

12 At that point Greg Crow and Dan Stidham started  
13 down. No additional questions were asked until they  
14 got there. The basic scenario once they arrived was  
15 they went in the room with Jessie. We could hear  
16 efforts being made to tell him that he didn't -- that  
17 he was wrong in the statements that he was making,  
18 that he should not talk with us, and at some point I  
19 walked in the room.

20 I said, "I'm here to take a statement. You are  
21 here. We called you here. You can advise your  
22 client. If you tell your client not to talk and he  
23 doesn't not want to talk, then there won't be a  
24 statement taken. If you advise your client that he's  
25 not to talk and he wants to give me a statement, then

1 I'm here ready, willing and able to take a statement  
2 and that's what I intend to do. I didn't bring him  
3 back here so that we could spend two hours with you  
4 cross examining your client, trying to get him to  
5 change his story again."

6 At that point, I left the room and Jessie  
7 Misskelley, Junior walked out of the room behind me  
8 and refused to talk to his attorneys any further.

9 At one point Mr. Stidham did call your Honor, and  
10 I think at the point where he asked that -- told the  
11 Court that Jessie Misskelley needed a psychiatric  
12 evaluation, Mr. Crow, who was sitting next to me at  
13 that time, made the comment that someone in the room  
14 needed a psychiatric evaluation but he wasn't sure  
15 that it was Jessie Misskelley, Junior.

16 And at that point I was -- since other things had  
17 developed in talking with Mr. Misskelley over the  
18 weekend, I had concerns because in every conversation  
19 I have had with him he indicates insisently that he  
20 was present, he did observe these things and he does  
21 want to testify and can't understand why his attorneys  
22 are not interested in that.

23 It is surprising and concerning to me that his  
24 attorneys even though disagreeing on strategy have now  
25 apparently provided the content of the statement that



1 was given that evening to other co-defense counsel,  
2 and it was shocking to me to learn from Mr. Misskelley  
3 that during the course of preparation for the last  
4 trial, that counsel for co-defendants were brought in  
5 to provide cross examination training regarding this  
6 case.

7 MR. WADLEY: You need to identify who you're  
8 talking about.

9 MR. DAVIS: Mr. Price. Not counsel for Jason  
10 Baldwin.

11 MR. PRICE: That's correct.

12 MR. DAVIS: That Mr. Stidham allowed one of the  
13 attorneys for the co-defendant to come in and  
14 according to Jessie Misskelley, Junior give two to  
15 three hours of cross examination in preparation for  
16 their testimony which appeared to me to create a  
17 significant conflict since the two interests of those  
18 defendants are not necessarily in accord, and it  
19 seemed to eliminate potential avenues available to  
20 Jessie Misskelley should he desire to take them.

21 It is my concern at this point -- number one, I  
22 don't think any of the relief requested in the motion  
23 -- one other thing I'd like to indicate -- Saturday  
24 morning --

5 MR. FOGLEMAN: Brent, one other thing while

1           you're back on the Joe Calvin thing, the statement  
2           that Joe made before y'all left --

3           MR. DAVIS: One other thing is and there is a  
4           witness that was present the entire time that Mr.  
5           Stidham and Mr. Crow were at Joe Calvin's office the  
6           night the statement was taken of Jessie Misskelley,  
7           Junior and upon leaving, Mr. Stidham made the  
8           statement he didn't like what we did. His quote was,  
9           "I know there was nothing unethical about it and I  
10          would have done the exact same thing were I in your  
11          position, but I still don't like it." And that was  
12          his exact quote as he left the door that night heading  
13          back to Paragould.

14          On Saturday morning because -- Friday afternoon  
15          when I had contact with Jessie Misskelley, Junior -- I  
16          didn't receive the fax where Mr. Stidham chewed me out  
17          for outrageous conduct until after I had returned, but  
18          before I went Saturday, I contacted three who I  
19          consider to be very highly reputable defense  
20          attorneys, one being Bobby McDaniel, one being Bill  
21          Bristow and one being Kent Rubens and -- John talked  
22          to Kent personally. I didn't talk to him directly.

23          But in talking with Bobby and Bill Bristow, I  
24          outlined the scenario as it had occurred, the  
25          situation under which we had contact with Jessie

1 Misskelley, Junior and asked him at that point based  
2 on their experience as a defense attorney, did they  
3 feel that it was necessary to have defense counsel  
4 present or to make any further contact with defense  
5 counsel if the defendant had indicated that he wanted  
6 to waive his rights and talk to us regarding this  
7 matter. All three of those attorneys advised me it  
8 would be a dereliction of my duty as prosecuting  
9 attorney to fail to make contact and that they felt  
10 that I had gone beyond any ethical requirements or any  
11 legal requirements in contacting Mr. Stidham and  
12 having him present for the first statement which was  
13 done Thursday and there was no additional requirement  
14 to make any additional contact with him as long as Mr.  
15 Misskelley was advised once again before each  
16 statement that this was against his attorney's advice  
17 previously and asked him if he independently and  
18 individually wanted to give his statement to us.  
19 That's what was done each time.

20 I think there's no merit to the motion. I  
21 certainly don't think that there's been any ethical or  
22 legal violations. At every discussion or statement  
23 Mr. Misskelley was advised that he was talking with us  
24 under complete use immunity, and it is my concern and  
25 I think it's the concern of Mr. Fogleman also that the

1 biggest problem we have here now is that Jessie  
2 Misskelley, Junior is being represented by two  
3 attorneys who in spite of their client's wishes and  
4 desires are taking action which is not only not  
5 consistent but impeding what his intentions and  
6 desires are and it will create -- if he continues to  
7 take the position that he's going to testify as he has  
8 indicated to us on the last three occasions -- it will  
9 create a nightmare because there are certain  
10 privileged communications which attorneys who  
11 represent him will need to claim, and it is difficult  
12 for me to envision -- when Mr. Stidham is providing  
13 information from his client to defense attorneys of  
14 other co-defendants -- how he is going to be in a  
15 position to claim and preserve and protect his  
16 client's rights when it seems that at this point his  
17 wishes and his client's wishes are no longer  
18 consistent.

19 MR. STIDHAM: Your Honor, I would like to respond  
20 to that. First of all, I would point out that  
21 anything that I say or Mr. Crow says is not anything  
22 that Mr. Misskelley says. It shouldn't be used  
23 against him. That's privileged communications.

24 Second of all, I'd like to ask that Mr. Crow's  
25 affidavit be admitted for the purposes of this

1 hearing. Mr. Crow has a different version of what  
2 happened. Your Honor, again, all this stuff that he  
3 says Mr. Misskelley told him Sunday, Saturday and  
4 Friday -- how did the prosecution get privy to this  
5 information? It's clear they violated his Sixth  
6 Amendment rights and once they did that, that gave  
7 them the authority which was granted by the Court to  
8 grant him use immunity.

9 THE COURT: You're talking about after Thursday  
10 night?

11 MR. STIDHAM: Yes. What they did is kidnap my  
12 client, contrary to what I had told them, that he was  
13 not going to testify.

14 Mr. Misskelley, my client, informed me -- and  
15 which I have a tape recorded conversation of that  
16 meeting -- that he did not want to testify, that he  
17 was not at the crime scene, that he did not want to  
18 testify. I made that very, very clear to Mr. Davis.

19 What Mr. Davis did was attempt to circumvent the  
20 attorney-client relationship --

21 MR. DAVIS: Can I interrupt?

22 MR. STIDHAM: No, you can't interrupt. When I'm  
23 done, you can talk.

24 THE COURT: Go ahead.

25 MR. STIDHAM: What he did was kidnap my client

1 through the assistance of the Craighead County  
2 Sheriff, poison my client's mind and basically by  
3 saying, we will get your girlfriend up here to see you  
4 and the judge is going to drop your sentence and it  
5 would be the right thing to do to testify.

6 Basically, what they did is they went in and  
7 violated my client's Sixth Amendment rights so they  
8 could back him in the corner, offer him use immunity  
9 and then violate his Fifth Amendment rights.

10 THE COURT: You're talking about what happened  
11 after Thursday night.

12 MR. STIDHAM: No, your Honor. I'm talking about  
13 what happened when they went and picked him up at Pine  
14 Bluff and brought him up to Joe Calvin's office.

15 Mr. Crow called Mr. Calvin and said, "We are not  
16 going to meet you at your office with our client. We  
17 are not going to do that." They did it anyway. They  
18 did everything they possibly could to violate my  
19 client's constitutional rights in contradiction to all  
20 established principles of the Sixth Amendment and  
21 under this guise of use immunity they could do  
22 whatever they want to with my client. It is  
23 ludicrous, Judge, and the Court should not condone  
24 that.

25 If Mr. Misskelley wants to testify, he should

1 make that decision based on an intelligent waiver of  
2 his rights if he wants to do that and with the  
3 prosecutors kidnapping him and bringing him to the  
4 prosecutor's offices and busting in the room and  
5 interfering with my attorney-client relationship, I  
6 think that is absolutely absurd. No court has ever  
7 condoned such activity.

8 MR. FOGLEMAN: Your Honor, Mr. Misskelley did  
9 make the statement that he was mad at Mr. Stidham  
10 because Mr. Stidham had cussed at him.

11 THE COURT: Did you record all of that  
12 conversation down at the penitentiary or just the last  
13 part of it?

14 MR. STIDHAM: I recorded most of the conversation  
15 --

16 THE COURT: -- Did you disclose that to anybody?

17 MR. STIDHAM: I played to Mr. Davis' secretary  
18 Mr. Misskelley saying that he did not wish to testify.

19 MR. DAVIS: Did you disclose it to anyone else?

20 MR. STIDHAM: I told the defense lawyers that he  
21 told me on February 15th that he was not going to  
22 testify. I think all of them were present in the  
23 room. They will confirm that. I informed them. They  
24 had a right to know whether he was going to testify or  
25 not. The prosecution requested that I go down and ask

1 him that, and I told them that's not what he wanted to  
2 do. He did not want to testify. All this stuff, your  
3 Honor, that he says Mr. Misskelley told him -- that  
4 was after they had violated his rights, and I think it  
5 is absolutely improper.

6 MR. FOGLEMAN: Your Honor, whether he wanted to  
7 testify or not, he told Mr. Stidham before we ever had  
8 any contact that he was involved. He did tell him  
9 that. And he is a witness and if he's given use  
10 immunity, it doesn't matter what Mr. Stidham says.

11 MR. STIDHAM: Look at the way use immunity was  
12 granted.

13 THE COURT: Let me get to that real quick. One,  
14 the Court was aware that Mr. Misskelley had made  
15 statements to officers. I discussed it with both  
16 defense and prosecution, I think you both were  
17 present. I also knew that each of you were going down  
18 to the penitentiary to visit with him. I'm aware that  
19 you went down there. Exactly whether or not he was  
20 going to give a statement, I'm not sure of.

21 From that point on, I received not just one  
22 telephone call but at least three, maybe four,  
23 originating from Joe Calvin's office on Thursday  
24 evening of last week.

25 MR. PRICE: Can you state the contents of the



1           conversations?

2           THE COURT: I'm going to do the best I can. I  
3 don't remember who called me first. But I talked to  
4 you, Mr. Stidham. I talked to Greg. I talked to Joe  
5 Calvin, Brent -- I don't remember whether I talked to  
6 John Fogleman. I don't think I did. Y'all were  
7 asking me to make a ruling from my den where I was  
8 watching TV in my underwear. And you popped all this  
9 on me where everybody was angry with each other, and  
10 essentially what you have outlined here today you  
11 outlined to me over the phone.

12           You asked me what you do. Frankly, I was put  
13 back by the whole circumstance and what I told each of  
14 you to do was that the only thing that mattered was  
15 what Jessie Misskelley wanted to do and that you  
16 should advise him that he didn't have to make a  
17 statement to anyone and that it was your advice for  
18 him as his defense attorney not to make a statement  
19 and that it was again your advice if he made such a  
20 statement.

21           Further, I told you if he persisted in it, you  
22 should request and demand that the State grant you use  
23 immunity for him. That if they were going to take a  
24 statement against your desires and over your  
25 objection, that the boy should be afforded that

1 protection, that anything he said from that point on  
2 could not be used against him in any subsequent legal  
3 proceeding.

4 I also instructed each of you if a statement was  
5 going to be taken, if further conversation was going  
6 to be carried on, to record it.

7 MR. DAVIS: Judge, I have got a transcript  
8 certified by the transcriptionist that I would make a  
9 part of this.

10 THE COURT: I want it made --

11 MR. STIDHAM: Your Honor, do you recall me also  
12 informing you that in my opinion Mr. Misskelley was  
13 perjuring himself?

