

1 allowed to copy a couple of pages that he does make
2 reference in his examination and I'd like to have for
3 my exhibit.

4 THE COURT: Okay. Did anybody offer it? I don't
5 remember.

6 MR. BURT: They did offer it.

7 MR. DAVIS: Are you talking about the pages of
8 the analysis?

9 MR. BURT: Yes.

10 THE COURT: No, I was talking about the last
11 report that I questioned him about. I thought you
12 asked for a copy of that?

13 MR. BURT: No, I asked to look at it. I think
14 Mr. Phillipsborn cleared it up, so I didn't request
15 it.

16 THE COURT: All right, that's fine.

17 THEREUPON,

18 GREGORY L. CROW

19 was called as a witness by and on behalf of the Defendant/
20 Petitioner and having been duly sworn, was examined and teti-
21 fied as follows, to-wit:

22 DIRECT-EXAMINATION

23 BY MR. BURT:

24 Q] Would you state your name again for the record, please?

25 A] Gregory L. Crow.

1 Q] And Mr. Crow, tell us your business or occupation?

2 A] I am an attorney by trade, but as of February of this year,
3 I am the Administrator of the Arkansas Contractor's Licensing
4 Board, which does not require an attorney's license.

5 Q] Congratulations. Back in 1993, were you doing some
6 criminal work?

7 A] Yes, sir.

8 Q] Were you affiliated with anybody else, or were you alone?

9 A] Yes, Dan and I were, uh, I don't know if we were - - but at
10 some time we became partners in '93, whether I was an associate
11 or a partner at that point, I can't recall, but we did practice
12 together in Paragould; Dan Stidham.

13 Q] Can you, uh, take your mind back to when you were first
14 appointed to represent Jessie Misskelley in this case?

15 A] Yes, sir.

16 Q] Tell us when that was, if you remember?

17 A] I believe it was in June, uh, I think I said in May some-
18 time, and that's not right. It had to be early in June of '93.

19 Q] You signed a declaration in support of Mr. Misskelley's
20 petition?

21 A] Yes, sir.

22 Q] And that's what you were referring to?

23 A] Yes, sir.

24 Q] Now when you were, uh, appointed to represent Mr. Miss-
25 kelley in June of 1993, what was your experience level, up to

1 that point; criminal cases in general, and death-penalty cases,
2 in particular?

3 A] No cases, no death-penalty cases at all, prior to this. I
4 had, uh, criminal cases and was a public defender, one of the
5 public defenders in Greene County, uh, Jon Williams was one half
6 of the office; Dan and I were the other half of the office, so I
7 guess I was a quarter of the public defender, uh, we were cer-
8 tainly appointed to felony cases on a regular basis, but at that
9 point, never while I was public defender, did I try a jury
10 trial, uh, felony cases, public defender. Uh, I tried a bunch,
11 we had misdemeanors every week, uh, they were always bench
12 trials. Then I had some civil experience when I was in practice
13 in Fort Smith. I had tried four, I think it was four, uh, civil
14 jury trials.

15 Q] And so if I'm understanding you correctly, at the time you
16 got appointed, you had not handled a single felony jury trial?

17 A] That's correct.

18 Q] Uh, in the cases that you had handled, that is, the misde-
19 meanor cases and the others that you have referenced, how much
20 experience, if any, did you have in June of 1993 in working with
21 and presenting and cross-examining expert witnesses in kinds of
22 expert areas that are dealt with in a homicide case?

23 A] Nothing that I can think of that would apply to homicide.
24 Again, in my civil case, I'm sure, I'm sure I cross-examined the
25 doctor or something, probably, but nothing in criminal whatso-

1 ever, uh, that I can think of. I can't think of any of the
2 misdemeanor cases I handled where any expert witness was called,
3 period.

4 Q] How old were you when you were appointed?

5 A] Thirty.

6 Q] What was the work-load that you and Dan had in your public
7 defender practice at the time you first got appointed?

8 A] Again, we were a fourth - - I was a fourth, Dan was a
9 fourth - - together, we were a half of the Greene County Public
10 Defender's office. I estimated - - Dan estimated to me, we were
11 doing about five hundred cases, somewhere between four and five
12 hundred cases a year, uh, I think total between us, so roughly
13 two hundred and fifty apiece. I believe that's - - it's been a
14 long time, fifteen years, so personally, that's the best I can
15 remember.

16 Q] Do you recall whether that was keeping you pretty busy?

17 A] It was certainly, you know, a part-time position. We
18 certainly had our private practice on the side, uh, now I would
19 say this was on the side. Our private practice was our full-
20 time. We basically, uh, every other week one of us was in - -
21 Mondays and Thursdays, of Greene County Municipal Court, now
22 District Court, handled it, and I was going to be in, one of us
23 was going to be in the courtroom, uh, Monday afternoon, all day
24 long and Thursday, could be all day, you know, could be shorter,
25 every other week. So, uh, yeah, and then there was obviously

1 prep time for those cases. Uh, estimating my time, oh, gosh.
2 This is a rough estimate: twenty-five percent of my time,
3 thirty percent of my time. That may be low; it's hard to say.
4 It's been fifteen years.

5 Q] When you were first appointed in this case, were you
6 informed by anybody at the outset that the death penalty was or
7 might be on the table?

8 A] I certainly, from the press coverage, understood the nature
9 of the case and knew that it was a very, a very good likelihood
10 that the death penalty would be asked for.

11 Q] Would be, or would not?

12 A] Would be.

13 Q] I take it from what you've already said that at the outset
14 of your representation, you had no prior experience or training
15 in handling death-penalty cases?

16 A] No, sir.

17 Q] After you got the appointment, did you do anything to bring
18 yourself up to speed training-wise, in how to handle a case like
19 this, and, and specifically, how you handle a death penalty
20 case, what it was about, what you needed to do, anything of that
21 nature?

22 A] I didn't take any classes or read anything in particular; I
23 dealt with those issues as they came on. But we didn't, I
24 didn't go take some class or buy a book on handling death-
25 penalty cases.

1 Q] What was the division of labor between you and Dan at the
2 beginning of the case, and was that discussed in terms of what
3 you would do and what his role was going to be?

4 A] He was, uh, he had more experience than I did. Like I
5 said, I think at that point, he was probably the partner and not
6 me, the only person in the firm who was a partner, and I was the
7 associate. Later we did become partners, uh, it could have been
8 about the same time. I don't recall the time period, but, uh,
9 he was going to do the vast majority of the work. He was going
10 to be the lead; I was going to be second. I had more experience
11 on writing briefs, uh, doing things like that, so that was going
12 to be - - I was going to be the research and brief writer for
13 the most part, uh, certainly do other things, but as the - - and
14 as specific tasks came up, uh, I would work on them, you know,
15 but pretty much he was going to be lead and I was going to be
16 second.

17 Q] And when you say "he was going to be the lead," did that
18 mean that he was going to make whatever strategic calls were
19 going to be made about how the case was going to be tried and
20 what investigations were going to be done and what experts were
21 going to be hired, et cetera?

22 A] Yes. We talked about it, but I don't know that we ever had
23 a - - I can't recall anything in the long run where we disagreed
24 about something but if push had come to shove, yeah, it was
25 going to be his call.

1 Q] I mean, sometimes lawyers, when they're in a case together
2 they'll say, "Well, this is your case, I'll do what I can to
3 help you, but this is your baby, not mine." Is that kind of the
4 way of you two?

5 A] Yeah, well, that's probably a little bit of overstatement,
6 I mean, Dan was - - it became that if a decision had to be made
7 about we were going to do X or we were going to do Y, uh, it was
8 going to be Dan's call.

9 Q] Okay. Now in the very beginning of the case, uh, did you
10 have certain presumptions about whether or not Mr. Misskelley
11 was innocent or guilty?

12 A] Sure.

13 Q] And what was your presumption?

14 A] Of course, obviously, even before we were appointed we were
15 aware of the fact that, uh, there was a confession. So I pre-
16 sumed he was, he was guilty. And when we were appointed, it was
17 my perceived responsibility, primarily, was to, uh, uh, prepare,
18 make the best deal possible for him to testify against the other
19 two, uh, and to try to get him an amount of limited jail time as
20 possible for that testimony, uh, realizing all along that if a
21 deal couldn't be made, we might do something different, but went
22 with fully expecting that we were going to make a deal and, uh,
23 that he was going to testify against the other two.

24 Q] And did, did that presumption affect the way in which you
25 and Dan investigated the case at the outset?

1 A] At the outset - - yes, sir.

2 Q] And how did it affect your investigative role, you presume-
3 ing he was guilty?

4 A] We were obviously, you know, watching, looking at all of
5 the discovery that came in and doing things, uh, there was
6 always the outside chance we were going to have to try it,
7 because of if we couldn't get a good enough deal, we knew we
8 would have to be prepared to try it, and the more you - - you've
9 got to have a strong hand. It's playing poker; you've got to
10 have a strong hand to get a better deal. So we were, uh, but
11 certainly, we weren't that worried about the alibi witnesses at
12 first, for example, uh, too much. I think we actually ended up
13 getting a few of them early on, but we weren't, uh, it wasn't -
14 - our mode we were in, was preparing to make the best deal
15 possible.

16 Q] Okay. And were you referenced, focused toward making the
17 deal in terms of talking with the prosecutor and prepping Jessie
18 to basically testify against the other two?

19 A] Absolutely. That was very difficult to try to prep Jessie
20 to do that. Yes, that's what we were working on.

21 Q] And what kinds of difficulties, if any, were you having in
22 that regard?

23 A] He couldn't tell the same story twice.

24 Q] And, uh, could you be more specific in terms of what you
25 were experiencing?

1 A] He, when we would ask a yes or no question, you know, he
2 generally would say "yeah," "yeah," "this happened," that
3 happened," if we asked a leading question. But if we asked
4 Jessie for a narrative, he couldn't tell you what happened,
5 when, where and how.

6 Q] Did you perceive that as being willful on his part, as
7 opposed to being a product that may need some help?

8 A] I did not perceive him to be willful. No.

9 Q] Did you, from the outset of the case, recognize, based on
10 your interactions with Jessie Misskelley, that there might be
11 something wrong?

12 A] Obviously, yes. I assumed, I mean, I knew enough early on
13 that he had a lower IQ, uh, I didn't know what it was until we
14 got some tests later, but I assumed he had mental, mental
15 issues, I guess is the right way to put it.

16 Q] And when you say he couldn't tell the same story twice,
17 uh, were you ever able to lock down any sort of a narrative one?

18 A] No.

19 Q] Did that cause you some concern that perhaps, uh, whatever
20 deal you were trying to make, is not going to happen because
21 he's just not going to be able to be a witness?

22 A] Yes, I was very concerned. I was worried that, uh, uh, I
23 didn't know if the prosecutor would even listen to that kind of
24 deal. One of the things we talked about doing was whatever deal
25 we made was contingent not only on, usually, make it contingent

1 upon the testifying as far as "yada, yada," and, uh, our thought
2 was if the deal was if the direct-examination could be made like
3 that. But I didn't think it could stand up to cross.

4 Q] How did the plea bargaining process work back then in this
5 jurisdiction? Were you, uh, shooting to get a commitment in
6 advance of him testifying, or was it: a) him testifying and then
7 "we'll see what we can do for you"? How did it work?

8 A] We wanted a commitment beforehand. I'm trying to remember
9 - - my recollection was that - - and I'm not one hundred percent
10 sure on this - - uh, my recollection was that our conversation
11 with Mr. Davis was that we would have a written deal, there
12 wouldn't be any, uh, if we came to a deal, it would be a written
13 deal and would be disclosed and everybody would know what the
14 deal was before the trial of the two started.

15 Q] And before he testified?

16 A] Yes.

17 Q] And what was the understanding in terms of what would hap-
18 pen if he didn't come through?

19 A] We didn't get that far, because we never made a deal. Now
20 that was kind of ground work for the deal. We never, we never
21 got that far.

22 Q] Now did the situation change at some point?

23 A] Yes.

24 Q] When, when did that happen?

25 A] It happened in September, the first thing that happened

1 was, I guess, Jessie had, I mean, in my recollection, and this
2 has been fifteen years ago.

3 Q] Sure.

4 A] I haven't had anything to do with the case since then. I
5 left private practice in '95, uh, '96 and haven't had anything
6 to do with it since then.

7 Q] It's kind of one of those things you want to put out of
8 your mind?

9 A] Yes, sir. I mean, I didn't even watch the movie. So my
10 recollection was in September, uh, Jessie had met with his
11 father and was insisting to his father that he wasn't guilty.
12 His father called us, upset, and we went down and met with
13 Jessie and that was the first time he was emphatic with us,
14 that, uh, that he wasn't guilty. And that was a few days - - I
15 don't remember exactly how, seems like it was a few days - -
16 again, it's been fifteen years. A few days before we had a
17 hearing scheduled in, uh, I believe Marion on something, uh, I
18 couldn't tell you what it was for. And that was the, uh, Jessie
19 now was telling us "I didn't do it, I didn't do it, I wasn't
20 there." As we left that day I wondered is he going to, you
21 know, go back after he, after he, after a few days from now and
22 go back and tell us different, but he never did. But I was
23 still really, I thought, uh, I had certain kind of questions in
24 my mind, but then I, uh, there was this bloody T-shirt that my
25 understanding, had one of the victim's, uh, blood on it that was

1 found in Jessie's house, I think. And that was, you know, that
2 just kept going back and forth - - well, there's no way he's not
3 guilty, uh, even if he wants to tell us he's not, uh, because
4 there's that bloody T-shirt. And then, of course, a few days, a
5 few days later, I think it was a few days, a short period of
6 time later, we were at a hearing in, I believe, Marion, and we
7 were informed that the blood on the T-shirt either matched - -
8 my, my memory is, it matched Jessie. Maybe it wasn't
9 identifiable, I don't recall what the deal was, but suddenly,
10 the bloody T-shirt was gone. And that opened up all of the
11 issues.