14 THE COURT: Yes. You indicated that you didn't  
15 believe the story that he was involved. I told you if  
16 you didn't believe him, you were in a dilemma and that  
17 was something that you probably were ethically bound  
18 to report to the Court --

19 MR. STIDHAM: That's why I did it, your Honor.

20 THE COURT: And I told you if you felt that way  
21 and believed that, then you probably should make that  
22 statement on the record that I was asking y'all to  
23 make since everybody was present and that's -- y'all  
24 called me back three or four times -- how many times  
25 was it --

1 MR. DAVIS: I think it was three.

2 THE COURT: Essentially, I told you do whatever  
3 you had to do based upon the circumstances. Make sure  
4 you had a recording of what took place and that Mr.  
5 Misskelley was advised, that that was your obligation  
6 as a lawyer to advise him that it was against your  
7 best judgment. That it's Misskelley's decision, not  
8 the prosecution, not the Court's, not the defense  
9 attorneys as to what he might do.

10 In that regard I'm going to appoint an  
11 independent attorney to question him further and to  
12 obtain from him his opinion as to whether or not Mr.  
13 Misskelley is willing to testify and I'm going to have  
14 him record that conversation with him.

15 MR. STIDHAM: Your Honor, am I being relieved?

16 THE COURT: No. You have the obligation to  
17 perfect the appeal unless you are relieved by the  
18 Supreme Court. I think in view of this that maybe an  
19 independent attorney who hasn't had any involvement in  
20 it needs to discuss with Mr. Misskelley what his  
21 desires are and to report to the Court.

22 Before I'll allow him to testify, if he does  
23 testify, I'm going to want to be satisfied that he  
24 knows what he's doing and that it is his own voluntary  
25 act and not influenced by his father, his lawyers or

1 anyone else.

2 MR. STIDHAM: Your Honor, I want to respond to a  
3 comment Mr. Davis made.

4 MR. PRICE: Your Honor, we would request that the  
5 attorney talk to Mr. Misskelley before we begin the  
6 voir dire process. Our voir dire questions will be  
7 completely different whether or not Mr. Misskelley is  
8 a witness.

9 MR. FORD: We join in that, your Honor.

10 MR. PRICE: We are joining in this motion.

11 THE COURT: You don't have any standing.

12 MR. PRICE: Judge, we have standing if the  
13 conduct by the State is the only way that they can get  
14 Mr. Misskelley to testify against Damien Echols, we do  
15 have standing. We join in this motion. We also have  
16 an identical motion. It is identical to the one  
17 filed, an identical brief. We do join in this  
18 request.

19 MR. FOGLEMAN: This is why Jessie Junior needs an  
20 independent attorney that is not working with Damien  
21 Echols.

22 MR. STIDHAM: Your Honor, I resent that  
23 insinuation, and I would like to make a further  
24 comment that on Thursday night at Joe Calvin's office,  
25 as the Court well pointed out, that was a shocking

1 situation and it wasn't clear exactly what should  
2 happen at that point. Any comments that I made to Mr.  
3 Davis after the melee without the benefit or full  
4 knowledge of the situation -- at that point I didn't  
5 know the Sheriff's Department had promised to bring  
6 his girlfriend to the jail. I didn't know the sheriff  
7 talked him into testifying on the way from Pine Bluff.

8 Also, I needed to research this issue. My formal  
9 response was done after an investigation and research  
10 and all that is set forth in my motion and brief and,  
11 furthermore, I think it is prosecutorial misconduct  
12 for the Craighead County Sheriff to elicit a statement  
13 from him as they did. In that statement, "We cannot  
14 use any of this against you, Jessie, so you might as  
15 well tell us what's going on," and that basically  
16 elicited a response.

17 Your Honor, at the trial and throughout all the  
18 pretrial hearings, we heard testimony about his mental  
19 competency, his mental status, his suggestibility, and  
20 all these things. And the prosecution knew that and  
21 they engaged in conduct which violated his Sixth  
22 Amendment rights and his Fifth Amendment rights and  
23 they interfered with the attorney-client relationship.

24 Mr. Misskelley instructed me on tape on Tuesday,  
25 February 15th, at Pine Bluff, Arkansas, in the

1 assistant warden's office that he did not want to  
2 testify, that he wanted me to pursue this appeal and  
3 that is a course of conduct that I undertook, and it  
4 was in the best interest of my client.

5 I informed the prosecutor that he was not going  
6 to testify. Under the law, the prosecutor at that  
7 point was duty bound to leave Mr. Misskelley alone.  
8 They did not do that. They kidnapped him, brought him  
9 to the prosecutor's office and elicited a statement  
10 from him and then gave him use immunity. And now  
11 they're going down to the jail and talking to him  
12 without my knowledge and consent or Mr. Crow's  
13 knowledge and consent. We'd ask again that Mr. Crow's  
14 affidavit be made a part of the record.

15 THE COURT: I think I accepted his affidavit.  
16 Why is he not here?

17 MR. STIDHAM: We had two court appearances and a  
18 deposition today.

19 THE COURT: I will take it for the purposes of  
20 this hearing but I may want to hear him testify. I'm  
21 taking you gentlemen's statements as if they were  
22 given under oath. You're officers of the court so I'm  
23 accepting your statements without having you sworn.

24 With regard to the relief requested, there's  
25 nothing here that I see any reason or cause to appoint

1 a special prosecutor. That'll be denied.

2 Whether or not the prosecuting attorneys are in  
3 the contempt of Court, that'll be denied. There's no  
4 conduct that I know of that is directly before the  
5 Court that would rise to contempt.

6 The issue really before the Court and the one  
7 that I'm going to take under advisement is whether or  
8 not Misskelley will be allowed to testify. That is  
9 the only issue. I would have been inclined to appoint  
10 Mr. McDaniel who is a criminal defense lawyer of some  
11 repute in this area but I'm not sure that -- since  
12 he's been consulted, I'm not sure he would be an  
13 appropriate person to appoint. Unless y'all can  
14 agree.

15 MR. STIDHAM: I have consulted with him as well.

16 THE COURT: Do y'all have any objection to Bobby  
17 being the one I ask to talk to Mr. Misskelley?

18 MR. STIDHAM: I think it would be a conflict.

19 MR. PRICE: Yes, sir, I would if he's talked to  
20 both sides.

21 THE COURT: Anybody got any suggestions?

22 MR. FORD: How about suggesting -- his name  
23 escapes me but he's an associate dean at the  
24 University of Arkansas at Little Rock -- Howard  
25 Eisenberg. He's reputable in all areas of criminal

1 practice and particularly appellate procedures, who  
2 may know some of the import and impact of some of the  
3 higher court decisions in this case that we may not  
4 have working knowledge of because of our not being so  
5 involved in appellate work that he would be truly  
6 independent and he sort of has a connection to the  
7 State.

8 MR. FOGLEMAN: Your Honor, first of all, he is  
9 not a criminal defense lawyer. He doesn't try cases.  
10 What effect it would have on appeal has nothing to do  
11 with whether he testifies. Nothing that he says in  
12 his testimony can be used against him, can't affect  
13 his appeal.

14 MR. STIDHAM: That is not true, your Honor. If  
15 prosecutors are at the jail and going over exhibits  
16 and testimony with witnesses, with our client, if we  
17 are successful on appeal, it is going to affect a  
18 remand.

19 MR. FOGLEMAN: How?

20 THE COURT: No. I'm not going to allow anything  
21 at all that the boy says to anybody, including those  
22 officers that talked to him, be used -- if he were  
23 successful on appeal, which I have some doubts about,  
24 if he were successful, then none of this, not one word  
25 said here today or that he's said since his conviction



1 will be used against him by innuendo, implication or  
2 any other way.

3 MR. STIDHAM: Your Honor, I need to ask for a  
4 specific ruling.

5 THE COURT: I'm denying your request for a  
6 special prosecutor and find that it's not even  
7 applicable to this situation. I'm denying your  
8 requested relief to hold the prosecutors in contempt  
9 for misconduct. I'm taking under advisement the issues  
10 that have been raised as to the method and manner of  
11 the statements that have been received from Mr.  
12 Misskelley and I am ordering that each of you hold  
13 those tapes that have been made of Mr. Misskelley's  
14 statements and not make those available to anyone at  
15 this time.

16 I think you are duty bound by attorney-client  
17 privilege not to disclose your conversation recorded  
18 at the penitentiary to anyone. It is a violation of  
19 attorney-client privilege.

20 Further, I'm telling the State that they are not  
21 to release any statements that they may have taken  
22 until I make a determination as to whether or not  
23 those statements are admissible.

24 MR. PRICE: Does that include the recorded  
25 conversations that the State had with Mr. Misskelley

1 on Friday, Saturday and Sunday as well?

2 THE COURT: All statements until I make a  
3 decision on whether or not they are proper.

4 MR. STIDHAM: There are two remaining issues.  
5 First of all, I object to the Court relieving me. I  
6 understand the Court's ruling. I just want to make --

7 THE COURT: I am not relieving you.

8 MR. STIDHAM: I'm confused then.

9 THE COURT: I'm not relieving you. All I'm  
10 attempting to do at this time is have an independent  
11 attorney that is not involved in the defense of this  
12 case or the prosecution determine and question Mr.  
13 Misskelley as to whether or not he's willing and  
14 voluntarily making a statement. In other words it is  
15 an independent determination of whether -- first of  
16 all, I'm going to ask the attorney to advise him of  
17 his constitutional rights not to testify, advise him  
18 --

19 MR. FOGLEMAN: If he's got use immunity, he  
20 doesn't have that right.

21 MR. STIDHAM: We go back to the issue of how he  
22 got use immunity.

23 THE COURT: Are you talking about the fact that  
24 they brought him back here --

25 MR. STIDHAM: Under the --

1 THE COURT: And Mr. Davis says he had some kind  
2 of understanding with Mr. Crow --

3 MR. STIDHAM: He did not have any kind of  
4 understanding with Mr. Crow at all.

5 THE COURT: What was Mr. Crow's statement?

6 MR. STIDHAM: He received a phone call from Mr.  
7 Calvin and that Mr. Calvin asked him --

8 THE COURT: No, no. I'm talking about before  
9 they ever brought him back.

10 MR. STIDHAM: We had no idea whatever that Mr.  
11 Crow [sic] was being brought from the penitentiary --  
12 none.

13 MR. DAVIS: I didn't talk with you so you didn't  
14 have any idea. I talked with Greg Crow.

15 MR. STIDHAM: Mr. Crow said that he got a phone  
16 call from Mr. Davis saying that Mr. Misskelley was  
17 already on his way up from Pine Bluff.

18 MR. DAVIS: No. I'm talking Wednesday morning  
19 before the order was ever signed I talked with Greg.  
20 In fact once you came back from the Department of  
21 Corrections, on the record you'll agree that we never  
22 -- you never told me or talked with me about what  
23 happened on Tuesday when you took Jessie's dad down  
24 there --

25 MR. STIDHAM: I talked to --

1 THE COURT: All right, wait a minute. For the  
2 record, the affidavit in paragraph four says that, "On  
3 Wednesday February 16, 1994, the prosecuting attorney,  
4 Brent Davis, telephoned me and requested permission  
5 from myself and my co-counsel, Mr. Stidham, to  
6 interview Jessie Lloyd Misskelley, Junior. Said  
7 permission was never granted."

8 MR. STIDHAM: That's correct, your Honor.

9 THE COURT: The way I'm seeing it there's a  
10 difference of opinion between Mr. Davis and Mr. Crow  
11 as to what was said on Wednesday before the order was  
12 obtained bringing him back.

13 MR. DAVIS: Judge, I can --

14 MR. STIDHAM: Your Honor, he said under -- I  
15 guess he wasn't under oath -- but as an officer of the  
16 court, he said a while ago he didn't call us, didn't  
17 tell us, he didn't have to. He's done it thousands of  
18 times.

19 THE COURT: No, Dan, that is not what he said.  
20 He stated that he called Mr. Crow on Wednesday because  
21 he wasn't getting anywhere with you, basically, and  
22 that Mr. Crow said that it was all right to bring him  
23 back and he would consider talking to him but he would  
24 have to talk to you --

25 MR. STIDHAM: That's not the way it happened,

1 your Honor.

2 THE COURT: I don't know. Do you know what Mr.  
3 Crow said?

4 MR. STIDHAM: Mr. Crow's affidavit speaks for  
5 itself. I'll be happy to get him out of the  
6 deposition and have him come down here.

7 MR. DAVIS: Judge, I will agree that it wasn't --  
8 what was said was, I said, "I'm tired of talking with  
9 Dan. Dan has lost his objectivity. He no longer is  
10 doing what is in his client's best interest. He's on  
11 a crusade. If I arrange to bring Jessie back up here,  
12 would you go with me and meet with me to talk with  
13 him?"

14 He said, "I'm inclined to do that if you get him  
15 back up here." And at that point I went ahead and  
16 prepared the order and I made arrangements to get him  
17 back up here because, frankly, I felt like until I did  
18 and until I got with Greg Crow and could meet with  
19 him, that there wasn't going to be anything  
20 accomplished.