12 Q] Let me see if I can understand this: A - - hopefully, it
13 will refresh your memory. There's a report in the discovery
14 that some laboratory in June of '93, I believe, where they found
15 some DNA on a T-shirt that was taken from Jessie Misskelley's
16 house and the report from Genetic Design said it was consistent
17 with one of the victims.

18 A] Okay.

19 Q] Do you remember reading a report like that?

20 A] Yes.

21 Q] Uh, and then there's another report in September in which
22 Genetic Design, I believe it's September 9, 1993, where Genetic
23 Design reports back that the blood on the T-shirt is also con-
24 sistent with Jessie Misskelley?

25 A] That sounds right. Yes, sir.

1 Q] And then, I believe the record shows that there was a hear-
2 ing in Marion on September 27th, 1993 in which Mr. Ford states on
3 the record that he has just been informed by Mr. Fogleman that
4 they're not going to use any of the DNA or serology. Was that
5 the court date you were talking about?

6 A] Yes, I'm ninety percent sure, about ninety percent sure, as
7 sure as I can be fifteen years later, but that would be the same
8 day that Mr. Fogleman, I believe, approached myself and told me
9 that they could not, uh, they could not use the, uh, the DNA
10 evidence because it also, I think his words were, "It also
11 matched Jessie."

12 Q] Up to that point, that is, up to September 27th, you were
13 presuming that Mr. Misskelley was guilty?

14 A] Correct.

15 Q] And whatever protestations of innocence he was making, in
16 your mind, were not persuasive because they had this bloody T-
17 shirt that looked like it was tied to the victims. Is that fair
18 to say?

19 A] Yes, sir.

20 Q] And so in September, uh, September 27th when this DNA
21 evidence was not what it appeared to be, what happened then in
22 terms of your strategies and your investigation and your work on
23 behalf of Mr. Misskelley?

24 A] Strategy, obviously, completely changed. Now we have an
25 innocent client. I couldn't even in good faith, even make a

1 deal unless I got convinced he was guilty, uh, and so we started
2 trying to get real serious about defending on the merits and
3 preparing for trial.

4 Q] Now at that point, uh, is it true that your role in the
5 case was to take care of the law practice while Dan's role was
6 to attend to this case?

7 A] Yes, I was certainly still doing the, I was reviewing the
8 discovery as it came in, uh, you know, uh, handling things as
9 necessary, uh, issues would come up, you know, research this,
10 think about this, do that, uh, talk to this person. But
11 primarily, uh, I was doing, trying to keep our law practice
12 afloat and Dan was spending a vast majority of his time on this
13 case.

14 Q] Now, uh, the record indicates, I think, on September 27th,
15 that the Court set a trial date sometime in December or January,
16 around that time; do you recall that, that was the timeline you
17 were working on?

18 A] Yes.

19 Q] So from June until September, is it true that at least you
20 did not really do any investigation on whatever defense Jessie
21 Misskelley may have had?

22 A] Not that I recall in particular. No. I mean, I'm sure,
23 again, we were reviewing the discovery as it came in. I don't
24 recall, I know we didn't talk to any alibi witnesses during that
25 time period until, I think it was sometime in September was the

1 first time we talked to any alibi witnesses. That's the best I
2 can remember.

3 Q] And in September when this change in circumstance took
4 place, did you and Dan sit down and say, "You know, you've got a
5 lot to do here and we're going to be in trial in January, uh, we
6 just are really starting on this; we need to get ourselves an
7 investigator to come in and help us."

8 A] I don't - - I know - - it was - - boy. Uh, I don't recall
9 ever saying we needed to get ourselves an investigator. I knew
10 we had things we had to investigate, but I don't think, uh, I
11 even thought we had an option to get an investigator.

12 Q] And why didn't you think had that option?

13 A] Money.

14 Q] Uh, could you explain that a little bit more accurately? I
15 know you didn't have any money?

16 A] Right.

17 Q] You were appointed by the court, but there was some
18 discussion with the Court, was there not, about funds to hire
19 experts, investigators, and I'm trying to get a sense on what
20 you were thinking about?

21 A] I mean, I was relying on Dan, again, to tell me what we
22 could and couldn't do. Uh, and again, I haven't thought about
23 this case in fifteen years for the most part.

24 Q] Sure.

25 A] Uh, I don't particularly recall us thinking that we could

1 get an investigator. And maybe Dan will have a lot better
2 memory than I, but I don't particularly recall thinking that,
3 uh, that we could do that, that was an option for us.

4 Q] You never, either in September or at any point in time, uh,
5 do you recall saying to Dan, or deciding yourself, "we've got to
6 get an investigator on this case"?

7 A] I remember thinking at some point, Ron Lax, who was working
8 mostly for Damien's case, uh, we started - - they volunteered to
9 let us, to give us some services, and sometimes, probably, real
10 late. That was probably in December, it may have been quite
11 later, I don't recall, uh, to do that. That was the first time
12 I can recall thinking that we could use - - that was the only
13 option for us.

14 Q] Okay. And this now, I think Mr. Lax testified that meeting
15 occurred on December 28th, 1993; right?

16 MR. DAVIS: I would object to the leading, Judge.
17 I mean, that's an improper question to suggest that
18 Mr. Lax has testified to something. I mean, if we
19 could, just hear about...

20 MR. BURT: ...yeah, I'll lay a foundation on it.
21 I apologize.

22 DIRECT-EXAMINATION, continuing:

23 Q] Do you have a specific recall when Mr. Lax, uh, offered his
24 services?

25 A] Other than what you just said. I was thinking December,

1 but I couldn't have told you.

2 Q] Uh, if I told you he testified December 28th, does that re-
3 fresh your memory?

4 MR. DAVIS: Your Honor, again, the same
5 objection.

6 MR. BURT: Well, I can ask it differently.

7 THE COURT: Well, I don't know if it makes a
8 whole lot of difference. He said he remembers talking
9 to him in December.

10 MR. BURT: Right.

11 THE COURT: Okay. Was it before or after
12 Christmas?

13 MR. DAVIS: Judge, there is some suggestion as to
14 what was said, because up to this point would have
15 been a lot of yes and no answers, and I realize it has
16 been fifteen years, but, uh, it's the witness's duty
17 to explain what went on.

18 THE COURT: I'm going to sustain your objection.

19 DIRECT-EXAMINATION, continuing:

20 Q] Whether it was December the 1st or December 28th, or December
21 31st, the bottom line was, it was right on the edge of trial when
22 Mr. Lax offered his services; is that true?

23 A] Yes, sir.

24 Q] And were you involved in that meeting with Dan and Mr. Lax
25 in terms of organizing what he was going to do?

1 A] I believe I was.

2 Q] At that point, was he making himself available to you, to
3 essentially do a full and complete investigation?

4 A] I didn't take it that way. No. Their client was, was, uh,
5 Damien. Uh, there were some things that we had in common, some
6 things they could help us with. I didn't take it that, uh, you
7 know, we had the full services of a private investigator for us.
8 No.

9 Q] And did you personally, aside from whatever Mr. Lax was
10 doing, did you personally take the role in investigating the
11 case during December or before trial?

12 A] I certainly interviewed alibi witnesses. I don't know what
13 else, uh, I tried to interview the police officers, uh, they
14 wouldn't talk to us. At least on one occasion I'm sure it was
15 more, uh, I remember being in the evidence room, uh, and I guess
16 that's in Marion, uh, or was it West Memphis. Where ever. It
17 was West Memphis, uh, and looking at evidence and going through
18 photographs and doing those kinds of things. But as far as
19 interviewing third parties, I tried to talk with police officers
20 and I interviewed the alibi witnesses and I obviously talked to
21 the experts we were using, uh, Dr. Ofshe, uh, Dr. Wilkins, uh,
22 and the, uh, I can't remember his name. The gentleman from
23 Miami, it was a, uh, a polygraph expert. I can't remember his
24 name right now.

25 THE COURT: Was it Homer?

1 THE WITNESS: It was Holmes.

2 THE COURT: Holmes. Yeah, it was Holmes.

3 DIRECT-EXAMINATION, continuing:

4 Q] Do you remember what alibi witnesses you yourself inter-
5 viewed?

6 A] Not off the top of my head, sir. No, sir.

7 Q] Was it all of them, some of them, a couple of them?

8 A] It was more than a couple. I know there was, uh, there was
9 actually the first time I interviewed any alibi witnesses, as I
10 recall, was right before that Marion hearing. We spent a day in
11 Marion, uh, and we brought in several. Jessie Misskelley, Sr.
12 had arranged for several of them to be there and I went through
13 them, you know, one at a time, you know, one came in and talked,
14 another one came in and talked and another one came in and
15 talked. I, uh, there will be notes in the file, but I do not
16 recall how many or who.

17 Q] Did you have any role in deciding whether to present an
18 alibi defense?

19 A] Certainly.

20 Q] Or was that Dan's call?

21 A] It would be Dan's call, I mean, we talked about it. I
22 think, yeah, that was pretty much a given we were going to.
23 Yes, sir.

24 Q] And what was your opinion about how the alibi was shaping
25 up?

1 A] I felt pretty good about it, once we could talk to the
2 witnesses and remind them of some timeframes, you know, this was
3 months before, uh, the crimes had occurred. It's hard for me to
4 remember what I was doing on May 5th of this year, and this is,
5 this is September. You ask me what I was just doing May 5th of
6 this year and I couldn't tell you. Now you try to give me some
7 touchstones: that was the day before this happened, or the day
8 after that, I might could remember. That's what we were trying
9 to do with the alibi witnesses, give them some touchstones. And
10 every time we did that, they couldn't - - there were several
11 things that they could remember that I felt pretty good about.

12 Q] Now was part of your role in this case, I think you said,
13 was to write motions?

14 A] Yes, sir.

15 Q] Was part of the strategy that you and Dan developed to make
16 every possible argument to suppress the statements that Mr.
17 Misskelley had made to the police department?

18 A] Yes, sir.

19 Q] On legal grounds?

20 A] Absolutely.

21 Q] Do you recall - - you were involved in the appeal; were you
22 not?

23 A] In the appeal? Yes, sir.

24 Q] And you actually wrote the brief?

25 A] Yes, sir, the vast majority of it.

1 Q] And was one of the issues you raised in your appellant
2 brief, an issue regarding Rule 2.3?

3 A] Yes, sir.

4 Q] And, uh, can you, from recall if you can, tell me what the
5 issue was?

6 A] Well, Rule 2.3 at the time, I don't do criminal law and
7 haven't in years and years, basically said that if you wanted to
8 take someone to the station house to - - a potential witness,
9 potential defendant to the station house to question him, you
10 had to tell them they were free to go at any time. Uh, I think
11 you also have to tell them they have to come in the first place,
12 I believe, but, you know, it's been a long time. And at the
13 time, the law, case law, was that if you didn't do that, it was
14 a bright line test. If you didn't do it, uh, any statement
15 given thereafter is gone, uh, it was inadmissible. I had read
16 the rules of Criminal Procedure in getting ready for this case,
17 probably some time that fall, and realized that might be an
18 issue; did some potential research, but I didn't feel like we
19 had any kind of factual basis to raise it, because number one, I
20 couldn't get Jessie to tell me what had happened, you know, what
21 they told him and not told him. And I couldn't get the police
22 officers to talk to me.

23 Q] Okay. Now at the suppression hearing, do you recall that
24 you put on evidence from Jessie Misskelley, Sr., about what hap-
25 pened when the police came out to take Jessie to the police

1 station?

2 A] Yes, sir.

3 Q] And do you remember that you also put on evidence from
4 Jessie Misskelly's boss, a guy by the name of McNease, I
5 believe?

6 A] I vaguely remember that; yes, sir.

7 Q] Who also testified about what happened when the police came
8 out to get Jessie?

9 A] Yes.

10 Q] And although you could not talk to the police and you were
11 having difficulty with Jessie, had you talked to Jessie, Sr.,
12 and Mr. McNease about the circumstances of the police taking
13 Jessie into, uh, into their custody?

14 A] I know I had talked to Jessie, Sr. several times. I don't
15 recall myself ever talking to Jessie Sr.'s boss.

16 Q] Now did you, do you recall that you filed a sort of bare-
17 bones motion to suppress in the beginning of the case?

18 A] Yes. I did not draft that. That was one Dan drafted.

19 Q] Okay. And do you recall that was basically challenging
20 everything under the sun on those specific grounds?

21 A] Yes.

22 Q] Do you recall that the hearing on the admissibility of the
23 confession was in January, I believe, of 1994?

24 A] Yes, sir.

25 Q] Right on the verge of trial?

1 A] Yes, sir.

2 Q] And do you recall that right before the trial, either you
3 or Dan submitted a amended motion to suppress?

4 A] Right before trial?

5 Q] Right before the hearing on the admissibility of the
6 confession?

7 A] I was recalling that we did it after the admissibility. So
8 I know there was an amended motion at one point. I honestly
9 thought it was after the, uh, the admissibility hearing.

10 Q] Do you remember that there was actually a post-hearing
11 brief being submitted?

12 A] Yes. I drafted that.

13 Q] And do you remember that - - did you write that brief?

14 A] Yes, sir.

15 Q] Do you remember that that was the first time after the
16 evidence was in, that you raised the 2.3 issue?

17 A] Yes, sir.

18 Q] And do you remember, uh, that following that brief that you
19 and/or Dan drafted the order following, the judge denied your
20 motion to suppress?

21 A] Yes. Dan drafted that.

22 Q] Dan drafted that?

23 A] Yes.

24 Q] Okay. And do you recall that in that order, although you
25 had mentioned 2.3 in your post-hearing brief, there was nothing

1 in the order that specified that 2.3 was going to be considered?

2 A] I, I remember briefly reading the order one day after Dan
3 drafted it, and being comfortable that it was covered because, I
4 thought it was, at least. Perhaps I was wrong. Uh, I thought
5 it was covered because he said he had considered every argument,
6 uh, and my recollection was the order said something to the
7 effect that it covered everything that had been raised, you
8 know, at the hearing, as well as been raised in the post-hearing
9 briefs; some kind of generic language like that. But I was
10 comfortable that it was covered.