21 MR. STIDHAM: Mr. Crow has told me that that did  
22 not happen. Furthermore, I resent the fact that the  
23 prosecuting attorney has to decide what my duties as  
24 defense counsel is and his desire to call my law  
25 partner and tell him that I'm off my rocker and I

1 don't know what my client's telling me. My client  
2 told me he did not want to testify, and I relayed that  
3 to the prosecutor. At that point he had a legal duty  
4 and obligation to leave my client alone. He did not  
5 follow the law.

6 MR. DAVIS: The difference is, Judge, it is their  
7 client, not his client, and I did talk with the other  
8 attorney.

9 MR. STIDHAM: It did not happen that way --

10 (MR. DAVIDSON, MR. STIDHAM AND THE COURT SPEAKING  
11 AT THE SAME TIME - UNINTELLIGIBLE)

12 THE REPORTER: I can't hear you when you're all  
13 talking at the same time.

14 THE COURT: One at a time. I thought you said  
15 your motion was identical.

16 MR. DAVIDSON: It is close to it.

17 MR. FORD: It tracks the same misconduct, your  
18 Honor.

19 THE COURT: Then it's denied.

20 (REPORTER'S NOTE: THE SHERIFF AND THE COURT  
21 SPEAKING OFF THE RECORD)

22 THE COURT: The press wants to come in,  
23 gentlemen. I told them y'all object.

24 MR. FORD: That's correct, your Honor.

25 THE COURT: Gentlemen, the only issue is as I see

1 it from your motion and their motion is whether or not  
2 Jessie Misskelley is voluntarily giving a statement  
3 and whether or not that statement is admissible and  
4 that's the only issue.

5 MR. FOGLEMAN: His statement is obviously not  
6 admissible but his testimony is.

7 THE COURT: I mean his testimony.

8 MR. FORD: If we're going to switch to our  
9 record, I'd like to make a record in this case, not  
10 the record that has been made in Mr. Misskelley's case  
11 with respect to similar issues --

12 MR. STIDHAM: -- your Honor, I would like to  
13 designate this hearing as part of the record in the  
14 Misskelley case and designate it on the record as for  
15 appeal purposes.

16 THE COURT: It would be my ruling that this is  
17 not relevant for appeal purposes. It is not part of  
18 the transcript of the trial, and it is not an  
19 appealable issue.

20 THE REPORTER: Is Mr. Ford making a record in  
21 this case?

22 THE COURT: Well, it is apparent that all the  
23 defense attorneys are together on this issue.

24 MR. FORD: Your Honor, I object to that comment.  
25 That's not correct, your Honor --

1 THE COURT: You're not to have any standing here  
2 right now --

3 MR. FORD: You're making a record. You're making  
4 an innuendo on the record that defense counsel is in  
5 concert together, and that may be an issue at a later  
6 point in our trial, and I object to that innuendo by  
7 the Court.

8 THE COURT: All right. Are you through?

9 MR. STIDHAM: Before you close the record with  
10 regard to Mr. Misskelley, for purposes of the record,  
11 you're taking part of the motion under advisement as  
12 to whether or not there's been a misconduct with the  
13 way I'm alleging they violated his Sixth Amendment  
14 rights. Are they going to be allowed to communicate  
15 further with my client until this issue is resolved?  
16 I respectfully request that they not be allowed to  
17 communicate with him.

18 THE COURT: I'm not going to dwell on this for a  
19 long time so until I make my final decision on this,  
20 yes, I will say that they are not to talk to him.

21 MR. STIDHAM: Will the State -- we also request  
22 that the prosecution not be permitted to sequester my  
23 client from his family.

24 MR. FOGLEMAN: That has not happened, your Honor.

25 THE COURT: I don't know anything about that and



1           whatever the sheriff's visitation rules are would  
2           apply to him as they would anybody else.

3           MR. STIDHAM: Thank you, your Honor. And the  
4           Court will not permit me to attach a transcript of  
5           this hearing as a part of our record on appeal?

6           THE COURT: I don't see where it has anything at  
7           all to do with an appeal issue. It's not anything  
8           that happened in his trial and I have already ruled  
9           anything that involving any statements that he might  
10          make from the time he was transported to anytime  
11          subsequent based upon police or prosecutor's efforts  
12          to obtain the statement, are not admissible against  
13          him at all. So there's absolutely no prejudice toward  
14          him whatsoever by any of this.

15          MR. STIDHAM: Note my objections, your Honor.

16          MR. DAVIDSON: Your Honor, we would ask that this  
17          hearing be made a part of record in our case. Rather  
18          than going through the same testimony. I guess we  
19          would put Mr. Davis and Mr. Stidham on the stand. We  
20          would ask that --

21          MR. STIDHAM: I'll be happy to be put under oath.

22          THE COURT: I will make it a part of your case --  
23          this hearing --

24          THE REPORTER: For which defendants?

25          THE COURT: For Baldwin and Echols.

1 MR. FORD: Your Honor, if this record is an  
2 all-inclusive record, then at this point I would like  
3 to make some statements since I now feel I have some  
4 standing.

5 THE COURT: All right. Go ahead.

6 MR. FORD: Your Honor, it is the allegation of  
7 Robin and I on behalf of Jason Baldwin that the  
8 prosecuting attorney's office is guilty of misconduct,  
9 that they have been informed by defense counsel that  
10 Mr. Misskelley --

11 THE COURT: Meaning Mr. Misskelley's attorneys?

12 MR. FORD: That's correct. By Mr. Stidham or Mr.  
13 Crow. That they advised the prosecuting attorney's  
14 office that Mr. Misskelley would not be testifying.  
15 At that point in time I concur with Mr. Stidham that  
16 they had a duty bound legal obligation to cease any  
17 efforts to discuss this matter further with Mr.  
18 Misskelley. The Court rulings on appeal discussing  
19 these areas have been clear that they cannot even  
20 subpoena him.

21 THE COURT: Are you talking about someone that  
22 they know is going to claim their Fifth Amendment --

23 MR. FORD: That's correct. And Mr. Stidham had  
24 advised them that would be the case.

25 THE COURT: It seemed to me there were kind of

1 mixed signals given.

2 MR. FORD: Your Honor, that's for the Court's  
3 determination. But for my record, my contentions are  
4 there were no mixed signals. That they were aware  
5 that he would not be testifying and at that point when  
6 they proceed further to obtain a pick-up order  
7 pursuant to a subpoena to bring him here to testify,  
8 they violated his rights under the Sixth Amendment.  
9 They initiated the contact. Once your Sixth Amendment  
10 right to counsel attaches and has been invoked, the  
11 State or the police may make no contact with the  
12 defendant until such time as the defendant initiates  
13 the contact. Being picked up by order of the Court,  
14 being placed in custody of the Sheriff of Craighead  
15 County, being transported back in here and to begin to  
16 question him and tell him the things that will be said  
17 will not be used against him, they are initiating the  
18 contact with a criminal defendant who has previously  
19 invoked his Sixth Amendment right to counsel.

20 At that point in time, they have violated his  
21 Sixth Amendment right to counsel and to do it  
22 knowingly, that rises to the level of misconduct.  
23 Once that prosecutor misconduct has occurred, we are  
24 requesting a remedy --

25 THE COURT: Are you saying there was misconduct

1 when they obtained an order to bring him back as a  
2 possible witness in the case?

3 MR. PRICE: After being told --

4 MR. FORD: After being told --

5 MR. PRICE: -- by Mr. Stidham that he would not  
6 testify.

7 MR. FORD: -- that he would not testify. That he  
8 was going to invoke his right to counsel.

9 THE REPORTER: Please don't talk over one  
10 another.

11 MR. FORD: I'm sorry, Barbara.

12 THE COURT: Are you completely disregarding Mr.  
13 Davis' statement that he contacted Mr. Crow and Mr.  
14 Crow informed him according to Davis' statement that,  
15 "I might be inclined to do that if you get him back  
16 here. I need to talk to Dan about it."

17 MR. FORD: It is a question of fact. It is a  
18 question of fact as to whether Jason Baldwin is guilty  
19 of a crime in this case. I totally disregard many of  
20 the things they say in that contention. It is a  
21 question of fact as to whether or not it occurred.  
22 Mr. Crow's affidavit --

23 THE COURT: Mr. Crow's affidavit acknowledges  
24 that there was a Wednesday telephone call. I prefer  
25 having him here --

1 (THE COURT AND MR. FORD SPEAKING AT THE SAME TIME  
2 UNINTELLIGIBLE)

3 MR. FORD: His affidavit states that permission  
4 was not granted --

5 THE COURT: To talk to him.

6 MR. FORD: And they did.

7 THE COURT: He's not saying that permission was  
8 not granted to bring him back with the possibility  
9 that they would talk to him. That is what I want to  
10 hear from Mr. Crow.

11 MR. FORD: Then, your Honor, I will move further.  
12 I feel that the written motion we have filed speaks  
13 for our position.

14 Also I would state, your Honor, that until this  
15 issue has been fully pursued, until this matter has --  
16 there's a determination as to whether this party will  
17 be allowed to testify, until the Court is going to  
18 fulfill its ruling to appoint an independent counsel  
19 -- quote, independent counsel, which I feel is  
20 inappropriate to begin with.

21 But if the Court does that and the Court is going  
22 to make these determinations, the voir dire process in  
23 this case be indefinitely postponed until the Court  
24 has made that ruling. As defense counsel, we are  
25 entitled to know that answer.

1 MR. FOGLEMAN: He's been listed as a witness.

2 MR. FORD: We are entitled to know whether we  
3 should make that a subject of our voir dire  
4 examination.

5 THE COURT: All right, gentlemen, anything else?

6 MR. DAVIDSON: We would concur in his motion and  
7 also set forth the things we put in our written  
8 motion.

9 THE COURT: I understand you don't want a  
10 co-defendant to testify. That is rather clear. The  
11 thing that is puzzling me -- all of these cases you've  
12 cited -- or basically all of them -- there may be one  
13 or two that aren't -- involved a situation where a  
14 defendant was called or co-defendant was called to the  
15 stand to testify when the State knew full well that  
16 that person was going to take the Fifth Amendment  
17 against self-incrimination and that they called that  
18 person in any regard and allowed them to make the  
19 statement in the presence of the jury that, I refuse  
20 to testify on the grounds that it may incriminate me.  
21 Which in and of itself created a prejudicial  
22 situation, the fact that the inference to the jury  
23 was, I'm not going to testify because it may  
24 incriminate me. And that is totally different to the  
25 situation before the Court.

1           Secondly, the issue that y'all are making is that  
2 his Sixth Amendment rights to an attorney have been  
3 abridged by this action. The whole concept and notion  
4 of use immunity is one where the State may use it as a  
5 tool to obtain testimony that would not have otherwise  
6 been available to them by granting that use immunity  
7 and only after leave of the Court to do so, and they  
8 are totally protected under a situation like that.

9           In fact in this case before a statement was taken  
10 -- other than the one made by the officers -- and that  
11 might have been misconduct on the part of the officers  
12 -- and clearly none of that would have been allowable  
13 in any case, and the only way a person can be given a  
14 grant of immunity or use immunity is by action of the  
15 Court.

16           Attorneys were present. The defendant was  
17 advised of his rights and that it was their best  
18 judgment that he should not make a statement and that  
19 he elected to do so anyway.

20           I suggest, how would a prosecuting attorney go to  
21 a defendant who had been convicted and tried before a  
22 jury and request his testimony against co-defendants  
23 if they didn't have access to him or have the  
24 opportunity to offer that grant of immunity to him  
25 either through attorneys or directly.

1           Do you have any cases on this point? Are there  
2 any? I don't know.

3           MR. STIDHAM: I think we are going to make some  
4 new law here.

5           THE COURT: That's what I told you on the  
6 telephone. I didn't know. I knew that after a person  
7 had been tried and convicted before a jury that they  
8 had a right to appeal. It seemed to me that a smart  
9 prosecutor would be doing everything they could to  
10 obtain that person's testimony in a subsequent trial  
11 against co-defendants.

12           And I'm not sure there's any misconduct on the  
13 part of the prosecuting attorney to do his job and  
14 that is to try to obtain testimony. The only issue I  
15 see of any significance is whether or not Jessie  
16 Misskelley is willing voluntarily to make a statement  
17 and -- perhaps, too, whether or not -- it has been  
18 suggested in the other trial that he was a suggestive  
19 type person -- to whether or not that free will has  
20 been yanked around either to get him not to testify or  
21 to get him to testify. And I can't be sure from the  
22 facts that are before the Court.

23           So for those reasons I'm going to find an  
24 independent attorney that does criminal practice to  
25 visit with Mr. Misskelley and inquire of him and



1 inform him what use immunity means and whether or not  
2 it is his desire and whether or not anyone has  
3 overridden his will and I'm going to take that report  
4 from the attorney and go from there.

5 MR. FOGLEMAN: You asked for suggestions earlier.  
6 I just thought of something. It is my understanding  
7 that Tom Montgomery has represented him before. We  
8 have not spoken to him anything about this.