11 Q] Did you, uh, yourself think that that 2.3 issue was pretty
12 solid?

13 A] Yes, I did.

14 Q] As a legal issue?

15 A] Absolutely.

16 Q] Did you therefore raise it in your appeal to the Arkansas
17 Supreme Court?

18 A] Yes, sir. That was my, probably my lead argument. It was
19 the only one I thought I had a chance to win.

20 Q] And, in fact, uh, we'll get to this later in more detail,
21 but there was a point in time after the trial when there was an
22 opportunity for Mr. Misskelley to make a plea bargain with the
23 State; correct?

24 A] Yes, sir.

25 Q] And part of what he was being told by you and/or Dan was

1 that he had an excellent chance on appeal in getting his case
2 reversed; right?

3 A] Yes.

4 Q] And part of that assessment was based on this Rule 2.3
5 issue?

6 A] Yes. Again, that was my only thing I thought we had a
7 chance to win on. Now I knew there were other issues that were
8 raised, but the one I thought was a winner was the 2.3.

9 Q] And what happened on appeal?

10 A] Uh, the Supreme Court ruled that, uh, we had not properly,
11 uh, raised it. I don't remember if it was probably raised at
12 the end of the order or on it, I don't remember for sure, but
13 they did not address the merits of the 2.3 argument.

14 Q] Basically, saying that you had defaulted it because you had
15 not raised it in your pleadings; you hadn't raised it in the
16 hearing; you hadn't raised it in the order that you had drafted
17 that the judge signed and therefore, it was defaulted?

18 A] Yes, sir.

19 Q] And did you think that was a big blow to your appellant
20 legal defense at that point?

21 A] Oh, absolutely. That was, again, that was the one issue
22 that I felt like we had a good chance of winning.

23 Q] And obviously, you had no strategic reason for not present-
24 ing that issue?

25 A] Oh, good lord, no.

1 MR. BURT: Your Honor, I wonder if the Court
2 would take a break at this point?

3 THE COURT: Take a recess? Sure. We'll take a
4 ten-minute recess.

5 (WHEREUPON, a recess was taken; proceedings resumed as follows,
6 to-wit:)

7 DIRECT-EXAMINATION, continuing:

8 Q] You said part of your strategy was on trying to exclude the
9 confession; right?

10 A] Yes, sir.

11 Q] Uh, if that failed, which obviously it did at the trial
12 level, did you have a back-up strategy in how you were going to
13 deal with this confession?

14 A] We were going to try to show that it was not true; it was a
15 false confession.

16 Q] And was part of, uh, your strategy in trying to show that
17 it was not true, to show that certain things that Jessie said
18 was contradicted by the physical evidence?

19 A] Yes, sir. And from the time the murders occurred to, uh,
20 just anything in the world that we could show that wasn't con-
21 sistent, was what we wanted to do.

22 Q] All right. And do you recall for instance, Mr. Stidham
23 asking Dr. Peretti about one of the victims being "choked out,"
24 and Dr. Peretti saying there was no evidence of that?

25 A] Yes, sir.

1 Q] Was that in line with trying to essentially impeach the
2 confession by showing that the confession was not consistent
3 with the physical evidence?

4 A] Absolutely.

5 Q] Uh, did you therefore realize that expert testimony,
6 especially expert testimony that impeached the confession was
7 going to be of some importance in this case?

8 A] Yes.

9 Q] And did you, uh, understand that part of Jessie's confes-
10 sion was that the, uh, certain people had engaged in sex with
11 some of the victims?

12 A] Yes.

13 Q] And did, uh, were you informed at some point before the
14 trial began that the State intended to call a DNA expert by the
15 name of DeGugliello, and also Kermit Channell to testify about
16 the possible presence of some semen on some of the jeans?

17 A] I don't remember the names of the experts, but I do
18 remember that yes, the, uh, the blue jeans, the DNA on the blue
19 jeans evidence was on the exhibit list, I guess. Yes, sir.

20 Q] Okay. Now the record shows that very early on, Mr. Stidham
21 or you, maybe, filed a motion for the appointment of a DNA
22 expert. Do you recall that?

23 A] I honestly don't recall that. It must have been Dan, you
24 know, something Dan did. I don't recall.

25 Q] Do you recall having any discussion with Dan about the need

1 to hire either a DNA expert or a serology expert to check out
2 the reliability of the evidence that was going to be offered
3 against Mr. Misskelley?

4 A] I'm sure we talked about it, uh, again, most - - there was
5 no physical evidence connecting Jessie to the crime. And there
6 was no DNA or anything; there wasn't, you know, other than the
7 one on the blue jeans that allegedly showed some type of, uh,
8 connection of semen, uh, came into play. I honestly don't
9 recall - - I think a combination of, at least on my end, not
10 thinking we couldn't get one, there was no money to get an
11 expert. You know, as an aside, all of the experts that we had
12 contacted, Dr. Ofshe, Mr. Holmes, uh, Dr. Wilkins, everybody
13 that we had talked to, we prefaced it as "I can't promise you
14 you'll even get your travel expenses," you know, "I can't
15 promise you anything; we're looking for volunteers." And I
16 didn't honestly think we could get a DNA lab to work on a
17 volunteer basis. So I think my perception was that we just
18 couldn't do it. We just couldn't get one.

19 Q] All right. And was that perception based on any research
20 you had done into the law in terms of the Court's obligation to
21 fund this defense?

22 A] I don't think I, I don't particularly recall researching
23 that issue, uh, I think I discussed that with Dan early on and I
24 knew our experience in Greene County is, uh, they paid us
25 twenty-five thousand dollars a year to do part-time public de-

1 fender and that was it. If we needed to hire an expert on some-
2 thing, that came out of that twenty-five thousand dollars. So
3 that was my experience there. There was no other funds and this
4 wasn't even part of that deal, so, uh, basically, uh, there
5 wasn't - - that was my perception - - right or wrong, that was
6 my perception that there were no funds available.

7 Q] Okay. And did you ever recall doing some research and
8 reading in a case called *Ake, A-K-E, vs. Oklahoma*, a U. S.
9 Supreme Court case on funding?

10 A] Not that I recall.

11 Q] In any event, right or wrong, you perceived that there was
12 no mechanism for you to get an expert to help you with issues
13 such as serology or DNA?

14 A] Yes, sir.

15 Q] And therefore, you never applied to the Court for that
16 funding?

17 A] I'm assuming we didn't. The record will show if we did or
18 didn't, but I didn't think we had a shot at it. No, sir.

19 Q] You had no strategic reason for failing to request those
20 experts?

21 A] No, I just thought we couldn't get them.

22 Q] Okay. Now, uh, did you on your own seek out the people
23 that were going to testify about the serology and DNA issues to
24 see what they were going to say?

25 A] Dan would have done that.

1 Q] You didn't do it yourself?

2 A] No, sir.

3 Q] You did review the discovery as it was coming in?

4 A] Yes.

5 Q] That was being provided by the State?

6 A] Yes, sir.

7 Q] Uh, we had an exhibit that was marked this morning, maybe
8 it's still up there in front of you, I think it is, which is
9 Exhibit number 21 and it's numbered down at the bottom, uh,
10 there's a lab report, a typed report and then a letter to Mr.
11 Channell from Mr. Gitchell. And then starting on page four are
12 some things that have been identified as bench notes. Do you
13 ever recall seeing those bench notes that are in front of you
14 there at any point during the trial?

15 A] (Witness examining same.) Again, it's been fifteen years,
16 but if it's in our, if it's in Dan's file, what I want to call
17 the case file, then we had it. And if it's not, then we didn't.
18 Uh, I do not recall this, independently recall this. No.

19 Q] In terms of record keeping, uh, when you left this case
20 after the conviction, did you have a file?

21 A] No, sir.

22 Q] All of the files and records were kept by Dan Stidham?

23 A] That's correct.

24 Q] And what you're saying is, is if that document is not in
25 Dan's file, he probably didn't get it?

1 A] I would say no. I would take the "probably" out of it. If
2 it's not in the file, we didn't get it.

3 Q] And I'm showing you, uh, specifically page five, which
4 references two samples, Q6 and Q10, and next to it is the words
5 "false positive." Do you ever remember seeing that particular
6 page in which the words "false positive" were written?

7 A] No, I do not.

8 Q] Looking at that today, uh, do you know what that means,
9 false positive, in reference to these tests?

10 A] I, I understand the concept of false positive for all kinds
11 of disease tests and things like that, but that would have got
12 my attention, uh, we would have, uh, either myself or Dan would
13 have called, uh, somebody or gone to see somebody to figure out
14 what they were talking about, because that's obviously, uh, a
15 false positive could lead to nothing, but it it's certainly
16 enough to make you question it and, uh, and ask follow-up
17 questions.

18 Q] So in other words, uh, if you had seen that, that's some-
19 thing that would definitely nod you in the direction to follow
20 it?

21 A] I think intrigued me would have been a good word. Yes,
22 sir.

23 Q] But you don't have any recollection of seeing those, that
24 particular paper and those words?

25 A] No, sir.

1 Q] Now how about, uh, in the same declaration, continuing on
2 with this same exhibit, there's a letter here dated May 19 - -
3 it's page 18- - and directing your attention specifically to
4 some handwritten notes there which is next to the blue jeans
5 samples which say, "Question possible bacterial in nature." Did
6 you ever see that letter with that handwritten notation written
7 on there?

8 A] No. And again, I understood that this blue jeans material
9 was going to be a, uh, an important piece of evidence for the
10 prosecution, and no, I did not see that, uh, if I had seen that,
11 I would have taken, uh, it would have been important to us and I
12 would have made sure we cross-examined on that evidence.

13 Q] Why would that have been important to your defense?

14 A] Because it was something that would be substantiated, uh,
15 the idea that there was some kind of semen or something that
16 could trace the semen on the blue jeans of one of the victims.
17 It was an eight-year-old boy. So there would be something that
18 could substantiate something that Jessie had in his confession.
19 And so, you know, absolutely the vast majority of stuff in his
20 confession wasn't true, but anything the prosecution could show
21 that was true, uh, would be a blow to us.

22 Q] So did you feel that the testimony that semen was on those
23 blue jeans was damaging to Mr. Misskelley?

24 A] Yes.

25 Q] Did you therefore recognize the importance of impeaching

1 that testimony in any way that you can?

2 A] Yes.

3 Q] Did you specifically attempt to retain anybody to address
4 that issue of whether the DNA in the sample was bacterial in
5 nature, as opposed to human DNA?

6 A] No, frankly, I didn't have a clue that that would even be
7 an issue. No.

8 Q] You didn't have a clue?

9 A] That the bacterial versus human. If the State Lab told us
10 it was human, it was human.

11 Q] And did you feel that way because you basically didn't have
12 any experience with DNA cases and you weren't aware of what the
13 issues were?

14 A] Yes. I, I, this, I didn't know what, I understand by
15 reading their findings of saying, "Yes, it is," "it's this," or
16 whatever; now that I read the conclusions, as we can look behind
17 the findings, their conclusions, and look at their lab notes,
18 you know, and say this percentage is so and so, and therefore
19 that conclusion didn't pass. I did not do that. No.

20 Q] Even though you did know how to do that, are you telling me
21 that if you had seen those words, "possibly bacterial in
22 nature," that that would have been a red flag to you that you
23 needed to follow?

24 A] Sure. Anything on those jeans, that jean cutting, would
25 have been critical, uh, I do understand the difference between

1 bacterial and human, I mean, I do know that much.

2 Q] All right?

3 A] Yes, that would have jumped out at me. Yes, sir.

4 Q] Now, uh, did you attempt with Dan's assistance, or either
5 with his assistance or without his assistance, did you consult
6 with any forensic pathologist to see if there were other ways in
7 which you could impeach the confession, through looking at what
8 the physical findings were?

9 A] No, sir.

10 Q] If a forensic pathologist had reviewed the evidence in the
11 case and concluded that many of these injuries, including the
12 injury to the penis of one of the victims had been caused by
13 animals, would that have had any significance to your defense?

14 A] Absolutely. Because, again, that would have been something
15 that would show that what Jessie said in his confession wasn't
16 true.

17 Q] Would you have had any tactical or strategic reason for not
18 presenting that sort of evidence, and by sort of evidence, I
19 mean evidence by a forensic pathologist or a forensic odon-
20 tologist, uh, to the effect that many of the injuries were
21 caused postmortem by animals, and not by humans?

22 A] Absolutely not. In fact, the opposite would be true. We
23 would have had every strategic reason to present it; not to not
24 present it.

25 Q] Do you think that kind of evidence would have assisted your

1 efforts to impeach the confession?

2 A] Absolutely.

3 Q] Now do you recall during the case at some point, uh, that
4 you had some concerns about Jessie Misskelley's competency to
5 stand trial?

6 A] Certainly. From the very beginning.

7 Q] And, and could you articulate for us what your concerns
8 were?

9 A] He couldn't tell us what had happened, as far as even how
10 the interrogation went. Uh, he couldn't tell us, you know, much
11 of anything about, just any, any, even when he was trying to
12 tell us that he did it at first, uh, he couldn't be consistent
13 and then later, he couldn't, he still couldn't tell us how after
14 the interrogation, he couldn't tell us exactly what he was doing
15 on May 5th; he couldn't tell us, he basically couldn't, wasn't
16 able to assist us much, uh, at all in, in his defense.

17 Q] Uh, when in the process did you begin to form the opinion
18 that he was, uh, unable to assist you in his defense?

19 A] It's a sliding scale. In the very beginning I was very
20 concerned that he couldn't, you know, tell the, tell the same
21 story twice. Uh, and in the very beginning when I was trying
22 to, uh, the very first day we met him, when I was trying to, uh,
23 get the background, find out what happened, uh, "tell us," you
24 know, uh, he couldn't, he couldn't even tell us about the crime,
25 he couldn't really tell us about the day of the, uh, uh, the day

1 he was arrested, uh, he didn't have a lot of, he just wasn't
2 able to tell us a whole lot.