9 MR. WADLEY: Your Honor, if Tom Montgomery, the  
10 public defender in Crittenden County, has a conflict  
11 in this case which caused us to be involved in the  
12 case, he should not be this person picked as an  
13 independent --

14 THE COURT: What about Bill Ross?

15 MR. FOGLEMAN: Your Honor, his conflict didn't  
16 have anything to do with Jessie.

17 MR. WADLEY: I don't know what his conflict was.

18 MR. STIDHAM: I understood his conflict was a  
19 religious objection.

20 THE COURT: No, I don't think that was it.

21 MR. FORD: Just a point of clarification. Did  
22 the Court grant use immunity to Mr. Misskelley at the  
23 time the order was signed to pick him up or would that  
24 use immunity be granted by the Court until after you  
25 had been made --

1 THE COURT: Nobody asked me to do it until  
2 Thursday night and at that point Dan was asking me --  
3 he was frustrated -- "What do I do under these  
4 situations?" I said, "You demand use immunity."

5 MR. FORD: So it hadn't been granted --

6 THE COURT: It was obvious to the Court --  
7 anybody with a lick of sense that that was what was  
8 going to be requested.

9 MR. DAVIDSON: Has use immunity been granted?

10 THE COURT: I granted it that night. There  
11 wasn't any question about it in my mind, if a  
12 statement was going to be made.

13 I was also under the opinion and belief that Mr.  
14 Crow had been informed that the Court was going to  
15 enter an order to bring him back.

16 MR. STIDHAM: Should I have Mr. Crow summoned  
17 here, your Honor?

18 THE COURT: If you want to put it on the record.  
19 He didn't deny that a phone was call was made.

20 MR. STIDHAM: No, your Honor. A phone call was  
21 made.

22 THE COURT: It seems to me his statement is kind  
23 of in between there. It is not just saying that the  
24 permission wasn't given to question him but he's not  
25 saying permission wasn't given to bring him back with

1 the prospect of a meeting to have him interviewed.

2 MR. DAVIS: For clarification on the record, Mr.  
3 Crow and I never discussed that morning an order to  
4 bring him back. From my recollection, the extent of  
5 the discussion was, "If I have him brought back," and  
6 I think I said specifically Clay County, "If I have  
7 him brought back to Clay County, will you go with me  
8 to talk with him," and he said, "I'm inclined to do so  
9 if you have him brought back."

10 I actually don't think he -- I don't recall him  
11 saying I'm going to discuss it with Dan but I kind of  
12 got the inference when he said, "I'm inclined to do so  
13 if you have him brought back," that he was either  
14 going to discuss it with Dan or was trying to figure  
15 out how to do it without burning bridges with Dan.

16 MR. STIDHAM: The key word is "if."

17 MR. WADLEY: Your Honor, it seems to me that the  
18 inquiry in this case should not be to appoint an  
19 independent attorney to make a determination as to  
20 whether or not he wants to testify. It seems to me  
21 the inquiry should be whether or not Mr. Stidham is  
22 his lawyer or not. If he is his lawyer, he's still  
23 the lawyer in this case. That should be the inquiry.  
24 If Dan Stidham's his lawyer, then he can act as his  
25 lawyer. If he wants him to be his lawyer or he

1 doesn't want him to be his lawyer. That should be the  
2 inquiry, not whether or not he's going to testify or  
3 not.

4 THE COURT: Does anybody want to make any more  
5 record?

6 MR. STIDHAM: Your Honor, just one point. The  
7 Court should analyze how the contact took place with  
8 Mr. Misskelley after February 15th when the prosecutor  
9 was notified that he would not testify. The  
10 circumstances surrounding the contact should be what  
11 the Court is analyzing to determine whether or not  
12 there was misconduct of him getting use immunity in  
13 the first place. That is the crux of our argument --

14 THE COURT: I understand that. That's what I've  
15 just done. As of Wednesday, Mr. Davis has testified  
16 he indicated to your partner and Jessie's co-counsel  
17 that, "If I bring him back, will you be willing to go  
18 to him and see if he's willing to make a statement,"  
19 or words to -- whatever he's testified to.

20 MR. STIDHAM: Did Mr. Crow ever tell you he would  
21 be willing to do that?

22 MR. DAVIS: He said, "I would be inclined to do  
23 so if you bring him back."

24 MR. STIDHAM: Did you tell him that you were  
25 going to be bringing him up from the Department of

1 Corrections? Did you tell him that that was going to  
2 happen?

3 MR. DAVIS: No, I didn't tell him.

4 MR. STIDHAM: Did he consent to that?

5 MR. DAVIS: In my opinion he didn't have to  
6 consent to him being brought back.

7 THE COURT: I don't have any problem with  
8 bringing prisoners back.

9 MR. STIDHAM: Two weeks before he's needed at  
10 trial?

11 THE COURT: I've brought them back months before  
12 -- before.

13 MR. FORD: What is the Court going to do with  
14 respect that the voir dire be postponed until a  
15 determination has been made by the Court?

16 THE COURT: I'm going to make that determination  
17 real quick.

18 MR. FORD: Will the Court -- is that a yes or a  
19 no as to whether or not voir dire will be postponed  
20 until that determination is made?

21 THE COURT: I'm not going to postpone the voir  
22 dire. We are going to start at one o'clock so I will  
23 make my ruling before then.

24 MR. FORD: You'll make your ruling on this issue  
25 before then.

1 THE COURT: Yes.

2 MR. DAVIDSON: Depending on your ruling, we will  
3 probably have other motions.

4 THE COURT: Like what?

5 MR. DAVIDSON: Possibly a motion for continuance,  
6 possibly a motion for a copy of those tapes.

7 MR. FOGLEMAN: He was listed as a witness.

8 MR. PRICE: We would like copies --

9 THE COURT: If he testifies --

10 (THE COURT AND MR. PRICE SPEAKING AT THE SAME  
11 TIME - UNINTELLIGIBLE)

12 MR. PRICE: -- of Mr. Misskelley Friday,  
13 Saturday, and Sunday.

14 THE COURT: You are entitled to co-defendant's  
15 statements that are recorded.

16 MR. PRICE: And also a copy of any notes of the  
17 three days of conversation.

18 THE COURT: You're entitled to that by the  
19 discovery statute.

20 MR. PRICE: Thank you.

21 MR. DAVIS: Your Honor, we can resolve that real  
22 quick. Number one, there's no tapes and number two,  
23 there are no notes.

24 MR. DAVIDSON: Mr. Stidham just said there was a  
25 tape.

1 THE COURT: Mr. Stidham has a tape of his  
2 conversation with his client, and I think that's  
3 attorney-client privilege and the only way you're  
4 going to get that is if Mr. Misskelley says you can  
5 have it.

6 MR. PRICE: We would also request that Mr.  
7 Misskelley be brought -- if he's allowed to testify --  
8 that he brought to my office so I can interview him  
9 and prepare to cross examine him just like --

10 MR. FOGLEMAN: Your Honor --

11 (MR. PRICE, MR. FOGLEMAN AND THE COURT SPEAKING  
12 AT THE SAME TIME - UNINTELLIGIBLE)

13 THE COURT: -- I thought you already had.

14 MR. FOGLEMAN: Mr. Price already has cross  
15 examined him.

16 MR. DAVIDSON: No, we have not.

17 MR. PRICE: No, your Honor --

18 MR. STIDHAM: -- your Honor, that is not correct.  
19 That is an absolute absurdity.

20 MR. FORD: I'd like the same opportunity.

21 MR. STIDHAM: Your Honor, as his lawyer, I'm  
22 objecting to anybody talking to him -- anybody.

23 MR. PRICE: If I could clarify something.  
24 Approximately two or three days prior to the Denno  
25 hearing, I went up with Mr. Stidham and I practiced

1 cross examination of Mr. Misskelley approximately ten  
2 or fifteen minutes. That's the only conversations  
3 I've had with Mr. Misskelley.

4 MR. FOGLEMAN: Was that to assist Mr. Misskelley  
5 in preparation for his trial?

6 MR. STIDHAM: Mr. Price was asking questions of  
7 Mr. Misskelley to prepare him for the onslaught we  
8 anticipated --

9 MR. PRICE: -- At the direction of Mr. Stidham.

10 MR. FOGLEMAN: So that was to assist him in  
11 preparation for their trial.

12 MR. DAVIS: Your Honor, we would certainly note  
13 on the record that if any statements were made by Mr.  
14 Misskelley under those circumstances, then Mr. Price  
15 was providing legal services at the request of Mr.  
16 Misskelley's counsel and, therefore, any statements  
17 Mr. Misskelley made at that point would be subject to  
18 attorney-client privilege and one of the things that's  
19 going to come up is who is going to advise him to  
20 claim that privilege and, number two, what happens  
21 when Mr. Price who represents a co-defendant in the  
22 case gets up and starts to examine him regarding that.  
23 Because Mr. Price said that he was there to provide  
24 legal assistance to Mr. Stidham in preparing him for a  
25 hearing.



1 MR. STIDHAM: I don't know if you want to term it  
2 "legal assistance." It was a mock trial situation,  
3 your Honor.

4 MR. FORD: I'd like a transcript of Thursday's  
5 statement at Mr. Calvin's office that he is preparing  
6 a rough draft for.

7 MR. FOGLEMAN: And y'all were told about that.

8 (MR. FORD AND MR. PRICE SPEAKING AT THE SAME TIME  
9 UNINTELLIGIBLE)

10 THE COURT: According to the rules of evidence,  
11 you are entitled to it. I think the rule reflects  
12 after he testifies, but I generally allow it  
13 beforehand.

14 MR. FORD: They have an open file policy.

15 THE COURT: I'm telling you that my ruling has  
16 been you are entitled to it.

17 MR. DAVIDSON: We also request a copy of any tape  
18 that Mr. Stidham has that he played for Brent's  
19 secretary and thereby wouldn't be privileged anymore.

20 MR. FOGLEMAN: It is the client's privilege.

21 MR. FORD: Are you representing Mr. Misskelley  
22 now?

23 MR. FOGLEMAN: Somebody has got to.

24 MR. FORD: Y'all don't have a conflict -- you two  
25 gentlemen -- the prosecutors --

1 MR. STIDHAM: It seems incredulous that the same  
2 two guys who are wanting to kill him two weeks ago are  
3 now his best friends --

4 THE COURT: All right --

5 MR. DAVIS: -- You could reverse that, Judge.  
6 It's nearly incredulous to us that the same guy that  
7 defended him two weeks ago is now doing these things.

8 THE COURT: All right. We're off the record.  
9 Let's take a recess.

10 (RECESS)

11 (THE FOLLOWING CONFERENCE WAS HELD IN CHAMBERS)

12 THE COURT: Let the record reflect this is a  
13 continuation of the hearing in chambers.

14 MR. FORD: Your Honor, two things --

15 THE COURT: You need to let the record reflect  
16 that the defendants are not present.

17 MR. FORD: That's correct. The defendants are  
18 not present. This is a hearing outside the presence  
19 of the prospective jury panel.

20 THE COURT: Do you want the defendants present?

21 MR. PRICE: We waive the presence of Mr. Echols.

22 MR. FORD: We waive the presence of Mr. Baldwin.  
23 Before we broke for lunch, the Court indicated that it  
24 would grant my request that voir dire be postponed  
25 until the Court has made its decision as to whether or

1 not it would let Jessie Misskelley testify. It's now  
2 my understanding that you're going to withhold that  
3 ruling but yet proceed with voir dire. Is that  
4 correct?

5 THE COURT: Yes.

6 MR. FORD: We'd like to voice our objection to  
7 the Court's ruling in that respect and state to the  
8 Court that we believe that whether or not Mr.  
9 Misskelley will testify or not is an extremely  
10 critical portion of the voir dire inquiry.

11 If he was to be eliminated from the potential  
12 list of State's witnesses, that the manner and method  
13 at which we would proceed with voir dire would be  
14 different and that if he is going to testify, it would  
15 put us in the position of not knowing. It's different  
16 in this situation than not knowing because of trial  
17 strategy as opposed to not being allowed to call him  
18 by virtue of whether or not he is a competent and  
19 qualified witness.

20 Secondly, we believe that not knowing for certain  
21 the Court's ruling in this respect could affect  
22 drastically the way in which we would exercise our  
23 challenges for cause and the challenges for peremptory  
24 reasons. If the defense is -- if the State is going  
25 to call Jessie Misskelley, then questions regarding

1 the jury's perception as to his believability whether  
2 or not he -- his impact and his indication that the  
3 two remaining co-defendants were the perpetrators  
4 along with him is clearly something that could create  
5 challenges for cause and not being able to clearly  
6 understand that at this point in time from a defense  
7 standpoint, I believe unduly prejudices us at this  
8 stage. Also, your Honor, we would --

9 (THE COURT RECEIVING A TELEPHONE CALL)

10 THE COURT TO THE BAILIFF: Bring Mr. Misskelley  
11 up here.

12 MR. DAVIS: Could we take him somewhere else  
13 besides up here because if we bring him up here,  
14 there's going to be an absolute circus with the media  
15 --

16 THE COURT TO THE BAILIFF: Take him to the county  
17 jail.

18 MR. STIDHAM: Your Honor, Mr. Crow is at the Clay  
19 County Jail talking to Mr. Misskelley and he's going  
20 to be on his way here.

21 MR. FORD: Are you objecting to him talking to  
22 his client?

23 MR. FOGLEMAN: I didn't say a word, Mr. Ford.

24 MR. FORD: Well, based on your laughter --

25 THE COURT: Is there any change in what was said

1 this morning?

2 MR. STIDHAM: He had just gotten there.

3 THE COURT: Bring him out to the jail and we will  
4 make arrangements to go out there and I am going to  
5 have Phillip Wells talk to him briefly and we will  
6 make a record out there as well.

7 MR. STIDHAM: Your Honor, I'd like to make an  
8 objection for the record and I'd ask that this be made  
9 a part of Mr. Misskelley's --

10 THE COURT: Well --

11 MR. STIDHAM: I hate to keep jumping back and  
12 forth, your Honor, but I need to protect my client's  
13 rights. Mr. Wells is a law partner of Mr. McDaniel.  
14 Mr. Wells and Mr. McDaniel have been color  
15 commentators for Channel Eight News during the course  
16 of the entire Misskelley trial. I have personally  
17 spoken to Mr. McDaniel about this case as has the  
18 prosecution, and I think it is an inherent conflict  
19 for Mr. Wells to talk to Mr. Misskelley. Again, I  
20 will renew my objection that anyone talk to him.

21 I think Mr. Misskelley needs to have a mental  
22 evaluation and Mr. Misskelley needs some time to  
23 decide what he's going to do, and he needs to make an  
24 intelligent decision about this. All I ask is that we  
25 have him evaluated and I have an opportunity to inform

1 him of what his rights are.

2 THE COURT: You are going to do that in the  
3 presence of the Court and you are going to do it  
4 today, and I'm going to be here, and we are going to  
5 make a record of it and get on with this, and it is  
6 going to be done.

7 The only significant issue is whether or not  
8 Misskelley is informed and if he's making a voluntary  
9 statement and if it is his voluntary desire to  
10 testify. That's the only thing that is important.  
11 All the rest of it is just window dressing.

12 MR. STIDHAM: Is the Court ruling on our motion?

13 THE COURT: I'm going to tell Mr. Wells -- if  
14 y'all want an independent attorney to listen to him --  
15 it seems to me that --

16 MR. FOGLEMAN: Your Honor, somebody is going to  
17 have to advise him in regard to attorney-client  
18 privilege.

19 MR. STIDHAM: Mr. Crow is quite capable of doing  
20 that.

21 MR. DAVIS: The concern -- and I think the Court  
22 would agree based on what has been presented here,  
23 based on some of the statements of Mr. Stidham -- that  
24 there are at least grave concerns whether that  
25 attorney-client privilege hasn't been jeopardized or

1 violated up to this point and there needs to be some  
2 steps taken to insure that it's protected down the  
3 road.

4 MR. STIDHAM: Your Honor, I would ask that the  
5 Court talk to Mr. Crow and allow him to testify under  
6 oath with regard to our motion and also allow Mr.  
7 Misskelley to visit with his family before making any  
8 decision. He's eighteen-years-old but he's also very  
9 incapable from a mental standpoint.

10 THE SHERIFF: I can bring him to this back door.

11 THE COURT: If you can do that, that's fine.  
12 Bring him on.

13 MR. STIDHAM: Your Honor, I think it would be  
14 important to have Mr. Crow testify under oath  
15 regarding our motion before the Court --

16 THE COURT: Call him and tell him to get up here.

17 MR. STIDHAM: He's on his way.

18 (VOIR DIRE BY THE COURT OF THE PROSPECTIVE JURY  
19 PANEL HELD AT THIS TIME)

20 (THE FOLLOWING CONFERENCE WAS HELD IN CHAMBERS)

21 MR. STIDHAM: I know I've objected to this.  
22 We've been on and off the record at this point. I  
23 want to make sure that I got this on the record. I  
24 understand the Court's ruling that an independent  
25 attorney is going to discuss with Mr. Misskelley

1           whether he understands the concept of use immunity and  
2           the appeal process and all that information, and I  
3           formally would object to that. Mr. Misskelley is my  
4           client, and I would like the opportunity to visit with  
5           him, something that I have been denied for the past  
6           several days. And also --

7           THE COURT: Wait a minute. Nobody has denied you  
8           the right to visit your client that I'm aware of.  
9           I've heard nothing that would prohibit you from  
10          visiting your client.

11          MR. STIDHAM: No one has physically restrained me  
12          but my allegation is that the circumstances that led  
13          to this offer of immunity has precluded and interfered  
14          with my attorney-client relationship.

15          THE COURT: Let's get the record clear. Has  
16          anyone prohibited you from going to the Clay County  
17          jail and visiting your client?

18          MR. STIDHAM: No one has physically --

19          THE COURT: Have you made any effort to go there  
20          physically and interview your client?

21          MR. STIDHAM: I have made phone calls to the  
22          county jail --

23          THE COURT: Were you allowed to talk to him?

24          MR. STIDHAM: I was not allowed to talk to him.  
25          I asked them to have him call me. He did not call me.



1 He finally called Mr. Crow yesterday afternoon.

2 THE COURT: Did you make any other efforts on  
3 your own to go visit him?

4 MR. STIDHAM: No, your Honor, because if he's not  
5 going to talk to me on the phone, he's not going to  
6 talk to me in person.

7 THE COURT: I understand that Mr. Crow was at the  
8 Clay County jail about an hour and a half ago when I  
9 called to have Misskelley brought back up here --

10 MR. STIDHAM: Yes, sir.

11 THE COURT: -- Talking to him.

12 MR. STIDHAM: My understanding was -- I had just  
13 got off the phone with Mr. Crow prior to you placing  
14 the phone call, and Mr. Crow had just gotten there.

15 THE COURT: In view of this unusual circumstance  
16 and the dispute between the prosecutor and the defense  
17 attorneys, the Court has taken it upon itself to call  
18 Phillip Wells, a lawyer of some reputation, to make an  
19 inquiry of your client and to make a report to the  
20 Court. I don't plan to be here. I want him to  
21 independently interview him in your presence and in  
22 the presence of the prosecutor to determine whether or  
23 not he understands what use immunity means, what the  
24 consequences are and all those things we've gone over.

25 MR. STIDHAM: I object to the prosecutors being

1 in there because those are the same guys that have  
2 been talking to him without my knowledge and consent.

3 THE COURT: All right. The prosecutors won't be  
4 present then. Do you want a record made of that?

5 MR. STIDHAM: No, I don't want a record made of  
6 that. Mr. Wells can report to the Court his findings  
7 and even though I object to him going in in the first  
8 place, I understand the Court's ruling and I would ask  
9 that he make a full and complete report to the Court.

10 THE COURT: There's several reasons for it. One  
11 is that there is a potentiality that -- based upon  
12 your statement that you believe it to be perjury --  
13 that you would have to be relieved from the case and  
14 at that point I would have to have another attorney  
15 appointed. So there are other reasons that I think an  
16 independent attorney needs to evaluate Mr.  
17 Misskelley's willingness to testify and I am going to  
18 allow that to be done in your presence.

19 MR. STIDHAM: Would you be willing to make a  
20 ruling on our motion we filed this morning on  
21 prosecutorial misconduct prior to this meeting taking  
22 place?

23 THE COURT: I think I have ruled on that.

24 MR. STIDHAM: You have not spoken to Mr. Crow and  
25 you asked that he be here to be put under oath and

1 explain the circumstances of the --

2 THE COURT: I will be glad to talk to Mr. Crow  
3 before I make any ruling. All right, let's go out  
4 there.

5 (RECESS)

6 (THE FOLLOWING PROCEEDINGS WERE HELD IN CHAMBERS)

7 THE COURT: Let the record reflect that this is a  
8 continuation of the hearing outside of the presence of  
9 the prospective jury.

10 MR. WELLS: For the record, I was brought in as  
11 an independent attorney to make a determination as to  
12 whether or not Jessie Misskelley was aware of the  
13 offer that had been previously made by the prosecuting  
14 attorney to offer him use immunity in exchange so that  
15 his testimony should he desire and choose to take the  
16 stand would not be used against him in any subsequent  
17 proceedings or be used against him in his appeal.

18 My first determination had to be made, is he  
19 mentally competent to be able to understand what was  
20 going on. Was he aware of the consequences of making  
21 a decision either way, and it is my opinion that  
22 Jessie Misskelley is mentally competent and does  
23 understand the circumstances of what his choice is to  
24 be.

25 It is my understanding and my impression that

1           Jessie Misskelley, although not an educated person and  
2           does not understand a lot of the words that we lawyers  
3           use in our normal discussions in legal circumstances,  
4           does understand that he has a decision to make as to  
5           whether or not he chooses to take the stand or whether  
6           or not he chooses not to take the stand.

7           I feel he understands what the consequences of  
8           either of those decisions would be. I feel that he  
9           understands what an appeal is, that he understands  
10          that his case is now on appeal and he understands that  
11          if he chooses not to testify, that he can continue  
12          with his appeal.

13          I believe that he also understands that if he  
14          chooses to testify under the use immunity situation,  
15          that he can continue his appeal.

16          I have attempted with the assistance of his  
17          attorneys to explain to him the technical defense that  
18          he has in terms of the fact that he signed a statement  
19          when he was 17 years of age and I believe Mr.  
20          Misskelley understands that that is an appellate  
21          argument that can be raised.

22          As any criminal defense lawyer has in a  
23          circumstance like this, Mr. Misskelley has a very,  
24          very difficult decision to make and as it stands right  
25          now, he understands that the prosecuting attorney is

1 of the opinion and is under the impression that the  
2 statement that he gave to the prosecuting attorneys is  
3 a truthful statement and that they are attempting to  
4 have him testify in open court as to the statement he  
5 gave against the other two defendants.

6 I specifically asked him not to go into any facts  
7 or circumstances so that I wouldn't be involved in  
8 whether or not he has provided truthful testimony, or  
9 made a truthful statement, but what I wanted to make  
10 sure that Jessie Misskelley understood is that if he  
11 took the stand, that he needed to provide truthful  
12 testimony under oath and if he had some kind of  
13 negotiations, that it would demand that he provide  
14 truthful testimony.

15 The other decision he has to make is which  
16 decision he should make. It is my impression that he  
17 is faced with the decision of not testifying and even  
18 though he is granted use immunity, he has indicated to  
19 me that that may be one of his decisions. But before  
20 he makes that decision, he would like to talk to his  
21 mother and father and get their parental guidance as  
22 to which decision he makes.

23 He has made that specific request and I also told  
24 him and I think his defense lawyers told him before  
25 this trial commences, both the defense lawyers and the

2400

1 prosecuting attorneys want to know what his decision  
2 is because the voir dire and the trial is going to  
3 depend on that. And he understands that he has to  
4 make a decision as to whether or not he should  
5 testify, whether or not he would be granted more than  
6 use immunity. And as a criminal defense lawyer, I  
7 have indicated to him that if he makes a decision that  
8 he is willing to testify, that before he makes that  
9 decision, he needs to have his criminal defense lawyer  
10 try to find out what type of negotiated plea they are  
11 willing to offer and only at that decision should  
12 Jessie Misskelley decide whether or not to give up his  
13 appellate rights and his opportunity not to testify in  
14 exchange for finding out what kind of negotiated plea  
15 that is.

16 I don't believe that at the present time Jessie  
17 Misskelley is going to make a decision until he talks  
18 to his parents. I have asked defense lawyers whether  
19 or not your Honor would allow him to talk to his  
20 parents. I feel it is a very unbelievably difficult  
21 decision that he has to make, and I would ask that he  
22 be given that opportunity.

23 Then, I believe that he will be willing to make a  
24 decision as to whether or not he should testify or  
25 whether or not he should choose not to testify and

1 depend on the appeal and understanding -- and I  
2 believe he understands if he chooses not to testify  
3 and the appeal is unsuccessful, that his sentence will  
4 remain as life imprisonment plus two twenty-year  
5 sentences.

6 THE COURT: Thank you, Mr. Wells. Anything else,  
7 gentlemen?

8 MR. STIDHAM: As Mr. Misskelley's court-  
9 appointed counsel, we would also make the request that  
10 he be allowed to visit with his parents before he  
11 makes probably the most important decision that he'll  
12 ever face.

13 THE COURT: I will permit him to talk to his  
14 parents. I don't know any reason why he couldn't  
15 anyway. Where are they?

16 MR. STIDHAM: I assume they are in Marion. I  
17 would be happy to make a phone call and have them  
18 start heading this way immediately.