3 Q] Besides being unable to tell you about, uh, the crime, did
4 you perceive he had difficulty in understanding what you were
5 telling him about his legal situation?

6 A] Yeah, I certainly didn't think he understood - - I think he
7 - -in some ways, he understood the gravity of it, I'm sure he, I
8 know he did. But as far as understanding that we were there to
9 help him, I'm not sure he understood that, certainly, early on.

10 Q] What was your perception of what he thought your role was?

11 A] I think we were just more of the authorities.

12 Q] The authorities?

13 A] Yeah. I later found out that, I didn't understand it at
14 first, but I later found out that, uh, that he thought, he told
15 Dan later that he thought we were the police. But I didn't know
16 that at that time.

17 Q] Uh, so this was later on in the process when Dan told you
18 this?

19 A] Yes.

20 Q] Now, uh, as you formulated in your mind that there was a
21 problem with incompetence to stand trial, did you and Dan decide
22 that you needed to get him evaluated?

23 A] Yes.

24 Q] And did you, in fact, have him evaluated for competency?

25 A] Yes, we did.

1 Q] What input, if any, did you have to the competency expert
2 before he rendered his opinion?

3 A] None. Uh, Dan, uh, knew Dr. Wilkins from - - my recollec-
4 tion was Dan had used him in a previous case. That may not be
5 correct, but I don't know if it was a child custody case; it
6 wasn't a criminal case, to my recollection. But Dan had some
7 involvement with him before, knew him, uh, contacted him early
8 on. Dan made that contact and Dr. Wilkins - - again, our whole
9 rubic was that we had to find someone who was willing work for
10 free. Well, there was a possibility of getting paid down the
11 line, but no guarantees, so when Dan contacted Dr. Wilkins, he
12 told Dan he was willing to work on a hope and a prayer of
13 getting paid later. And Dan thought he was a good psychologist
14 until he testified, and we ended up with Dr. Wilkins.

15 Q] And was it your understanding he was retained specifically
16 to examine Jessie for incompetence, or were there other issues
17 that he was...

18 A] ...at first, uh, my recollection is, at first it was just
19 on a competence issue. And then as our, uh, we started getting
20 into the false confession concept and understanding what little
21 bit of psychology of it, there were aspects of that, so Dr.
22 Wilkins was to give us an expert opinion on the dealing with
23 false confessions. But my recollection at first, it was just a
24 competency issue. Also, I think, an IQ issue, too. I had
25 forgotten that. It was the state law at the time that with

1 death-penalty, uh, an IQ below a certain number, uh, then you
2 weren't, uh, then the death penalty was off the table. Uh, and
3 so we didn't know what that number was going to come back to be.
4 So I think that was the first two aspects were IQ, and uh, and
5 competency. And then later, we worked on some of the stuff that
6 came into play on the false confession issue.

7 Q] And you were aware when you retained or got him to
8 volunteer, uh, on this competency issue, part of the competency
9 evaluation was determining whether he could rationally assist
10 his defense lawyers; right?

11 A] Yes.

12 Q] And did you seek to provide Dr. Wilkins with information
13 that might be relevant to his assessment of whether he could
14 rationally assist; for instance, by sitting down with Wilkins
15 and saying, "here are the problems we're having with this guy"?

16 A] I never did. No.

17 Q] You never did that?

18 A] No.

19 Q] Do, do you know if Dan did?

20 A] I have no idea.

21 Q] Uh, at some point in time, uh, Wilkins just issued a
22 report?

23 A] Yes.

24 Q] And saying he was competent?

25 A] Yes.

1 Q] And did you, uh, from that point on, believe that Jessie
2 was competent to assist his defense?

3 A] I, my take on it was, I personally didn't think he was
4 competent to help with us, uh, perceiving that the legal stand-
5 ard was so low that I didn't doubt that he met the legal
6 standard. I didn't think that he was able to help us, uh, but I
7 did think he probably, uh, I was satisfied that he met the legal
8 standard.

9 Q] And your perception of the legal standard was it was so low
10 that it didn't matter whether he could, uh assist you or not?

11 A] Certainly, I thought that the legal, that he had, there was
12 a report saying that the legal standard, I was satisfied to go
13 forward with that. I knew we had massive issues trying to get
14 him to assist, but I mean, he could have a little, but a little
15 is too, too crazy. So, yeah, I guess the answer is yes.

16 Q] Did you think at any point in time, even before or after
17 that competency report that he was mentally able to be put on
18 the witness stand to be examined?

19 A] Oh, there was no way.

20 Q] No way?

21 A] No way.

22 Q] And, and why do you say that?

23 A] He couldn't tell the same story twice, uh, he couldn't,
24 there was no way I felt like that he could even handle direct-
25 examination, much less cross.

1 Q] So are you telling me that your decision in this case not
2 to put him on the stand was affected by your perception that he
3 was not able to do that?

4 A] Yes.

5 Q] Uh, did you realize that you were entitled to raise the
6 competency issue at any point in the proceedings, even though
7 the competency report had been issued?

8 A] I assume I did realize it. I mean, I did read through the
9 rules at the time.

10 Q] You assume you did?

11 A] I assume I did. I don't, uh, obviously, I don't know.
12 What I knew back then, I don't know, honestly, on that issue.

13 Q] You did raise it after the conviction; right, the second
14 time. Do you recall that?

15 A] I do not recall it. I mean, I don't recall.

16 Q] Do you remember there was a whole discussion about, uh, uh,
17 alleging misconduct in interviewing Mr. Misskelley?

18 A] Yes.

19 Q] And you and Dan moving to have him evaluated because of
20 about his competency?

21 A] I didn't - - I had forgotten about that. But, yes, that
22 did happen.

23 Q] And so but at some level you must have realized you were
24 entitled to ask the Court to again consider whether your client
25 was competent?

1 A] Yes, sir.

2 Q] And did you know that you had the obligation to write, in
3 connection with the motion, to say he was incompetent to explain
4 to the Court why you thought so?

5 A] If I knew I had the right to raise it, I'm sure I knew I
6 had the right to, yeah, to explain why, why I thought he was.
7 Yes.

8 Q] Okay. Now you said that, uh, Dr. Wilkins initially was
9 hired to look at competency, but then he then he got into some
10 other issues; right?

11 A] Yes, sir.

12 Q] And do you recall that one of the issues he got into at the
13 juvenile fitness hearing in the case was Mr. Misskelley's
14 functioning at about the fourth-grade level?

15 A] Yes, sir.

16 Q] Do you recall that he testified at that fitness hearing
17 that in Dr. Wilkins' mind, there were some issues about his
18 ability to comprehend his *Miranda* rights?

19 A] I don't recall, but I thought I had. I know I wasn't - - I
20 didn't feel we were going to have a *Miranda* issue we could win,
21 but, uh, if it, uh, I probably knew it back then, but I don't
22 recall it now.

23 Q] Do you recall that you did not call Dr. Wilkins at the
24 suppression hearing?

25 A] Yes.

1 Q] To testify about difficulties that Mr. Misskelley might
2 have comprehending his *Miranda* rights?

3 A] Yes.

4 Q] Did you have any strategic reason for withholding that
5 evidence?

6 A] No.

7 Q] Do you recall that at the suppression hearing you had Dr.
8 Ofshe sitting in the audience?

9 A] Yes.

10 Q] And that at one point in time, Mr. Fogleman said, "Let the
11 record reflect that for Rule 37 purposes, the Defense is not
12 calling Dr. Ofshe at the suppression hearing." Do you recall
13 that?

14 A] I don't recall that.

15 Q] Do you recall if there was some strategic reason why you
16 didn't put Dr. Ofshe on at the suppression hearing to try and
17 convince the Court that the confession should be suppressed?

18 A] I don't recall why we didn't. Honestly, I have, uh, Dan
19 probably does, uh, but I had honestly forgotten until just now
20 when you said that that we didn't call him at the, uh, at the
21 suppression hearing.

22 Q] You don't have any recollection whether there was any
23 strategic reason for failing to put him on?

24 A] No, I do not. I do not.

25 Q] All right. Now, uh, while the deliberations are going, was

1 there somewhere the touchy issues, uh, do you recall being
2 informed by Mr. Stidham that there was some contact between the
3 judge and the jurors?

4 A] Yes, sir.

5 Q] And what information was conveyed to you, not for its
6 truth, but to show what action you took in response to that?

7 A] Uh, at some point on the second, I believe it was the
8 second day of deliberations, uh, it must have been late morning,
9 uh, because of the nature of what was related to me, Dan came
10 and said that, uh, that he was in the hallway and the judge said
11 he was going to stick his head in the jury room to ask if they
12 wanted lunch, and the judge asked the jury if they wanted lunch
13 ordered, and they said no, that they were almost through. And
14 the judge stated something like they'll need, "you'll need to
15 come back for sentencing," and there was some remark back from
16 one of the jurors about, uh, I guess it was the foreman, uh,
17 "well, what if we find him not guilty?" And that was, uh, Dan
18 relayed that to me. I took it at that point that we were going
19 to lose the case, uh, and was kind of, uh, was despondent.
20 Despondent is almost too strong of a word, but I can't think of
21 another big word to put it under. Devastated, I guess, at that
22 point, because I really thought we had a shot. For a confession
23 case, things had gone pretty well at the time.

24 Q] Uh, what was your understanding of the law at that point,
25 with that sort of contact?

1 A] Well, again, in retrospect, you know, I didn't, again, I
2 didn't hear it, I didn't hear the conversation. I didn't hear
3 it.

4 Q] All right. I'm not saying it's true.

5 A] Right.

6 Q] But, you know, he reports this to you; did you start
7 thinking there was some mistrial issue here?

8 A] In retrospect, I, it was some time later. I don't honestly
9 remember if it was a month later or if it was two years later,
10 but I kind of like had what I call a V-8 moment. I could have
11 hit myself up side of the head and say, "why didn't I ask for a
12 mistrial" because of that comment. But like I said, at the time
13 it didn't occur to me at all.

14 Q] Uh, now you said that this in your mind was, uh, had the
15 potential for being a death-penalty case; right?

16 A] Yes.

17 Q] Uh, did you understand your obligation to prepare, not only
18 to defend the guilt phase, but also to put on evidence in miti-
19 gation in the event that the jury had found Mr. Misskelley
20 guilty of capital murder?

21 A] Yes.

22 Q] And what did you do to investigate mitigating evidence, I
23 mean, evidence for Mr. Misskelley?

24 A] My recollection is, and I've thought a lot about this over
25 the last few days as I got ready for this is that I only thought

1 mitigation was going to come into play if it was death. Uh, and
2 my intention was to put on a psychologist. I don't think I in-
3 tended to put on anybody else, uh, but a psychologist. That was
4 my recollection. Uh, and obviously, some issues of Wilkins had
5 come up and I recall during deliberations phase, telling Judge
6 Burnett, I don't know if he remembers this or not, but, uh, if
7 it comes back capital, then I wanted a continuance to get a
8 different psychologist. And I don't know if he remembers that
9 or not, but he didn't tell me if he would grant it or not, but,
10 uh, but obviously we had issues with Wilkins, uh, so that makes
11 me - - that's what I remember that I was planning on putting on
12 a psychologist if, uh, uh, if it had been capital. Other than
13 that, uh, I didn't plan on putting on any, calling any witnesses
14 or putting on anything for the mitigation.

15 Q] The information that you had through Wilkins was, in your
16 view, pretty compelling in terms of mitigation; right?

17 A] Yes.

18 Q] And it showed Mr. Misskelley being a product of a very
19 dysfunctional home; family background and having some very
20 serious mental, uh, health issues; correct?

21 A] Yes.

22 Q] Uh, was it your understanding that if the jury came back
23 with less than capital murder, that the jury would still have
24 some sentencing obligations and that your role was to present
25 mitigation, even if it came back on capital?

1 A] If it came back on capital, my perception as I recall it
2 from fifteen years later was that there would be argument.
3 There would not be witnesses called.

4 Q] So you did not realize that you had the right to present
5 evidence in mitigation in the situation if the jury came back
6 with less than capital?

7 A] That's my memory from fifteen years ago. Yes, sir.

8 Q] Uh, whose responsibility was it going to be present the
9 mitigation, either capital or non-capital?

10 A] It was going to be mine.

11 Q] And why was that? What was going on that Dan assigned you
12 that role?

13 A] Well, two things - - well, actually three things. One is,
14 the, the, uh, if there was going to be a witness called, it was
15 going to be a psychologist. If I recall right, I was the one
16 that took, uh, took Dr. Wilkins on direct. And so I was more
17 familiar with Dr. Wilkins, and by this point in the game, I was
18 more familiar with him and more comfortable with his testimony
19 and obviously, as things developed, I wasn't going to use him,
20 but I was going to use a separate psychologist, and I was the
21 one kind of on that issue. The second thing was that, uh, Dan
22 felt that since he didn't lead on the guilt phase and had been,
23 you know, basically screaming around to the jury that, uh, he
24 wasn't guilty, he didn't think he had credibility, uh, from the
25 jury, now to say, "okay, he's guilty, but here's why you should

1 be not so rough on him." And so that was, uh, and again, also,
2 when the verdict finally did come down, Dan was pretty much
3 despondent is a pretty good word for that at that point, uh, on
4 it. I don't think he could have done it at that point.

5 Q] And what you're telling me is that you decided not to put
6 on mitigation because you thought that for Mr. Misskelley was
7 to present argument, not evidence, on that issue?

8 A] That's my memory. Yes, sir.

9 Q] Now this expert, Dr. Wilkins, is it true that before he
10 testified and that's reflected on the record, the prosecution
11 gave you some notice that they had some skeletons in his closet
12 that they were going to bring out if you put him on the stand?

13 A] Yes.

14 Q] Uh, when you learned that, did you do any investigation to
15 see what it was that they had and how bad it was going to be?