19 THE COURT: Go ahead and do that.

20 MR. FORD: Was the question as to the factual  
21 dispute between Mr. Stidham and Mr. Davis this morning  
22 regarding Mr. Crow's recollection of Wednesday and  
23 Thursday morning -- has that been developed on the  
24 record?

25 THE COURT: Let's do that.

1 MR. DAVIS: One thing I would -- as far as the  
2 scenario of him talking to his parents -- and I  
3 realize this would be asking an additional hardship on  
4 Mr. Wells -- but would the Court request that Mr.  
5 Wells be present or at least initially to advise them  
6 and bring them up to snuff on the scenario that's  
7 transpired here today and kind of fill them in --

8 MR. STIDHAM: We would object -- Mr. Crow and I  
9 would object to that, your Honor.

10 THE COURT: For what reason?

11 MR. STIDHAM: We feel again the same objection  
12 with Mr. Wells talking to him in the first place. We  
13 feel that that is Mr. Crow and I's job to take care of  
14 matters which fall within the realm of the  
15 attorney-client relationship.

16 We certainly -- and I don't mean that as an  
17 affront or attack on Mr. Wells at all. I think he  
18 understands that.

19 MR. DAVIS: Your Honor, it is the State's  
20 position that all the same reasons that made it make  
21 sense to the Court for Mr. Wells to communicate with  
22 the defendant Misskelley about this, that all those  
23 same reasons would apply to providing that same  
24 information and communication to parents who obviously  
25 are going to be assisting in making this decision.



1 THE COURT: Frankly, the Court doesn't believe  
2 the parents ought to make that decision. They're not  
3 legally trained and probably the worst persons to give  
4 him advice, but I'm going to allow them to talk to him  
5 if that's who he wants to talk to.

6 MR. STIDHAM: Mr. Misskelley, would you like to  
7 talk to your parents before you make this decision?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: I'm going to let him do that. Can  
10 you sit in on that, Mr. Wells?

11 MR. WELLS: I'll be willing to do anything that  
12 the Court directs me to do.

13 THE COURT: I'm going to ask that you stand in  
14 with Mr. Crow and Mr. Stidham during that interview  
15 with his parents.

16 MR. STIDHAM: We'd ask that no officers -- that  
17 the officers be directed to not discuss anything  
18 regarding the case with our client.

19 THE SHERIFF: Fine with me.

20 THE COURT: Okay. That's fine. You can take him  
21 back to the jail.

22 (THE SHERIFF AND JESSIE MISSKELLEY LEAVING  
23 CHAMBERS)

24 THE COURT: Mr. Crow, do you want to state for  
25 the record your recollection of a Wednesday telephone

1 call from you to Mr. Davis or one he originated? I  
2 don't remember which.

3 MR. CROW: I honestly don't recall who called  
4 who. He may have called me and I called him back. I  
5 don't recall which way it was.

6 He wanted to know if we would consider letting he  
7 speak with Jessie in the presence of Dan and myself  
8 about testifying. He simply, as I understood it, just  
9 want -- just wanted to talk to him and make himself,  
10 make his own pitch kind of like what Mr. Calvin did on  
11 the day before -- on the day of trial. This is what  
12 we are offering, this is what you're going to get,  
13 which we certainly allowed on the day the trial  
14 started. Mr. Calvin came in and spoke, made Jessie an  
15 offer in our presence and then left and we discussed  
16 it.

17 I said that I didn't think I had a problem with  
18 it, but I expected Mr. Stidham would, and I wasn't  
19 making any decision yet, and I would talk to Dan and  
20 call him back. That was the end of the conversation  
21 at that point.

22 THE COURT: Did you indicate whether or not --  
23 let me put it another way. Let me think how --

24 MR. DAVIS: Judge, could I ask a question?

25 THE COURT: Go ahead.

1 MR. DAVIS: Greg, didn't I say to you on the  
2 telephone that if Jessie were to be brought back to  
3 Clay County, would you agree to go talk to him with me  
4 where I could ask the questions?

5 MR. CROW: I don't honestly remember if it was  
6 Wednesday or Thursday the first time I was aware that  
7 Jessie was being brought back to Clay County. The  
8 first time I remember it being discussed it was given  
9 to me as a, "He is being brought back," not a, "Do you  
10 mind if he's brought back."

11 I don't think I made an objection to him being  
12 brought back because I don't think I have -- they can  
13 put him in Cummins. They can put him in the Miller  
14 County jail in Texarkana if that's what they want to  
15 do. That's not my role, to decide where my convicted  
16 client is housed.

17 I honestly don't think it was until Thursday  
18 morning that I was aware of the fact that he was being  
19 brought back, but it may have been Wednesday morning.  
20 My recollection was not, "Do you mind." It was, "He  
21 is being brought back."

22 MR. DAVIS: Are you saying that it didn't happen  
23 or you just don't recall on Wednesday morning if at  
24 that time I said, "If I can get Jessie back to Clay  
25 County, would you go up there and talk with him."

1 MR. CROW: My recollection was, whether it was  
2 Wednesday or Thursday, that "He is being brought back.  
3 Would you go talk to him with us."

4 MR. DAVIS: We never had any telephone  
5 conversations between you and I on Thursday, correct?

6 MR. CROW: I did with Joe. First -- when I was  
7 aware he was being brought back it was, "He is being  
8 brought back." And then if that was the conversation  
9 with you, if it was Wednesday, my recollection, you  
10 said, "He is being brought back. Would you mind going  
11 to talk to him."

12 At that point I said, "I will have to discuss it"  
13 -- I certainly said, "I'm going to discuss it with Mr.  
14 Stidham." I think talking with you yesterday you had  
15 the impression I was going to talk to Mr. Stidham.  
16 You didn't remember one way or the other. You  
17 certainly had the impression I was going to talk to  
18 him.

19 MR. DAVIS: Would it be accurate to say that what  
20 you related to me over the phone was you personally  
21 didn't have any qualms with that but in order to do  
22 it, you needed to talk with Dan first?

23 MR. CROW: And I expected he would have a  
24 problem.

25 MR. DAVIS: On Thursday when Joe called you and

1 said he was on his way to Clay County, didn't you tell  
2 Joe that, "I will talk to Dan and we will be there by  
3 4:30," or something to that effect?

4 MR. CROW: My recollection is when I first talked  
5 to Joe, "He is on his way, would you come talk to  
6 him." And I took it that he didn't want me to tell  
7 Dan and I wasn't going to do that. I said, "I have  
8 got to check into some things and I will get back to  
9 you."

10 I then went and talked to Dan. We decided that  
11 we did not want to proceed that way and -- Joe may  
12 have called me back or I called him. I think I had a  
13 phone message on my desk to call him, and the phone  
14 rang and it was Joe, or it may have been me calling  
15 him back. And he said, "He's on his way up here." I  
16 told him, "I'm not coming up. It is not going to  
17 happen."

18 Then at that point Joe asked if they could talk  
19 to him and I said absolutely not and that was it.

20 MR. DAVIS: Did -- at that point did Joe indicate  
21 to you, "If he's here and indicates he wants to give a  
22 statement, do you want us to call you and have you  
23 present?"

24 MR. CROW: He said, "If he wants to give us a  
25 statement, what happens?" I said, "He's not giving a

1 statement to anybody without us being there." I made  
2 it clear that I didn't want him to question him  
3 without me being there -- me and Dan, one or both.

4 MR. DAVIS: To your knowledge, there was no  
5 statement taken until after you were present at Joe  
6 Calvin's office?

7 MR. CROW: What I understand from talking to you  
8 guys is he walks in the door and he was asked a one  
9 line question, "Do you want to give a statement?"

10 MR. DAVIS: And you were immediately called and  
11 advised as to what his response was.

12 MR. CROW: That's my understanding.

13 MR. DAVIS: Did Joe and you discuss that he was  
14 on his way to Clay County and what -- and this is in  
15 that conversation where Joe calls you and says he's on  
16 his way here -- did you discuss the fact that he was  
17 -- as to whether or not he was going to be brought to  
18 Joe's office versus the jail?

19 MR. CROW: Yes. That was the first conversation  
20 Joe and I had. At this point it wasn't -- I had  
21 already told either you or Joe one that there wasn't  
22 going to be a conversation with all of us, the  
23 prosecution, Jessie and the defense attorneys in the  
24 room.

25 At this point the question was, "Am I going to

1 talk to Jessie?" And Joe said, "Do you want to do it  
2 at the jail or my office," and Joe's office is a  
3 little closer than mine. That's when I said, "I'm not  
4 sure it is going to happen. Let me check on some  
5 things. But if it does happen, I'd as soon do it at  
6 your office."

7 Then when I called him back, I told him I didn't  
8 want him going to anybody's office.

9 MR. DAVIS: At that time he advised you that the  
10 sheriff's deputy was already --

11 MR. CROW: -- Apparently he -- apparently that  
12 was already set up before I got on the phone because  
13 -- that was already set up to happen before I ever  
14 talked to you the first time. My understanding is the  
15 first time he ever left Pine Bluff --

16 MR. DAVIS: But in the first conversation with  
17 Joe, he asked would you rather do it at the jail or my  
18 office, correct?

19 MR. CROW: That's correct.

20 MR. DAVIS: You indicated that you would prefer  
21 if it was done, that it be done at Joe's office.

22 MR. CROW: That's right.

23 MR. DAVIS: So you don't know if he was already  
24 headed to Joe's office or if that was changed as a  
25 result of --

1 MR. CROW: I have no knowledge. Timing wise he  
2 had to be already out of Pine Bluff before that  
3 conversation occurred.

4 MR. STIDHAM: Your Honor, I'd like to ask Mr.  
5 Davis a couple of questions.

6 THE COURT: All right.

7 MR. STIDHAM: Mr. Davis, earlier while we were  
8 not on the record, you mentioned that there was radio  
9 contact between Joe's office and this deputy that was  
10 bringing Jessie up?

11 MR. DAVIS: It wasn't radio contact between Joe's  
12 office. When Joe talked with Greg the first time, Joe  
13 calls me and says, "Greg said ~~he~~ he will be up here in  
14 about 45 minutes."

15 At that time I called the Craighead County jail  
16 and asked them if they had radio contact with Deputy  
17 Howell. They indicated that they did not at that  
18 point in time. I waited around and they called back  
19 and said that he had checked in and he was at  
20 Brinkley.

21 Then I called the jail and told them, "When he  
22 gets near Jonesboro, contact him and tell him to go to  
23 Joe Calvin's office. It is an office on the left  
24 right before you get to the Citgo station."

25 In fact I had to call them back and give them



1 directions because I didn't know exactly how to  
2 explain it to them.

3 And so then I took off for Rector myself and was  
4 -- I think at Halliday when Joe calls me on my car  
5 phone and tells me at that point that he said that he  
6 had talked with Greg and that he indicated that he  
7 wasn't coming unless Jessie indicated he was going to  
8 give a statement.

9 So at that point I went on to Joe's office. I  
10 didn't know Officer Howell's -- apparently he had a  
11 car phone but I didn't know his number and I didn't  
12 have radio communication. I just assumed when he got  
13 there, we would figure out what was going to happen.

14 MR. STIDHAM: When you got there and Officer  
15 Howell got there, Officer Howell told you that Jessie  
16 wanted to make a statement?

17 MR. DAVIS: I think that's correct.

18 MR. STIDHAM: So Officer Howell had been  
19 discussing the matter with Mr. Misskelley prior to  
20 arriving at Joe's office.

21 MR. DAVIS: I got the impression from Officer  
22 Howell that Jessie Misskelley indicated that he wanted  
23 to discuss this matter.

24 MR. STIDHAM: I don't have anything further.

25 MR. DAVIS: I'd like Joe Calvin to tell his

1 recollection of the events.

2 MR. CALVIN: Your Honor, on February 7th we had  
3 criminal pretrial in Piggott and as deputy prosecutor  
4 I was discussing this case with Judge Pearson and  
5 asking his opinion about the possibility of having  
6 Misskelley testify. And he said most certainly the  
7 prosecution can do so. You would give that individual  
8 immunity and bring him to court and have him testify.  
9 He said you could do not do it unless you give him  
10 immunity. He said it was probably a dereliction of  
11 duty if you did not do that. So I relayed that  
12 conversation somewhere in the next few days to Brent.

13 But what happened on February 11th, John Fogleman  
14 called me and said he had some political aspirations,  
15 and we discussed that, and I told him I'd have to wait  
16 and see who was running for a particular job.

17 I asked him, are you going to have Misskelley  
18 testify, and he said, "I don't know." And he asked if  
19 I would call Dan Stidham. That was on the 11th day of  
20 February which was a Friday. And if I'm not mistaken,  
21 that was the day that we had a considerable amount of  
22 ice and when I called down there, they said Dan was  
23 somewhere shooting ducks or geese or deer or something  
24 in Mississippi and he probably couldn't get back.  
25 That was on Friday.