16 A] I inquired of Dr. Wilkins about it.

17 Q] And what did he tell you?

18 A] He told me, he said it wasn't true, there was no, uh, now
19 I've forgotten what the skeletons even were now. I've forgotten
20 all of the details, but that there was no probation. I think
21 the newspaper item, newspaper article I had seen, uh, the prose-
22 cution showed it to me or if I found it myself, I honestly don't
23 remember, uh, but where it said there was some kind of probation
24 and, uh, I asked him about it and he said there is no such thing
25 as probation. You either have a license or you don't, uh, and I

1 took him at his word.

2 Q] Now when you say you took him at his word, I assume that
3 you didn't make any attempt to investigate with the licensing
4 board itself, as to what the problem was?

5 A] No.

6 Q] Uh, if the evidence in this case were to show that present
7 in his licensing board file at the time you were considering
8 putting him on the stand, were psychological evaluations of Dr.
9 Wilkins, himself, saying he had some very serious mental dis-
10 orders and some very serious sexual improprieties. If you had
11 known that, would you have never put him on the stand?

12 A] Never in a million years.

13 Q] Is the only reason he was involved in the case is because
14 you thought you didn't have the funds to get another expert and
15 he was a volunteer at this point?

16 A] Yes, every expert we approached was with the concept, you
17 know, you may not get paid, matter of fact, you probably won't
18 get paid, but if you're willing to work on a good cause and work
19 on the potential of maybe getting paid, uh, we'd like to have
20 you on board. And so, yes, he volunteered and Dan didn't have -
21 - Dan thought he was a fine psychologist. I had never met him
22 until this case.

23 Q] Uh, looking at the whole course of your representation
24 here, and, uh, considering what you have testified up to this
25 point and realizing how hard this, uh, do you have an opinion

1 that as a result of financial constraints or other constraints,
2 that Mr. Misskelley did not receive the effective assistance of
3 counsel to which he was entitled?

4 A] Boy, that's hard for me to answer.

5 Q] I mean, if you can answer?

6 A] I thought we did a great job with what we had to work with
7 as we proceeded. As we proceeded, not having funds to hire
8 experts, maybe we were wrong, I didn't think we were at the
9 time, obviously, uh, you know I thought we did - - with what we
10 had to work with and with our limited experience, I thought we
11 did a good job. There are lots of things now, uh, that I look
12 back at and would do different and then frankly, if we didn't
13 properly raise and preserve the 2.3 issue, uh, uh, I don't, I
14 don't, I don't know what the opposite of that coin is. If we
15 didn't raise it and protect it, uh, I guess that is
16 incompetence. I don't know. Other than that, uh, on the
17 experts, I thought we did as well as we could with what we
18 perceived to be our limitations.

19 Q] And, uh, if your perception on the experts was wrong, in
20 other words, the fact there was some evidence for you to get
21 forensic serologists, DNA experts, forensic pathologists,
22 odontologists, uh, what would your opinion be in that situation?

23 A] Certainly the, in retrospect especially, and now knowing
24 now what I know - - if I had known then what I know now, uh, and
25 we could get the experts, absolutely it would have helped. Yes,

1 sir.

2 Q] It would have helped, and you had no strategic reason for
3 not presenting, not seeking or presenting those experts?

4 A] Absolutely not. That would have been our best strategy.
5 It would have been a good strategy to call all of those
6 witnesses if we could have.

7 Q] Uh, Mr. Ford said that presenting a bad alibi was worse
8 than presenting no alibi at all. Do you agree with that?

9 A] No, I do not. Well, it depends on how bad the alibi is.
10 But no, not from our angle. Our alibis were not perfect. They
11 were friends, and most people you hang out with are your friends
12 and so I thought our alibis were good strong witnesses. And
13 that's not one thing I would do differently. I would call them
14 again.

15 MR. BURT: Thank you. I appreciate you coming
16 here to testify. I pass the witness.

17 CROSS-EXAMINATION

18 BY MR. DAVIS:

19 Q] Well, let me start with the last and kind of work my way
20 back. So if I understand it, you were responsible for putting
21 together the alibi witnesses; correct?

22 A] By the time we got to trial, yeah, I think, uh, if I
23 recall, I was the one who did all of the alibi witnesses on
24 direct, uh, and it certainly, and both of us were interviewing,
25 uh, the more we interviewed them, many times both of us were

1 there, but I probably, you know, took the lead on direct. Yes,
2 sir.

3 Q] Okay. And part of your defense, part of the defense that
4 he didn't do it was that he had an alibi for where he was and
5 you put on multiple witnesses that set forth not only an alibi
6 that he was at the trailer park, but also that he was at
7 wrestling?

8 A] They weren't inconsistent alibis. They were, they were
9 first he was here, and then he left, and then he was here. Yes,
10 sir.

11 Q] Well, if I understand your testimony, you would do all of
12 that all over again if you could?

13 A] Yes, sir.

14 Q] Okay. So you thought that you did a good job at that, you
15 put those witnesses together and you presented them and you felt
16 that it came across as effectively as it could under the
17 circumstances?

18 A] Yes, sir.

19 Q] And so that aspect of the defense that you used to defend
20 Jessie Misskelley is you're not up here telling us that it was
21 defective?

22 A] No, sir.

23 Q] Or ineffective?

24 A] (Witness shaking head negatively.)

25 Q] Now as I understand it, based on your testimony, from the

1 time you were brought into the case or assigned to the case or
2 appointed to the case, which would have been in June of '93?

3 A] Early June; yes, sir.

4 Q] Okay. Until sometime in early September of '93?

5 A] Yes, sir.

6 Q] So that would be June, July, August, and during those three
7 months that the defendant, Jessie Misskelley, is telling you
8 that he did it?

9 A] Yes, sir.

10 Q] Okay. And you got a confession, didn't you?

11 A] Yes, sir.

12 Q] And your client is telling you that he did it?

13 A] Yes, sir.

14 Q] Okay. Now let me ask you and see if - - you were talking
15 and testifying about efforts you were going to make to negotiate
16 with the prosecutor, myself and Mr. Fogleman, about a possible
17 plea deal; right?

18 A] Yes, sir.

19 Q] Okay. Do you recall in August of '93 that on a Saturday
20 afternoon, there was a gathering at the Holiday Inn where all of
21 the attorneys that were involved in this case, prosecutors and
22 defense attorneys, the judge, as well as news media from all of
23 the news media stations that were going to be involved, met at
24 the Holiday Inn here in Jonesboro to have lunch to kind of
25 discuss some possible ground rules about how we would deal with

1 this massive media onslaught once the trials took place later or
2 at the beginning of the next year?

3 A] Vaguely.

4 Q] Okay. Do you remember there was a meeting at the Holiday
5 Inn on a Saturday afternoon; right?

6 A] Yes, sir.

7 Q] All sat down to have dinner, not talking about the
8 specifics of the case, but about how to deal with the media;
9 right?

10 A] Right.

11 Q] Okay. Do you remember you and Dan meeting with John Fogle-
12 man and myself at my office after that was over?

13 A] I didn't connect those two dates together, but I do remem-
14 ber meeting with you and John, Judge Fogleman, now, uh, at your
15 office, yeah, after an event. Yes, sir.

16 Q] Okay. And you approached us and in fact said, we need to
17 go somewhere, where we're out of this media circus where we can
18 sit down and discuss this case; right?

19 A] Yes, sir.

20 Q] Okay. And you remember the two of you came into my office
21 that day and sat down and explained to Fogleman and I exactly
22 how your client committed the crime. Do you remember that?

23 A] I'm -- I remember the meeting. I'm sure we -- I don't
24 know, I don't know if I would say it -- I -- boy. That's
25 tough, because I never had a clear view how this crime allegedly

1 occurred.

2 Q] At that point in August, had you been to the crime scene?

3 A] I don't know.

4 Q] Okay. Do you remember describing to us in the office that
5 day - - I'm asking you this because I hadn't been to the crime
6 scene up to that point, describing it to us how one side on the
7 ditch bank was much higher than the other side, and how two of
8 the young men hid kind of up under the cut out part of the ditch
9 bank while one of them lured the boys on the bicycles up to the
10 edge. Do you remember telling us that?

11 A] I honestly do not. I mean, I really do not.

12 Q] Okay. But you were there, in order to tell us information
13 that would cause us to be interested in being able to cut a deal
14 with your client so he could testify against the other two;
15 right?

16 A] Absolutely.

17 Q] Okay. And you were telling us, I mean, do you recall
18 generally, that you told us "here's what our client says, as far
19 as how this thing went down"?

20 A] Yes.

21 Q] Okay. And when we left it there that evening it was basic-
22 ally, "we heard what you told us, we'll get back with you."

23 Right?

24 A] Yes, sir.

25 Q] Okay. Do you remember that on the six o'clock news that

1 night on the Memphis news that Jessie, Sr. appeared on the news
2 sitting in a Lazy Boy recliner with a Budweiser in his hand,
3 telling what two village idiots were representing his son in
4 this case?

5 A] I didn't remember being that vague, but I do remember that
6 happening.

7 Q] Okay. But you remember that occurred?

8 A] Yes, sir.

9 Q] Okay. And he's basically on the six o'clock news in
10 Memphis on the weekend telling everybody that the two guys
11 representing his son was selling him down the river; that he is
12 totally innocent. Do you remember that?

13 A] I actually didn't see the video, didn't see that, but I,
14 trust me, I knew about it. Yes.

15 Q] Okay. And wasn't that the event that caused everything to
16 change: it was Jessie appearing, Jessie, Sr. appearing on TV
17 and all of a sudden saying "my son is innocent" that it was that
18 Monday that all of a sudden, Saturday you were there telling us
19 "this is what Jessie, Jr. did; we want to cut a deal," and by
20 Monday morning you're in the newspaper telling everybody that he
21 is as innocent as can be?

22 A] I can certainly associate the two. I did not remember that
23 association between when Jessie, Sr., you know, but close in
24 time to that is when we went to visit the jail and when Jessie
25 then started telling us he was innocent. Yes, sir.

1 Q] Okay. And that was after his dad, you said in your state-
2 ment I believe, that there was something about his dad going to
3 him and meeting him?

4 A] That's what I thought. Yes, but my understanding at the
5 time was his dad had gone and met with him. Yes, sir.

6 Q] Okay. Do you remember the Dr. Wilkins episode, he became
7 or he took some hits on cross-examination when testifying;
8 right?

9 A] Yes, uh, which hearing?

10 Q] Well, the first one at the trial?

11 A] At trial, yes, sir.

12 Q] And he did, the test that he did on your client indicated
13 that he had an IQ in the low 70 range; right?

14 A] I was, I recall 69, but it could have been low 70s; yes,
15 sir, it was in that area. Yes, sir.

16 Q] Okay. And you also, do you recall that there was other
17 testimony of tests that had been performed on him in which his
18 IQ range had been higher than that previously, a couple of other
19 references to IQ tests that had been performed earlier?

20 A] Uh, yes, sir, I vaguely remember that. Yes, sir.

21 Q] Okay. So you've got a, the test that Dr. Wilkins performed
22 or in that borderline range that really don't have any legal
23 significance; would you agree?

24 A] It didn't meet the standard; I think it was 65, if I recall
25 was the standard you had to meet to, uh, to take the death

1 penalty off the table. So yes, sir, I agree. Yes.

2 Q] Okay. And there were other tests out there that he had
3 performed that had been performed previously that showed he even
4 had a higher functioning IQ; correct?

5 A] Yes, sir. I don't think it was very high, but it was high.
6 Yes, sir.

7 Q] Okay. And so on that issue, you, you might have been able
8 to obtain another expert. But as far as the results of the test
9 itself, you're not saying that that would have changed the
10 results of a standardized IQ test; that those results would have
11 changed as a result of hiring somebody different than Dr.
12 Wilkins; right?

13 A] I'm assuming not.

14 Q] Okay. And you certainly, regardless of who you hired, you
15 were going to be stuck with the results from the two IQ tests
16 that had been administered previously; correct?

17 A] I would assume. Yes, sir.

18 Q] Okay. And as far as the competency of him or his ability
19 to understand and comprehend and waive his rights, you knew that
20 some of the information regarding that, some of the testimony
21 that was presented at the hearing was the fact that he had done
22 that about four times before; right?

23 A] I had forgotten about it until just now, but yeah, that
24 sounds - - that rings true.

25 Q] In fact, you and Dan were kind of throwing a fit at the

1 suppression hearing because you really wanted to have the
2 suppression hearing sequestered because you didn't want the
3 media to hear all of the other times in the past that Jessie
4 Misskelley had been arrested for juvenile offenses, and had been
5 advised of his rights and had waived his rights and given
6 statements and you thought that was kind of going to harm your
7 client?

8 A] That sounds right.

9 Q] Right. And basically, the Court kind of was in a situation
10 where it couldn't exclude the press, and so they were there and
11 they got to hear it, and they got to hear of three or four
12 instances where he had previously been advised of his rights and
13 previously waived those rights and given statements to officers?

14 A] Yes, sir.

15 Q] Okay. And so you could make a pitch and you might have
16 been able to make a stronger pitch for competence, his ability
17 to waive his *Miranda* rights or not having the ability to waive
18 them, but the truth of the fact is you were saddled with a
19 situation where he had done it multiple times in the past and
20 the testimony and evidence was presented was that he had, in
21 fact, he understood his rights and he waived them?

22 A] Yes, sir.

23 Q] Okay. And you've characterized it as basically that you
24 knew that the argument on suppressing that statement as far as
25 him not understanding his rights or not effectively waiving them

1 was a loser?

2 A] Yes, sir.

3 Q] Okay. And you still, I mean, looking back on it now, even
4 though you may have had marginal experience at the time, I mean,
5 there's not anything that's changed on that, is there?

6 A] Again, I haven't done a whole lot of criminal things. The
7 last criminal case, I think I retired, but no, I'm not aware - -
8 again, I didn't think at the time we had a good *Miranda*
9 argument.

10 Q] Now on the criminal cases that you handled as public de-
11 fender, you and Dan made up fifty percent of the team for Greene
12 County?

13 A] Yes, sir.

14 Q] Okay. Granted, they weren't capital murder cases, but was
15 it common place in northeast Arkansas for people that were
16 appointed to defend felony cases, to do a lot of their own in-
17 vestigation?

18 A] Yes, sir.

19 Q] Okay. And when you took this thing on, you didn't walk
20 into it with blinders on; I mean, you knew it was a serious case
21 you knew it was serious charges, and you knew that there would
22 be a lot of work and investigation involved; right?

23 A] Yes, sir.

24 Q] Okay. Would you say that it's fair to say that Dan was in
25 the same boat?

1 A] Yes, sir.

2 Q] Okay. And the two of you, even though you might not have
3 gotten paid a lot, you put forth your best effort as far as
4 preparing for this case; correct?

5 A] Absolutely.

6 Q] Okay. And did you do a lot of investigation as far as
7 locating witnesses for the alibi, interviewing them, finding out
8 what they were going to say, trying to corroborate their
9 stories; things of that nature?

10 A] Yes.

11 Q] And was Dan doing, I mean, he was the lead dog in the hunt;
12 was he also, uh, doing a lot of this, too?

13 A] Yes. I think I was doing, the more I think about it, the
14 more I think I was doing most of the alibi, but, uh, just about
15 everything else was probably Dan.

16 Q] Okay. And at the time even though you say it comes in
17 December at some point, you also received the benefit- - you're,
18 you're working toward this trial thinking you're going to
19 basically do your own investigation; right?

20 A] Yes, sir.

21 Q] And then in December, kind of manna from heaven comes in
22 and here is investigator Lax, who, from what you viewed, was he
23 a highly experienced professional in this area?

24 A] Yes, sir.

25 Q] Okay. And he comes in and he offers to help you; right?

1 A] Yes, sir.

2 Q] And he does a great deal to help you; right?

3 A] Yes, sir.

4 Q] Okay. In fact, there were a couple of key witnesses that
5 you thought you were going to have to deal with that would be
6 difficult to deal with, I believe one fellow was Jones and one
7 was possibly Buddy Lucas, and through Lax's efforts in his
8 investigation, they end up trading the situation where neither
9 one of those two people would present testimony; correct?

10 A] Well, I think they reminded them of what we were saying the
11 true facts were, and they changed; they recalled what the true
12 facts were.

13 Q] Well, wouldn't you attribute some of that to the fact that
14 Lax is working in your behalf in assisting you and gathering in-
15 formation and maybe helping achieve that goal?

16 A] Yes.

17 Q] Okay. And as an attorney, did you see any, I mean, is
18 there any downside you viewed, is there any reason why Ron Lax
19 and the investigator for the Echols team wouldn't be working
20 their tail off to try to help you guys. I mean, wasn't it an
21 advantage for them if Misskelley can win his case on the get-go?

22 A] Absolutely. I'm not sure you'd have, I don't mind telling
23 you, you wouldn't even have tried this other case if we had
24 gotten a not guilty verdict.

25 Q] Okay. And so that was your assessment was, this is the

1 kind of, uh, the kingpin, if it doesn't fall, neither one of the
2 others do?

3 A] Certainly, that was a lot less likely. Yes, sir.

4 Q] Okay. And would you agree that your assessment of Mr.
5 Lax's interest in assisting you, his efforts to assist you
6 reflected that reality?

7 A] Yes.

8 Q] How many times do you think you met with your client and
9 went over evidence and testimony; you said met with him at the
10 Marion sheriff's office, Greene?

11 A] With Jessie?

12 Q] Yes?

13 A] No, he was being held in Clay County, uh, early on. I
14 think that was - - I'm trying to remember whether it was - - I
15 think, wasn't he transferred to Clay County right away? I think
16 he was. I don't remember it now, but I think the first time I
17 ever met him was in Clay County. Now I wouldn't swear to that,
18 but that's my recollection. How many times; a whole lot of
19 times, in fact, I wouldn't have, uh, I got appointed in June - -
20 that was eight months. Oh, my gosh. Uh, and then of course, as
21 it was getting closer to trial, the meetings became more
22 frequent. I'd hazard - - I'd hate to even - - it would be a
23 wild guess, but you know, twenty times, uh, I don't know.

24 Q] Okay. When did y'all finally shut down everything and
25 start putting all of your efforts into preparing for this trial?

1 A] Dan was spending a whole lot of his time pretty much all
2 fall. I think it was after Thanksgiving that I really started
3 spending the vast majority, most of my time, I mean, after
4 Christmas, I know I didn't do anything except this case.

5 Q] Okay. Now there was talk about what experts you could have
6 obtained and that sort of thing, but Dr. Ofshe that you got to
7 come in and testifying on behalf of the defense, I mean, he was
8 at least, he was a renowned expert in that area, or at least a
9 well-publicized expert in the area, uh, of false confessions;
10 right?

11 A] Absolutely. Yes, sir.

12 Q] Okay. And in fact, before and since this particular trial,
13 uh, I mean, he's achieved some degree of fame in that regard;
14 right?

15 A] Yes, sir.

16 Q] I mean, if you had gone out and beat the bushes to try to
17 find somebody that was, uh, at least a highly, uh, though of in
18 some areas, expert in the areas of false confessions and things
19 of that nature, you couldn't have done better than that, could
20 you?

21 A] I think Dr. Ofshe is probably, certainly in this country if
22 not in the world, the best expert on false confessions there is.

23 Q] Okay. And this Warren Holmes fellow that you got on the
24 area of polygraph and police interrogation, proper methodology
25 and that sort of thing, I mean, gosh, he's been instructing law

1 enforcement officers since the early 80s or mid-70s, hasn't he?

2 A] Yes, sir.

3 Q] I mean, wasn't he one of the, I mean, when you got him
4 didn't you think "gosh, we couldn't have done any better than
5 this"?

6 A] Absolutely.

7 Q] Okay. So in that regard in those two areas and the areas
8 of the false confessions or the areas of improper or alleged
9 improper police interrogation, those were the two cornerstones
10 of your defense; right?

11 A] That, and attacking the confession itself. Yes, sir.

12 Q] Okay. And along with that was the alibi defense; right?

13 A] Yes, sir.

14 Q] So you had Ofshe that you, I mean, gosh, the best you could
15 get; you had Holmes that was right up there and you wouldn't
16 have gotten anybody other him if you had had the choice; and you
17 did everything you could and you said you were satisfied with
18 the alibi defense, so what, what exactly was it you felt like
19 you were deficient in?

20 A] In retrospect, like I said before...

21 Q] ...then?

22 A] No, I'm talking about my feeling now, as I said before, if
23 we didn't properly raise and preserve the Rule 2.3 argument, uh,
24 I just can't, uh, I thought that was, I honestly thought that
25 was a winner. I may have been, I may have been fooling myself,

1 but I thought that was going to be a winner at the, uh, at the
2 Supreme Court. And then in retrospect, the, uh, uh, some of the
3 DNA and, and, uh, forensic stuff, uh, I wish we would have, uh,
4 had an expert on that who could have, uh, contradicted some of
5 the things that were told by the Crime Lab.

6 Q] Would you agree that in the case involving Jessie Misskelly
7 although there was testimony from the get-go, I don't know if it
8 was testimony from the get-go or the current, but the testimony
9 regarding DNA or serology was fairly minor as compared to some
10 of the - - the confession itself, and some of the other testi-
11 mony that was presented?

12 A] Compared to the confession, yes. But I will say that the,
13 uh, I do think that blue jean sample was one of the few things
14 that in an outside part following Jessie's confession, that's
15 one of the few things that the prosecution could point to and
16 say, "see, what Jessie was telling us was true." So I think
17 that was big.

18 Q] Now the Rule 2.3 that you pointed to, in looking back on it
19 and hindsight, that's only significant if that Rule 2.3 issue is
20 successful on appeal; right?

21 A] Yes.

22 Q] Okay. I mean, and if, if the law in that area changed
23 dramatically, very, very shortly after this trial occurs and the
24 Court takes a different interpretation and the different
25 ramifications from a Rule 2.3 mistake is different, then that

1 was how significant what you did in that area?

2 A] All I know is that was a bright line defense at that time.

3 Q] Uh-huh.

4 A] It was a bright line test and I still remember the, uh, the
5 rapist out of Little Rock who was telling, you know, his, when
6 the police told him did he want to come down and he said "yes,
7 that's cool," or "neat," or something like that, and I was so
8 shocked that this guy was even the kind that he would even
9 associate himself that it was okay to go, so at the time I was
10 doing the research, there was a real bright line defense, so I
11 felt comfortable with it.

12 Q] Okay. And it was based on those rulings up to that point
13 that caused you to feel that way?

14 A] Yes.

15 Q] Okay. But if that bright line test gets thrown by the way-
16 side shortly thereafter and applied retroactively to cases that
17 are interpreted much more forward, that would have a detrimental
18 impact on how successful you thought that strategy might be?

19 A] I guess the Supreme Court can always change its mind.

20 Q] In fact, as I understand it, your testimony was that based
21 on your knowledge of the case and review of the record and
22 having prepared the appeal for Mr. Misskelley, the only chance
23 you thought you had a shot at on direct appeal was the 2.3
24 issue?

25 A] That was, that was the one I thought I had by far the best

1 chance. I didn't think I was going to win on the -- we should
2 have used the lie detector test, you know, those kinds of things
3 that we wanted to use, things like that. Now I thought the 2.3
4 was the one if we were going to win on appeal, that's what we
5 were going to win on.

6 Q] If I understand it, the choice of Dr. Wilkins you said in
7 part was because he had a good price tag?

8 A] Yes, sir.

9 Q] Okay. But you also said it was in part to his -- that Dan
10 was familiar with him and you thought there had been some -- he
11 had used him in the past or had success with him in the past?

12 A] That's my recollection that, uh, Dan had somehow either
13 been associated with him, used him in the past, consulted with
14 him or something. Dan knew him; I didn't know the name until he
15 brought it up.

16 Q] In preparing for the case, did you kind of, I mean, in
17 trying to figure out where you stood early on and what the like-
18 lihood was that you might be able to work out a plea, did you
19 assess how your case stacked up against the other two guys, the
20 other two defendants, I mean, who was in the -- who had the
21 toughest row to hoe as far as the...?

22 A] ...considering that my client had confessed, I thought we
23 had the hardest row to hoe, if we were going to try him.

24 Q] Okay. And I think you even made reference or you referred
25 to your case as a "confession case," which made it much more

1 difficult to defend; right?

2 A] Yes, sir.

3 Q] Okay. And out of the three cases that were presented, your
4 case ended up with the best results; right?

5 A] Technically, yeah. I mean, life plus forty; it beats three
6 lives or three deaths. But life is life in Arkansas, so life is
7 life.

8 Q] I want to ask you this: And as an attorney who practices
9 and attorney who presented this case, do you seriously believe
10 that any mitigation evidence that you could have presented after
11 that jury found Jessie Misskelley guilty of having murdered an
12 eight-year-old and guilty of two counts of second-degree murder,
13 the murders of two eight-year-olds, do you think any mitigation
14 evidence you presented would have gotten him anything less than
15 a life sentence?

16 A] Once they didn't find him guilty of capital, no, sir.

17 Q] I mean, and I don't know whether that went through, was
18 that something that you actually thought about and thought,
19 "well, at this point, you know, we can stand up there and we can
20 put on other evidence, but the end resulting won't change," or
21 was that just a fortuitous circumstance?

22 A] I think I honest -- my recollection from fifteen years ago
23 was I thought that if it was capital, there would be mitigation
24 evidence. If it wasn't capital, all you do is argue it. That's
25 all I think I ever even, you know, you don't consider what

1 happens if you fly to the moon if you're not going to go to the
2 moon.

3 Q] And if I understand you in assessing it now, even though
4 you're saying that you aren't sure and you're not sure you had
5 that opportunity or not, but frankly, do you think that
6 opportunity, if you had exercised it, would have changed the end
7 result as far as punishment goes?

8 A] From my experience, which is limited, no, I don't. I don't
9 think so.

10 MR. DAVIS: One second, Your honor.

11 THE COURT: While he's looking at his notes
12 there, Greg, you've testified that you had zero funds
13 to prosecute the defense, uh, what about the seventy-
14 five hundred from Home Box Office from the so-called
15 "Documentary"?

16 THE WITNESS: Thank you, Judge. I forgot about
17 that. Thank you for remembering that.

18 THE COURT: I use the word "so-called," because
19 it wasn't a documentary.

20 THE WITNESS: I had totally forgotten about those
21 funds. You know, it's been fifteen years.

22 THE COURT: What did you spend that for?

23 THE WITNESS: We did spend it on, uh, Dan will
24 have the records, uh, it was all spent on - - none of
25 it went to us. Uh, I think we paid...

1 THE COURT: ...I think I made you tell me what
2 you did with it, but I don't remember.

3 THE WITNESS: Yeah, I don't remember either,
4 Judge. I believe, I believe it was on travel expenses
5 and things for the, uh, for maybe Ofshe, or maybe for
6 Holmes.

7 I had totally forgotten about that. But we did
8 have seventy-five hundred dollars from the movie
9 makers, uh, and Brad Broadway, an attorney in Para-
10 gould, represented Jessie in that situation, and he
11 made the deal with Home Box Office and then he had to
12 agree to release the funds, uh, that we had to pay, so
13 we asked him. He was the only one who could spend it
14 and he had to agree to it.

15 And I honestly don't - -it's been fifteen years
16 and I don't recall how it was spent, but it was spent
17 on expenses on things like Ofshe and/or Holmes.

18 MR. DAVIS: I don't have anything further.

19 THE COURT: Gentlemen?

20 RE-DIRECT EXAMINATION

21 BY MR. BURT:

22 Q] The last topic first, you said that you don't think it
23 would have made any difference to present mitigation; right?

24 A] Yes, sir. But again, I'll put the caveat on it, but that's
25 my one criminal jury trial, so I don't have a whole lot of

1 experience to base that comment on. But, yes. Yes, sir.