1           So the following Thursday Greg Crow called me and  
2           said, "We are four days late in returning your phone  
3           call." Greg and I talked a little bit about the case,  
4           and I do not remember what the conversation was at  
5           that point.

6           I -- immediately when we hung up, they buzzed me  
7           and said Brent was on the phone and Brent got on the  
8           phone. I said, "I just hung up from talking to Greg."

9           He said, "I just wanted to tell you that Jessie  
10          Misskelley is on his way to Clay County to give a  
11          statement or perhaps to be asked to give a statement."

12          MR. STIDHAM: Who told you that?

13          MR. CALVIN: Brent.

14          MR. STIDHAM: He told you that when?

15          MR. CALVIN: When he said, "He's on his way to  
16          Clay County to give a statement or to be asked to give  
17          a statement."

18          MR. STIDHAM: This was on the 17th?

19          MR. CALVIN: Yes.

20          MR. STIDHAM: What time was that?

21          MR. CALVIN: That was that afternoon. But at  
22          that point then he said, "Would you mind calling Greg  
23          and tell him that if he gives a statement, could he be  
24          present."

25          I said, "If you want me to." He says, "You have

1 a better rapport with the two attorneys than I do." I  
2 then picked up the phone and called Greg.

3 MR. STIDHAM: Why did he ask you to call Greg?

4 MR. CALVIN: I don't know. I didn't ask him. I  
5 called Greg and I said, "It is my understanding that  
6 Misskelley is on his way to Clay County."

7 I might also mention that I discussed with Brent,  
8 do we want to do this in my office or in the jail.  
9 The jail is pretty noisy. He said, "That would not  
10 make a lot of difference," or something to that  
11 effect.

12 Anyway when I did call Greg, I said, "Greg, it is  
13 my understanding that he might be coming here to give  
14 a statement. I don't know what about." I guessed  
15 what it would be about. We discussed how long it  
16 would take him to get here, and he said about 40  
17 minutes.

18 He said, "Don't talk to him until we get there."  
19 And he said, "We are going to advise him not to make a  
20 statement."

21 I asked him if he was going to inform Dan of the  
22 conversation because I think they had had some  
23 problems during the trial about defense tactics, and  
24 he said, probably will, but I certainly didn't tell  
25 him not to inform Dan.

1           So he said he could be there in about 40 minutes.  
2           I then called Brent back and Brent said, "I'm on my  
3           way to Rector."

4           I said -- Greg had mentioned that it would  
5           probably be more comfortable in my office to take a  
6           statement if one was given. I called Brent back, and  
7           he said that he would contact the Sheriff's Department  
8           some way to tell Dick Howell to bring him to my  
9           office, told him where it was.

10          Brent then called back on the phone. I think we  
11          had another conversation, I don't remember what, but I  
12          did call Greg back after an hour and a half and  
13          wondered why he wasn't there, and he told me he wasn't  
14          coming and I said, "Well, what if he gets here and  
15          wants to make a statement?"

16          He said, "If he wants to make a statement, you  
17          call me and I will be there."

18          Then about five o'clock Brent drives up and I  
19          tell him that Crow had indicated he was not coming,  
20          that I did ask him if he wanted to make a statement,  
21          what would happen. He said I'll be there.

22          So after he drove up, the deputy sheriff left  
23          Misskelley out in the car and came in. Brent was  
24          there. He left him out there I guess for about five  
25          minutes. I suggested bringing him in the library, and

1 I would ask him if he wanted to make a statement.

2 So the deputy sheriff went out and -- I guess he  
3 had him in handcuffs. I don't know. He brought him  
4 into the library. He took a seat at the end of the  
5 table and I asked Misskelley if he wanted to make a  
6 statement. He said he did.

7 I immediately picked up the phone and dialed  
8 Greg's number that he had given me. He gave me two  
9 numbers, his residence and his office, and I think you  
10 said it was a direct number where it would not go  
11 through the switchboard.

12 So he answered the phone and I said, "Misskelley  
13 is here and he told me he wanted to make a statement,"  
14 and so I held the phone out and Jessie said where Greg  
15 could hear him, "I want to make a statement."

16 Then Greg said, "I heard him," and I said, "Can  
17 you come up?" He said yes. I said over the phone,  
18 "He's indicated he's hungry and we are going to get  
19 something to eat. Do you have any objection to that,"  
20 and Greg said no, and at that point somebody went and  
21 got several cheeseburgers and brought them over and we  
22 ate.

23 About 45 minutes later Dan calls and is very  
24 upset. He said, "Is Misskelley there," and I said,  
25 "Yeah, he's here and wants to make a statement," and

1 he might have said -- I don't know -- "It might not be  
2 in his best interest," and I said, "I don't know  
3 anything about that."

4 About seven o'clock, I think, the two of them  
5 arrived and came into the office. So we stood around  
6 and waited. Jessie went outside to smoke a cigarette.  
7 We don't allow smoking in the office. I think he  
8 smoked several cigarettes. I think Brent smoked a  
9 cigarette. Several people smoked cigarettes. But at  
10 no time was any discussion had with Misskelley about  
11 anything he had done.

12 When they arrived, they said, "We want to talk to  
13 our client." No problem. So they went into the  
14 library and shut the door. And I want to say it was  
15 about 40, 45 minutes -- it was quite a length of time  
16 -- it was getting late and I was wanting to go home so  
17 I came in and said, "Why don't we get the show on the  
18 road," or something like that.

19 I think Dan became upset with me because I had  
20 walked in the room, and so he said something about,  
21 "He made a statement," and I said, "Well, according to  
22 what I know about law he certainly has a right to make  
23 a statement. He has already been convicted." They  
24 said, "He's innocent." I said, "Well, he may be  
25 innocent but twelve people in Clay County said he was

1 guilty. If you grant him immunity that you can't use  
2 it against him, the State has a right to call him."

3 We said a few words back and forth. I went out  
4 and shut the door. We stood out there about another  
5 twenty minutes or so. Brent and I walked back in then  
6 and Jessie Misskelley was angry. He got up and went  
7 out and made some derogatory remarks about -- I won't  
8 say about who -- but anyway he stood back out in the  
9 lobby and Dan came out and he indicated he wasn't  
10 finished talking with Jessie.

11 Jessie said he didn't want to talk to him  
12 anymore. He wanted to make his statement. Dan says,  
13 "I will have the sheriff handcuff you and drag you  
14 back in there," and Dick says, "Not this sheriff. I  
15 will not drag him back in there."

16 Then about that time they said, "Let's call the  
17 judge." So then we all four proceeded into my office.  
18 I dialed Judge David Burnett. He answered the phone  
19 and I said, "Judge Burnett, this is Joe Calvin. I'm  
20 in my office at Rector and before me is Brent, Dan  
21 Stidham and Greg Crow."

22 And at that time I had just about a thirty second  
23 conversation. Dan talked to you. I don't know what  
24 you said to Dan. And then Brent talked to you. And  
25 then I think we went back in there --



1 THE COURT: I think I talked to Greg, too, didn't  
2 I?

3 MR. CROW: Yes.

4 MR. CALVIN: You talked to everybody but me. I  
5 just heard one side of the conversation.

6 THE COURT: I wanted to talk to people who knew  
7 something.

8 MR. CALVIN: And I appreciate that. I might add  
9 that I was paying the phone bill. So after all that  
10 phone conversation, they got up and went back out and  
11 said -- they told me what you had said to both of  
12 them. We got a tape recorder. Dan had a tape  
13 recorder --

14 MR. STIDHAM: The police chief --

15 MR. CALVIN: The police chief had a tape  
16 recorder.

17 THE COURT: Is this the transcript? I want it to  
18 be made a part of the record.

19 MR. CALVIN: We took a tape recording of his  
20 statement. Brent swore him in, and in that recording  
21 gave him immunity and he related to Brent about  
22 certain things about the crime and he wanted to  
23 testify. At the end of the conversation they went on  
24 the record as saying they thought he had committed  
25 perjury.

1           So at that time we concluded the interview and  
2 got up and we found that my tape, the third tape, was  
3 dragging, was not real audible. So we got another  
4 tape and I can't remember where we got that but we  
5 played our tape back and let Dan record it again and  
6 that took 45 minutes. So we had to sit around the  
7 office for 45 minutes. I might say at that time the  
8 feelings were very nice. They were very cordial.

9           THE COURT: What were you doing?

10          MR. CALVIN: Well, I had about six or eight beers  
11 and they drank all the beer and I had about a half of  
12 a fifth --

13          MR. STIDHAM: -- of cheap bourbon.

14          MR. CALVIN: I don't think it was actually cheap.

15          MR. FOGLEMAN: I think the record should reflect  
16 --

17          THE COURT: That John Fogleman wasn't there?

18          MR. FOGLEMAN: -- that Jessie did not partake.  
19 And John Fogleman was not there.

20          MR. CALVIN: Jessie had already gone. We set  
21 there for 45 minutes and recorded that and I think Dan  
22 had a fairly accurate statement of what Mr. Misskelley  
23 had given and we stood around a few more minutes and  
24 talked and shook hands and Dan says to Brent, "I don't  
25 really agree with this, but you are just doing your

1 job and if I were prosecutor, I would have done the  
2 same thing."

3 And we shook hands and they left. That was  
4 basically it. Then I get a copy of a letter that he  
5 faxed to you and various other people. But at no time  
6 was any questions asked of Misskelley until they got  
7 there. I honestly think under the rules that they  
8 wouldn't have to be there from what the Honorable  
9 Judge Pearson said. But there were no questions  
10 asked.

11 Jessie did make statements about prison life,  
12 that he didn't like it, things like that. But he  
13 stood outside and smoked about half the time.

14 MR. STIDHAM: For purposes of the record, I  
15 didn't have a clear understanding of what had  
16 transpired when I made any statements to Mr. Calvin  
17 and Mr. Davis. I do respect and understand they have  
18 got a job to do. I think it is very clear from the  
19 motion I filed this morning that I disagree entirely  
20 with the tactics that they used and I think that's  
21 very obvious to the Court exactly why they transported  
22 Mr. Misskelley.

23 We again would renew our motion and the arguments  
24 set forth that this was a deliberate and willful  
25 attempt to interfere with Jessie Misskelley's Fifth

1 Amendment rights and his Sixth Amendment right to  
2 counsel, and we submit the offer of immunity was given  
3 in bad faith, and we would also submit that the  
4 prosecution shouldn't be allowed to violate one  
5 constitutional right in order to compel a witness to  
6 testify by granting him immunity, and we think that is  
7 absolutely improper.

8 MR. CALVIN: Your Honor, I would like to add  
9 something. This is actually not my case and it was  
10 moved to Clay County. I helped pick the jury, and I  
11 only did this to assist Mr. Davis.

12 THE COURT: Are you saying don't do it again?  
13 Anybody else?

14 MR. STIDHAM: I do have one other thing. Who  
15 told you that Mr. Crow and I had different ideas about  
16 trial strategy?

17 MR. CALVIN: I think Greg told me over in Corning  
18 that y'all might -- y'all, you know, as two law  
19 partners, y'all disagreed on some of your theories of  
20 how to defend the case. It was nothing derogatory.

21 MR. CROW: I don't remember that.

22 MR. CALVIN: Something to that effect, but that  
23 would have been a month ago.

24 MR. STIDHAM: I would like to say for the record  
25 I don't recall ever having any disagreement with Mr.

1 Crow throughout the process.

2 MR. CALVIN: I don't know that it makes any  
3 difference.

4 MR. STIDHAM: I would like Mr. Crow to state  
5 whether or not he believes we had any problems or  
6 disagreements with regard to the representation of Mr.  
7 Misskelley.

8 MR. CROW: I don't remember anything during the  
9 trial process.

10 THE COURT: All right. I'm ready to rule.  
11 Motion will be denied. Specifically, the motion for  
12 Jason Baldwin and Damien Echols -- the relief  
13 requested was dismissal of all charges against those  
14 defendants with prejudice. That will be denied.  
15 There's absolutely no reason or justification  
16 whatsoever. You've barely got standing. I'm making  
17 an affirmative finding that there was no, absolutely  
18 no, prosecutorial misconduct in this case. The  
19 prosecuting attorney is duty bound once evidence comes  
20 to their knowledge to pursue that evidence with all  
21 vigor and to present that evidence in a court of law.  
22 That is his sworn duty.

23 Once the statements that Misskelley made were  
24 made known to him, he had a duty and an obligation to  
25 pursue that. Frankly, in my mind I'm not sure that he

1 had any obligation at all to contact defense attorneys  
2 before approaching Mr. Misskelley at the penitentiary.  
3 If he had driven down there and asked him if he wanted  
4 to make a statement and testify under a grant of  
5 immunity, assuming he could get that from the Court,  
6 I'm not sure that it was necessary.

7 As I see the facts and from my knowledge of how  
8 it developed, he apparently was reluctant and did not  
9 attempt to take a statement from Misskelley before  
10 informing defense counsel.