2 Q] Right. And of course, you read about capital cases all of
3 the time where jurors, even in capital cases, return a non-death
4 verdict?

5 A] Yes.

6 Q] For some pretty heinous crimes?

7 A] Yes.

8 Q] And you probably read about those back then?

9 A] Yes, sir.

10 Q] You would agree with me that in order to make a strategic
11 call on whether to present mitigation or not, you've got to in-
12 vestigate to find out what you're dealing with?

13 A] Yes.

14 Q] You didn't do that; right?

15 A] No, sir.

16 Q] And, in fact, as I understand your testimony, you never
17 made a strategic position not to put on mitigation because you
18 thought it was weak; you made a decision not to put it on
19 because of the erroneous view you had about the law; assuming it
20 was erroneous?

21 A] If that's erroneous, yes, sir. That's my recollection of
22 the "I thought," if it was capital, we put on mitigation with
23 some witnesses. But if it wasn't capital, we didn't.

24 Q] And, and so that your decision making process at the time
25 of trial?

1 A] Yes, sir.

2 Q] Removing hindsight, what you thought at trial was "I don't
3 have a legal remedy to put this on; therefore, there's no need
4 to investigate it or to put this on"?

5 A] Yes, sir. That's my recollection.

6 Q] Okay. Now you said that in your non-capital practice that
7 it was not uncommon for lawyers to investigate, to do investi-
8 gations themselves; correct?

9 A] Yes, sir.

10 Q] And are you referencing the misdemeanor cases you handled?

11 A] That, and I don't remember if it was before or after, I
12 think it was before. We tried a felony bench trial, uh, in
13 which there was a, uh, charge was using under-age kids to, uh,
14 to make, uh, to make, uh, uh, pornographic movie and we had to
15 call a doctor to testify, uh, about the age, uh, of the, of the
16 victims, because of the three victims ages, and we had to find
17 that doctor and talk to him and do those kinds of things.

18 That's the only felony. The rest of them were misdemeanors
19 where I would go talk to a police officer on a DWI, look at the
20 video at the police station of the person taking the
21 Breathalyzer test, those kinds of things.

22 Q] Was there ever a point in time when you were representing
23 Jessie Misskelley in trial where you heard the phrase "death is
24 different"?

25 A] I don't recall that phrase. I certainly understood that

1 the death penalty cases were different, I mean, but I don't
2 recall that phrase. No, not off the top of my head.

3 Q] How did you think back then they were different than your
4 run-of-the-mill non-capital case. What did you think that was
5 different about that?

6 A] Well, obviously, the stakes are so much higher. Uh, I
7 mean, life in prison or time in prison is not for someone who is
8 innocent. It's not good, but it's not, it's not death. That's
9 the primary thing on my mind, is that the stakes are so much
10 higher.

11 Q] And did you, were you, did you have any perception that be-
12 cause the stakes were higher, your obligations were higher?

13 A] Sure.

14 Q] And did you think that what you did in your non-capital
15 practice was sufficient to represent Mr. Misskelley in a capital
16 case?

17 A] Certainly not. No. I, I, we put a lot in the record into
18 his case than we did in our run-of-the-mill, even felony cases
19 that we had.

20 Q] So even though you used, you did investigation on your own
21 in non-capital cases, you realized that because the stakes were
22 higher, you had a higher obligation to perhaps use a different
23 method of investigation in this case?

24 A] Again, I didn't think we could get a different - - if I, if
25 I thought I was entitled to an investigator, I would have asked

1 for one and tried to get one, but, uh, absolutely, because of
2 the stakes involved, I didn't think that that was an option.

3 Q] So your decision not to use an investigator was not based
4 on any perception that this was going to be like your other
5 cases, but rather, it was based on your perception that the law
6 did not permit you to get an investigator at State expense?

7 A] Yes, that's correct.

8 Q] Now, uh, I have marked next in order, Exhibit number 28,
9 the American Bar Association, 1989 Standards. At any point in
10 time while Mr. Misskelley's case was pending, did you become
11 aware of those Standards that I just handed you?

12 A] (Witness examining same.) I didn't become aware of them
13 until this second.

14 Q] And so you were not aware that the American Bar Association
15 had promulgated some standards for the conduct of the defense in
16 a capital case?

17 A] No, sir.

18 Q] And so I take it that you were therefore not aware of this
19 language which said, "Minimum standards that have been
20 promulgated concerning representation of defendants in criminal
21 cases generally, and the level of adherence to such standards
22 required for non-capital cases, should not be adopted as
23 sufficient for death penalty cases." You weren't aware of that
24 statement?

25 A] No, sir.

1 Q] Uh, and were you aware of the standard which said, "Counsel
2 should conduct independent investigations relating to the
3 guilt/innocence phase and to the penalty phase of a capital
4 trial. Both investigations should begin immediately upon
5 counsel's entry into the case and should be pursued expedi-
6 tiously. The investigation for preparation of the guilt/
7 innocence phase of the trial should be conducted regardless of
8 any admission or statement by the client concerning facts
9 constituting guilt." Were you aware of that standard?

10 A] No.

11 Q] Do you think you adhered to that standard in this case, uh,
12 especially in relation to the first of June up until September?

13 A] I certainly had every intention of making my own determina-
14 tion whether he was guilty or not - - one, because I felt like I
15 couldn't let a client plead guilty of something they weren't
16 guilty of. That was colored by the confession and then Jessie
17 telling me he was guilty. I had, uh, also I will say I had
18 every intention of pursuing the defense, because the better
19 poker hand I had, the better deal I was going to get from the
20 prosecutor. And in retrospect, did we spend as much time early
21 on, on actual innocence, as we should have, probably not. But I
22 don't think we, I wouldn't say we did nothing, either. We were
23 getting the discovery, we were reviewing the discovery and we
24 were looking - - preparing as if we had, uh, we knew there was
25 always the chance we were going to have to try the case.

1 Q] Now you said that, uh, your preparation of the alibi
2 witnesses really geared up in that period from September to the
3 start of the trial; right?

4 A] Correct.

5 Q] Did you keep billing records in this case that reflected
6 your expertise?

7 A] Yes, sir.

8 Q] And would you say that billing you submitted accurately
9 reflects the amount of time that you put into the case and the
10 specific activities that you performed?

11 A] I sure would hope so. Yes, sir.

12 Q] The next in order would be the billing records, Exhibit
13 number 29.

14 THE COURT: Have they not already been received?

15 MR. BURT: Those are the Lax billing records,
16 Your Honor.

17 THE COURT: Okay.

18 MR. BURT: These are a separate set that relate
19 to Mr. Stidham and Mr. Crow.

20 RE-DIRECT EXAMINATION, continuing:

21 Q] While that's being marked, let me ask you some questions.
22 Did you and Mr. Stidham submit a joint bill to the Court for
23 your time and expenses at the end of the case?

24 A] A joint statement of our time and expenses; yes, sir.

25 Q] In other words, it was a combined billing; correct?

1 A] Yes, sir.

2 Q] And unfortunately, it doesn't list who did what, does it?

3 A] I'd have to look at it. It's been fifteen years. If it
4 doesn't, it doesn't. I don't recall.

5 Q] I think you and I looked at it the other day?

6 A] Yeah, if I could look at it one more time?

7 Q] Yes. I'll give it to you. I just wanted to see if you
8 recall that.

9 A] (Witness examining same.) No, it doesn't say who does what.

10 Q] So some of those entries are reflected with what Dan did,
11 and some of them are reflected with what you did; correct?

12 A] Yes, sir.

13 Q] And, uh, take a look at the - - and the billing covers from
14 your initial appearance in the case, or appointment in the case
15 on June 7th all the way through to the trial period in February
16 of 1994; correct?

17 A] Yes, sir.

18 Q] Take a look at the billing between September 27 and the
19 start of trial on January 10, 1994, and if you could, tell me
20 where it reflects that you were interviewing alibi witnesses,
21 and if so, uh, what dates and who was interviewed?

22 A] (Witness examining same.) 10/11/93, phone conference of
23 witness. I have no idea with what witness that is.

24 Q] Let me catch up with you if I could and we'll come to the
25 same words. It's all on the same page there. What's the next

1 entry?

2 A] 10/11/93.

3 Q] So the first entry from September 27 to what you're reading
4 now, there's no activity indicating alibi witness interviews;
5 right?

6 A] (Witness examining same.)

7 Q] 10/11, the entry says phone conference with witness?

8 A] Yes. I'm not saying that wasn't one of my witnesses.

9 Q] Well, do you know if it's your entry, or is it Dan's?

10 A] I can't tell.

11 Q] And it looks like .45 hours, an interview with a witness?

12 A] Yes, sir.

13 Q] All right. Okay. Where else between September 27 and
14 January 10th, '94, when trial began?

15 A] (Witness examining same.) This is probably a Dan entry,
16 but I can't tell: 10/27/93, there's a conference with Jim
17 McNease.

18 Q] 10/27/93, uh, Jim McNease is the boss of Jessie, Sr., who
19 testified at the suppression hearing; right?

20 A] I believe so.

21 Q] Was he an alibi witness?

22 A] I don't recall.

23 Q] Okay. And you say that entry may be Dan's, or maybe yours?

24 A] Yes. And then there was a bunch here on 10/27, conference
25 with Stephanie Dollar; conference with Kevin Johnson; uh,

1 conference with Christie Jones; conference with Susie Brewer.

2 Q] Are those your entries, or Dan's?

3 A] I can't tell. We apparently made a trip, or someone made a
4 trip to and from West Memphis, uh, for this. I don't remember
5 if that was me, Dan, or both.

6 Q] So this is on one day the trip was made on October 27th?

7 A] It would appear.

8 Q] Okay. Any place else?

9 THE COURT: Greg, you previously testified that
10 after a hearing in Marion that you and Dan went to
11 Misskelley, Sr.'s residence and interviewed the
12 witnesses?

13 THE WITNESS: I think it was the day before.

14 THE COURT: When was that?

15 THE WITNESS: That had to be, uh, my recollection
16 is it was the day before. It may be wrong, but that's
17 my recollection. It was the day before the, uh, the
18 meeting where Fogleman told us, or the hearing where
19 Fogleman told us about the T-shirt.

20 We spent that whole afternoon. That's what that
21 whole afternoon was, was interviewing alibi witnesses.
22 Jessie Sr. had lined them up. And that was in
23 September.

24 RE-DIRECT EXAMINATION, continuing:

25 Q] Do you think the record reflects that that hearing took

1 place on September 27th and reflected a billing for 9.5 hours for
2 court appearance and travel time?

3 A] Okay. On 9/26, there's interviewing witnesses, uh, 3.30
4 hours; meet with client's families ; interviewing witnesses,
5 4.30 hours; preparing for hearing, interviewing witnesses 3.75
6 hours; we spent that whole day, early until late, uh, on 9/26.

7 Q] And, and this is during the time period that Mr. Davis was
8 referring to where Jessie, Sr. was making some noises in the
9 paper about you guys not doing your job?

10 A] This was before. I think that happened in August, if I'm
11 not mistaken. I was thinking it was September, but according
12 what Mr. Davis said - - touchstone's easy to connect, was that
13 would have been in August, uh, this was the end - - my
14 recollection was this was a day before the hearing in Marion or
15 West Memphis, where Fogleman told us that the T-shirt matched
16 Jessie, as well. And then it was after Jessie had asserted,
17 contended to us that he was innocent.

18 Q] All right. So this is one day on the 26th where you get
19 together with the witnesses?

20 A] Yes, sir.

21 Q] And I think you said that you continued to investigate the
22 alibis up until the time of trial. I'm trying to see where else
23 that's reflected?

24 A] (Witness examining same.) It's not reflected, but I'm
25 pretty sure on the 20th of December, we spent fifteen hours that

1 day with some of the alibi witnesses. I'm not going to sit here
2 and swear that's the case.

3 Q] You're saying you spent fifteen hours on what day?

4 A] December 20th, is what it says.

5 Q] And you didn't bill a single hour for that?

6 A] No, it's on there. 15.2 hours is on there. Travel to West
7 Memphis, conference with chief of police in Turrell; conference
8 with Jessie, Sr.; review negatives of *West Memphis Evening Times*
9 conference with Gitchell and Fogleman; visit crime scene;
10 prepare for hearing. I'm not sure - - that rings true to me
11 that we would have been, I would have been talking to the alibi
12 witnesses that day, but I can't say which ones.

13 Q] In other words, the entry does not in any way indicate you
14 interviewed any witnesses; right, it reflects some of the other
15 entries?

16 A] No, it does not.

17 Q] But what you're saying is because some many hours were
18 billed that day, that you were probably interviewing witnesses?

19 A] On that day we were in West Memphis.

20 Q] Do you know who you interviewed?

21 A] No, sir.

22 Q] Did you keep any, uh, notes of interviews that you did
23 personally of these alibi witnesses?

24 A] I believe I saw some in the file the other day. That's the
25 first time I had seen the file in fifteen years. Yes, there

1 were some.

2 Q] And you said that Lax was providing some sort of assistance
3 here; correct?

4 A] Yes, sir. That's true.

5 Q] Was Lax providing you with memos and interviews that he was
6 conducting?

7 A] Yeah, but to what extent, I don't recall. There were, uh,
8 we had a file on every person and some of the files would have
9 memos or notes from Lax and as to what they were about it seems
10 like.

11 Q] Did you have some game plan in court where one of you was
12 examining a witness, that the other person was reviewing what
13 information he had on the witness and reminding the other law-
14 yer to ask certain questions that might impeach the witness,
15 based on the investigation?

16 A] Yes.

17 Q] Do you recall a witness named Jennifer Roberts?

18 A] Not off the top of my head.

19 Q] Do you recall that you had some information to impeach a
20 witness named Vicky Hutcheson?

21 A] I remember Vicky, but I don't remember what - - I know we
22 wanted to impeach real bad because I thought she was lying.

23 Q] You wanted to impeach her real bad?

24 A] Yeah.

25 Q] So you didn't have any reason not to use information that

1 you had from Lax or anybody else to impeach?