11 You may not like how he brought him down here and  
12 the fact that you were summonsed to an office and went  
13 there because your client was there. I certainly can  
14 understand that feeling and your objection to that.  
15 On the other hand, he informed you and had you present  
16 before he made any attempt to even approach your  
17 client with regard to use immunity.

18 So I don't find that there was any misconduct on  
19 his part at all. There's absolutely no reason to  
20 suppress the statements made by Misskelley or any  
21 references to them. That was some of the relief that  
22 was requested in Baldwin and Echols' motion.

23 "That the prosecutor be ordered not to have any  
24 contact directly or indirectly with any of the  
25 defendants." Well, the -- them trying to approach a

1 defendant that is being tried and to obtain a  
2 statement from him is quite different from what was  
3 done under these circumstances. Obviously, I think  
4 Mr. Davis and Mr. Fogleman know that they are not to  
5 contact Baldwin and Echols prior to -- and that would  
6 be an infringement of attorney-client privilege to  
7 attempt to do so.

8 However, where there are co-defendants and one  
9 has been convicted and sentenced to the penitentiary,  
10 I think the prosecutor would be derelict in his duty  
11 if he didn't attempt to elicit testimony from that  
12 co-defendant, at least make the attempt to do so.

13 I'm not going to forbid the State to call Jessie  
14 Misskelley as a witness or to to make any reference to  
15 him at the trial. His statement that he previously  
16 had given and any statement that has been taken and  
17 recorded is not admissible, and I think all of you  
18 know that, and I shouldn't have to make any ruling on  
19 that. It's simply not admissible.

20 However, if Misskelley is willing to come forward  
21 and give testimony at the time of trial, the State  
22 will not be prohibited from calling him as a witness  
23 and eliciting that testimony.

24 There's no reason or justification to hold anyone  
25 in contempt of Court on this and so a special

1 prosecutor would be absurd and that is the extent of  
2 it.

3 The way I see it, if Mr. Misskelley is willing to  
4 testify, then he will be permitted to do so.

5 MR. PRICE: Will that decision be made known to  
6 us?

7 THE COURT: I'm sure it will be. I haven't  
8 removed Mr. Crow or Mr. Stidham. It's been my  
9 observation they have done a rather remarkable job in  
10 a capital murder case where the client had given  
11 police officers a statement. With the nature of this  
12 case, the high interest that's been involved in it and  
13 the emotions that have been involved, they have done a  
14 remarkable job in avoiding a capital murder  
15 conviction.

16 I did seek Mr. Wells' help because of the  
17 conflict between the prosecutor and the defense  
18 attorneys under the circumstances and the allegations  
19 made in the motion, and I feel it is beneficial to the  
20 Court to have that outside influence where parties or  
21 their feelings are raw and their attitude toward each  
22 other are at odds.

23 So for that reason I thought it was beneficial to  
24 have an independent attorney that didn't have any  
25 emotional tie to the case one way or the other to make



1 inquiry of Mr. Misskelley as to whether he was willing  
2 to make a statement.

3 From Mr. Wells' report, he apparently didn't ask  
4 him whether or not he wanted to make a statement, but  
5 he apparently talked for about an hour.

6 MR. CROW: At least.

7 THE COURT: So I'm going to give him an  
8 opportunity to visit with his parents. I'm going to  
9 start this trial tomorrow morning and after I finish  
10 voir diring that next batch of jurors, we're going to  
11 start picking a jury. So you can do whatever you want  
12 with regard to your voir dire questions, each of you,  
13 the State and the defendants, because I think you will  
14 be on fairly equal footing as to whether you surmise  
15 whether he'll testify.

16 Hopefully, he will be able to give an answer  
17 tomorrow or this evening as to whether or not he's  
18 desirous in giving his statement, or his testimony.  
19 His statements don't mean a thing. They're hearsay.  
20 The only way Jessie Misskelley is going to be able to  
21 do anything is if he physically takes the stand.

22 MR. DAVIDSON: At that time we should be given  
23 the statements for impeachment purposes.

24 THE COURT: You have already been given a copy of  
25 the statement. Mr. Stidham gave you a copy of the

1 statement that he gave --

2 MR. PRICE: We did get a copy of the statement.  
3 Brent brought me one yesterday. I think it is a rough  
4 draft version --

5 MR. DAVIS: I've got one of those for each  
6 defense attorney, which is a certified transcript that  
7 Joe's secretary prepared based on the tapes that were  
8 taken that night. They can compare them with whatever  
9 Dan's got.

10 MR. CALVIN: I have a question for curiosity's  
11 sake. You're going to afford Mr. Misskelley the  
12 opportunity to speak with his parents. When he talks  
13 with his parents, then he's going to tell somebody, I  
14 want to testify or I do not want to testify. That  
15 still wouldn't be his decision to make because the  
16 State even if he says, I don't want to testify, still  
17 has the right to put him on the stand.

18 MR. STIDHAM: I disagree, your Honor. That's not  
19 the law.

20 MR. CALVIN: I think it is. If they want to put  
21 him on the stand --

22 MR. STIDHAM: -- Knowing that he's going to  
23 invoke his Fifth Amendment privileges?

24 MR. CALVIN: He's been given immunity, and he  
25 doesn't have a Fifth Amendment right. Once the judge

1 grants immunity, the State can still call him as a  
2 witness even though he says, I don't want to testify.

3 THE COURT: That's my understanding as well. If  
4 there is a grant of immunity, he doesn't have the  
5 right to impose the Fifth Amendment.

6 MR. CALVIN: If he says today that he doesn't  
7 want to testify, that still --

8 THE COURT: That doesn't mean that they cannot  
9 call him. That's correct.

10 MR. DAVIDSON: If I go to the jail tonight and  
11 ask him if he wants to talk with me --

12 THE COURT: I'll do this on that. If you want to  
13 brief that issue further -- if there is a grant of  
14 immunity given, the person who received that grant  
15 can't refuse to testify. That is my understanding of  
16 the --

17 MR. PRICE: Even if the case is on appeal.

18 THE COURT: That's right.

19 MR. STIDHAM: Our research indicates --

20 THE COURT: Y'all can research that if you want  
21 to, but I think that is a correct statement of the  
22 law.

23 I'm not ruling on that. I'm ruling that if he  
24 chooses to testify, I'm sure going to let him.

25 MR. STIDHAM: I'd again make the request that a

1 transcript of these hearings today -- that I be  
2 allowed to designate those on appeal for the purposes  
3 of Mr. Misskelley.

4 Second of all, if Mr. Misskelley says, I don't  
5 want to testify, does that mean the prosecutors are  
6 going to be able to go down there and beg him some  
7 more or do anything with him some more? Do we have a  
8 right to be notified and be present? I think that  
9 issue probably needs to be clarified.

10 THE COURT: I think they have a right to talk to  
11 him.

12 MR. PRICE: In the presence of their attorney?

13 THE COURT: It would be preferable --

14 MR. DAVIDSON: -- Can we talk to him?

15 THE COURT: If he wants to talk to you, I think  
16 you can.

17 MR. STIDHAM: Your Honor, you're ruling that if  
18 he tells us that he does not want to testify, they are  
19 still going to have an opportunity to pursue him  
20 unbridled by --

21 THE COURT: In view of all this hoopla we've  
22 raised about it I think it would probably be  
23 preferable to have you present, but I'm not going to  
24 bar them access to a potential witness, or at least a  
25 person they believe has some testimony or information.

1 MR. PRICE: So the State can talk to Mr.  
2 Misskelley without his attorneys being present --

3 THE COURT: I didn't say that. I said it would  
4 be more advisable to have them present in view of this  
5 motion.

6 MR. STIDHAM: They haven't deemed it to be  
7 advisable thus far.

8 THE COURT: My thought is -- and y'all haven't  
9 shown me any law contrary -- I'm not sure that they  
10 don't have a right to go down there and talk to him.

11 MR. PRICE: So the same thing would apply to us?  
12 We would have the right to talk to him --

13 MR. FOGLEMAN: Your Honor, there are different  
14 interests involved --

15 THE COURT: Yeah, I think you probably do. As a  
16 witness, you probably have a right to.

17 MR. FORD: But we can talk to him now, too.  
18 You're going to allow him to testify if he chooses to  
19 and will not -- under use immunity would order him  
20 with the contempt powers to testify against his will.

21 THE COURT: I haven't made that ruling yet. I'm  
22 saying that is a potentiality that that ruling will be  
23 made, and I am giving you an opportunity to brief  
24 that.

25 MR. FORD: Okay.

1 MR. STIDHAM: We would ask that no one be allowed  
2 to talk to him until that ruling has been made. We  
3 submit to the Court that Jessie Misskelley has just as  
4 much Sixth Amendment rights now as he did before  
5 because of the status of his appeal and the fact if we  
6 have a remand, your Honor, we'll be trying this again.

7 THE COURT: Nothing he says can be used in that  
8 trial when you do it again.

9 MR. CALVIN: This man is a convicted person from  
10 Clay County, Arkansas. He has been convicted.

11 MR. STIDHAM: That man has rights --

12 MR. CALVIN: He may have rights to appeal but  
13 once he's been convicted and the Court grants him  
14 immunity, the State can call him and put him on the  
15 stand. They might not know what he's going to say but  
16 they can flat call him. That's been law for years.

17 MR. STIDHAM: I disagree --

18 THE COURT: There's one other thing. There's  
19 been some talk about the Court's power to reduce the  
20 sentence, and we have talked about that indirectly.  
21 And for the record, I have never said I would do  
22 anything one way or the other. In fact I tried to  
23 tell each of you that I wasn't going to make any  
24 commitment that I'd do anything, one way or the other,  
25 whether he testifies, doesn't testify or what.

1           If they are going to require his testimony after  
2 you brief that and I have considered that, then the  
3 proper way to proceed if that were to happen would be  
4 for his defense attorneys to file a motion for a new  
5 trial, and I can rule on that, and I suppose at that  
6 point a plea bargain if I granted a new trial based  
7 upon him testifying under a grant of use immunity,  
8 that a plea bargain could be agreed upon. Those are  
9 mechanics that I'm not sure whether anyone really  
10 knows --

11           MR. CROW: Judge, the statute basically says  
12 within 120 days you can do what you want without --

13           MR. FOGLEMAN: That's not what the statute says.

14           THE COURT: In a civil case I can.

15           MR. STIDHAM: For the record, I object to anyone  
16 -- law enforcement personnel, prosecutors, anybody --  
17 conferring with my client. I object to that at all in  
18 any form or fashion -- indirect, direct, innuendo or  
19 anything.

20           MR. DAVIS: One thing I would like to request --  
21 and I don't know what the logistics are with Barbara  
22 -- but the portion of your ruling on this motion and I  
23 know -- I don't know how much of it would be -- since  
24 apparently everybody in the media has a motion  
25 alleging misconduct on my part, if there is a

1 transcript of your order or your findings made which  
2 indicates no prosecutorial misconduct, I would request  
3 that that portion of your ruling that indicates that  
4 be transcribed so I can file that in the Court file so  
5 that I don't have to make a public comment but that  
6 there's some record so that --

7 THE COURT: Well, every one of these people out  
8 here have been given -- or obtained a copy of the  
9 motion. I'm prepared to go out and announce my  
10 ruling.

11 MR. DAVIS: I would certainly appreciate that,  
12 your Honor, because that leaves me in a --

13 THE COURT: They know what the motion was. I'm  
14 going to announce the ruling the Court has made.

15 It still leaves a question mark as to whether or  
16 not Mr. Misskelley will testify. Y'all will just have  
17 to deal with that however you can in your voir dire  
18 because I'm going to start the voir dire in the  
19 morning.

20 (ADJOURNMENT)

21 JONESBORO, ARKANSAS, FEBRUARY 23, 1994, AT 10:30 A.M.

22 (THE FOLLOWING CONFERENCE TOOK PLACE IN CHAMBERS)

23 THE COURT: Let the record reflect that this is a  
24 hearing in chambers for the purpose of announcing an  
25 agreement between the prosecuting attorney and the



1 attorneys for Mr. Misskelley.

2 MR. DAVIS: There's been an agreement reached  
3 between the prosecuting attorney and attorneys for  
4 Jessie Misskelley that no contact or effort will be  
5 made to contact him by the prosecution without first  
6 contacting Mr. Crow.

7 MR. PRICE: Can you state what the results of Mr.  
8 Wells' conversation was with Mr. Misskelley?

9 THE COURT: It has been reported to the Court by  
10 Mr. Stidham and Mr. Wells that at this time Mr.  
11 Misskelley does not intend to testify.

12 MR. STIDHAM: Your Honor, I also want to state  
13 for the record that our agreement not only goes to  
14 prosecutors but to law enforcement personnel as well  
15 --

16 MR. DAVIS: That's right.

17 MR. STIDHAM: -- that they are not to have any  
18 direct contact with him.

19 (PROCEEDINGS CONCLUDED)  
20  
21  
22  
23  
24  
25