2 A] No, sir.

3 Q] Uh, are there any other entries here, other than that one
4 you just referenced that might reflect interviews you conducted?

5 A] (Witness examining same.) I don't remember who the parties
6 are we interviewed in Earle on December 31. It says travel to
7 Earle to interview Buddy Lucas; conference with Lax; Jessie,
8 Sr.; Dee Carter; David Sims; and Keith Johnson. I don't
9 remember who all of the parties are.

10 Q] Was Buddy Lucas an alibi witness?

11 A] I don't think he was.

12 Q] Any other entries before the start of trial?

13 A] (Witness examining same.) There's an entry on January 2nd,
14 trial preparation, 12.7 hours, and then on, I guess that's Dan's
15 statement. And mine are interview witness statements; work on
16 brief; conference with Stidham Re: witnesses; review discovery.

17 Q] Does it refer to witnesses in that entry?

18 A] It doesn't say it, but obviously I'm preparing, we're
19 preparing to go to trial so, uh, I don't, uh, preparing for
20 trial, so I'm assuming we were in Paragould, uh, but I don't
21 recall if I talked to him on the phone or anything else. I
22 don't know. I don't recall. It's been so long, it's a full day
23 at work and I was dealing with witnesses on that day, obviously.

24 Q] And why do you say "obviously"?

25 A] Conference with tomorrow's witnesses; review witness

1 statements, that's the first thing I said; work on brief.

2 Q] Did you have a lot of witness statements in your file?

3 A] Yes.

4 Q] Police interviews, for instance?

5 A] Yes.

6 Q] So it could have been reviewing police interviews?

7 A] Could have been.

8 Q] You don't know whether you were interviewing witnesses?

9 A] No. I don't know. 1/3, meet with police and prosecutor;
10 travel to West Memphis; interview witness.

11 Q] Do you know who that witness was?

12 A] No, sir. 1/4, investigate case in West Memphis. That was
13 probably, I was in West Memphis. That very easily could have
14 been - - I know I met with a witnesses before we put them on.

15 Q] Would you agree that the billing records speak for them-
16 selves in terms of whether the witnesses were interviewed on a
17 certain date?

18 A] Not necessarily. No. An investigation case in West
19 Memphis very easily could have been meeting with a witness. So
20 not necessarily; no, sir.

21 Q] Now the question was asked of you about Dr. Wilkins. Let
22 me make sure I understand. Are you saying that because Dr.
23 Wilkins was providing you with IQ numbers that were higher or
24 lower than some of the other numbers that it didn't make any
25 difference what his credibility was?

1 A] No, I didn't say that at all.

2 Q] Was there, aside from the numbers he was giving you, was
3 there some importance to making sure that he was a credible
4 witness?

5 A] Surely. In the first place, one of the things that the
6 prosecutor was trying to say was that Jessie was, I think the
7 term was "malingering" or something on those lines, but I assume
8 the person doing the interview, uh, the test, would be the best
9 person to say whether he was or whether he wasn't. I don't know
10 enough about psychology to know if that's a subjective or ob-
11 jective issue. But he would lay the foundation for several
12 things that Ofshe was going to get into, and he needed to be a
13 believable witness.

14 Q] He needed to be a believable witness and therefore these
15 problems about his credibility had some significance?

16 A] Absolutely.

17 Q] And you had every incentive to investigate those problems
18 and decide in advance whether you can safely put him on the
19 stand?

20 A] Yes.

21 Q] But you didn't do that; right, you took his word?

22 A] I took his word.

23 Q] That there were no problems?

24 A] Biggest mistake, in retrospect.

25 Q] And it kind of blew up in your face?

1 A] Yes, sir.

2 Q] And the reason it blew up was because you didn't do the
3 investigation that was necessary in order for you to make a
4 tactical judgment about whether you could put a witness like
5 that on the stand?

6 A] He convinced me that he was fine.

7 Q] Now attention was brought to the fact that you hired Ofshe
8 and you hired Holmes. Ofshe, as I understood, was going to
9 testify on your false confession theory; right?

10 A] Yes.

11 Q] And Holmes testified about the same issue?

12 A] Yes.

13 Q] Correct me if I'm wrong, but I thought you said that part
14 of your defense strategy was, an important part of your strategy
15 was to impeach the credibility of that confession, which you
16 claim is false, in any way that you could?

17 A] Yes, sir.

18 Q] And did you realize that the prosecution's forensic path-
19 ologist, Dr. Peretti, damaged your case in terms of attacking
20 the credibility of that confession because he was testifying
21 about the sexual assault and things that corroborated to a
22 certain degree?

23 A] Yes, anything that corroborated the confession obviously
24 would, uh, would hurt us. Yes.

25 Q] So you were aware that there was an area of expertise that

1 was important to your case, namely, forensic pathology, that you
2 had no assistance on whatsoever?

3 A] Yes.

4 Q] And you also admit that there was no tactical reason, other
5 than your belief about your inability to obtain funds that
6 prevented you from pursuing an independent forensic pathologist?

7 A] Yes, that's correct.

8 Q] The same questions about the serology DNA, you realize that
9 that area of expertise was something that was very, very import-
10 ant to the prosecutions attempt to bolster the confession?

11 A] Yes.

12 Q] And you realized that any evidence that contradicted that
13 would have been important to your defense?

14 A] Yes.

15 Q] And the only reason you didn't pursue expertise in those
16 two areas was because of your belief that the Court would not
17 grant you the funds to obtain those independent experts?

18 A] Yes, that's correct.

19 THE COURT: Greg, did you raise that on appeal,
20 the inability to have trial funds?

21 THE WITNESS: No, sir.

22 THE COURT: Did you ever file a pleading before
23 the Court requesting funds?

24 THE WITNESS: Not that I recall. No, sir.

25 THE COURT: I don't recall it, either.

1 RE-DIRECT EXAMINATION, continuing:

2 Q] If the record reflects that the only motion that was filed
3 on Mr. Misskelley's behalf for any sort of expert assistance was
4 the early motion for a DNA expert, would that be contrary to
5 what you remember?

6 A] I didn't even remember that motion being filed. So that's,
7 uh, yeah, that would be consistent. I don't, again, my
8 presumption was that we didn't get money for experts.

9 Q] Did you ever think in that regard that although you were,
10 you were pessimistic that Judge Burnett would grant those funds;
11 correct?

12 A] Yes.

13 Q] Did you ever think that regardless of whether Judge Burnett
14 was going to grant the funds or not, you needed to make the re-
15 quest and to make a record so that in the event that Mr.
16 Misskelley was convicted, and especially if he was sentenced to
17 death, you had some appealable issue to take to the Arkansas
18 Supreme Court and beyond, uh, on the grounds that you had been
19 denied an effective defense because of lack of funds?

20 A] It never entered my brain.

21 Q] It never entered your brain and you never read any Supreme
22 Court cases or any federal, other federal cases on the right of
23 an indigent defendant to get state funding in a capital case?

24 A] I never did that research. No, sir.

25 Q] You had no strategic reason for failing to do that re-

1 search; correct?

2 A] No, sir.

3 Q] And you certainly had no strategic reason for raising the
4 issue in the Arkansas Supreme Court?

5 A] No. That's the way it was. In my mind, that's the way it
6 was. Two and two is four, and that was just it.

7 MR. BURT: Okay. Thank you. I'd move into
8 evidence the billing records.

9 THE COURT: All right, they well be received.

10 MR. BURT: Thank you. And the ABA Standards, I'd
11 move into evidence, also.

12 THE COURT: I think I've already received those,
13 although at some point the record ought to be clear
14 that in 1993 those standards were not the standards
15 that was applied to the state of Arkansas. They might
16 have been the ABA standards, but we certainly weren't
17 following and it certainly wasn't until several years
18 later that we developed the program that we have now.

19 MR. BURT: I think we're going to be addressing
20 that with some of the other witnesses.

21 THE COURT: Well, I hope somebody does, because
22 the record needs to be clear on it. I think Jeff's
23 got a pretty good history on it; we've talked about it
24 earlier.

25 MR. ROSENSWEIG: Judge, the Public Defender

1 Legislation passed in early session in 1993 the
2 conflicts office and also the prior commission
3 promulgates standards and requires two counsel. I
4 think that passed in '93.

5 THE COURT: Well, the way I remember it, at the
6 time this case was tried the public defenders were
7 hired and paid for by the counties and any expense
8 money had to come from the counties. In fact, when I
9 did order payment in this case to the lawyers, there
10 was another lawsuit by the county government objecting
11 to it because they wanted the State to pay it. And
12 how it was resolved, I can't remember, but there was a
13 big fuss over who was going to pay it.

14 MR. ROSENZWEIG: There were several cases that
15 went back and forth. The case involving *Arnold* ...

16 THE COURT: ...well, I handled the *Arnold* case,
17 which was before this, and it gave substantial payment
18 to the lawyers.

19 MR. ROSENZWEIG: That was in 1991 an the Court
20 held, and I cannot - - I think it was the case
21 involving Jerry Post, but I'll double check on that
22 tonight, uh, that was some state requirement for ob-
23 taining funds by the State. But the fee and expense
24 caps were busted in 1994.

25 THE COURT: I remember that. But what I'm

1 pointing out is at the time, the lawyers were paid by
2 the counties and the funds came from the counties.
3 And I think in order for them to get paid, there had
4 to be a lawsuit.

5 In fact, I believe the lawsuit was filed in
6 Crittenden County. Now I don't know how it was
7 resolved. Do you remember how it was resolved, David?

8 THE WITNESS: Judge, I can tell you how it got
9 resolved. In our case, it finally, the Supreme Court
10 finally ordered the State to pay what fees you had
11 awarded.

12 THE COURT: Well, it did go up on appeal.

13 THE WITNESS: Yes, sir, it went to the Supreme
14 Court. And we finally had to go before the Claims
15 Commission and file a claim with the Claims Commission
16 to get paid.

17 THE COURT: That's the way I remember. All of
18 the monies were paid by the Claims Commission.

19 RE-CROSS EXAMINATION

20 BY MR. DAVIS:

21 Q] Greg, I'm going to ask you some more questions and see if
22 any of this refreshes your memory or causes any places of
23 conflict. Were you aware that prior to January 3rd of 1994, that
24 criminal trials prior to that date were not bifurcated trials?

25 A] That's my, yeah, in general, yes. I couldn't give you that

1 date, but yeah, that sounds right. Yes, sir.

2 Q] Okay. And prior to January 1st 1994, in the state of
3 Arkansas if a defendant in a non-capital case, or a defendant
4 found guilty of a non-capital offense, the jury determined the
5 sentencing at the same time they determined guilt or innocence,
6 without two separate phases?

7 A] Yes, sir.

8 Q] Okay. Now this trial, which takes place in the late part
9 of January and comes to an end in the early part of February of
10 '94 was one of the first trials in our district in which the new
11 standards were applied to it; correct?

12 A] Yes, sir.

13 Q] Do you recall not only did this defense possibly have the
14 opportunity to present mitigation in a bifurcated trial setting,
15 but the State could also present victim impact testimony for the
16 first time as well; correct?

17 A] Yes, sir.

18 Q] Okay. Do you recall discussions that were made and maybe
19 not on the record, but that the State was willing to waive any
20 victim impact sort of evidence that would be presented and
21 presenting additional evidence along that line if we went ahead
22 and just proceeded to arguing the punishment issue, rather than
23 present additional evidence?

24 A] I didn't recall that at all until the other day when I saw
25 a portion of the transcript, where we had some discussion about

1 that. I honestly don't have any first-hand recollection of that
2 at all, but I don't doubt that, but I don't have any first-hand
3 recollection.

4 MR. BURT: Excuse me for interrupting. He's
5 stated he's got no first-hand recollection. His
6 statement that he doesn't doubt, and he has no
7 independent recollection are the same.

8 THE COURT: Sustained.

9 MR. BURT: Thank you.

10 RE-CROSS-EXAMINATION, continuing:

11 Q] Was it, did I understand you to say that in this particular
12 case it was Dan and your assessment that there was no way that
13 Jessie Misskelley was going to take the witness stand?

14 A] That's true.

15 Q] Does that hold true whether it was in the guilt/innocence
16 phase or the penalty phase?

17 A] Yes.

18 Q] Okay. And would it strategically, if you're putting on a
19 mitigation defense and your client, who has not testified at the
20 regular trial is sitting there, wouldn't it be, uh, devastating
21 to then proceed forward with a mitigation defense and try to put
22 on a mitigation case, if you don't put your client on the
23 witness stand?

24 A] I think that's probably as much tactical as than to put him
25 on in the trial in chief, but I think you could put on, I could

1 perceive, limited experience I've got, but putting on a
2 mitigation defense with psychologists and parents and things
3 like that, uh, without putting on my client.

4 Q] And I also noted in here when photos, copies and films, in
5 addition to Mr. Holmes, Dr. Ofshe and Dr. Wilkins, that you also
6 had employed or at least had the benefit of a person to help you
7 select the jury?

8 A] Yes, I had forgotten that. Yes.

9 Q] And that was somebody that you were able to retain to
10 assist you with the expertise in the area of jury selection?

11 A] That's correct.

12 Q] Had you ever seen or used such an expert, or were you aware
13 if Dan had prior to this trial?

14 A] No. I knew they existed, but no, I had never used one.

15 Q] And in your review of the billing, did you see in there any
16 reflection as to time spent or hours involved in the change of
17 venue motion?

18 A] Do you want me to go back through them?

19 Q] Well, from what you have reviewed up to this point, do you
20 recall seeing it?

21 A] I wasn't looking for those words, but I didn't see it.

22 Q] Now you were able to, you or Dan one, or both of you, what-
23 ever, filed a change of venue motion, which in fact was granted?

24 A] I think I did most of that work.

25 Q] And as part of that change of venue motion at this state,

1 you've got to at least be able to provide affidavits reflecting
2 that individuals indicate that your client couldn't get a fair
3 trial in a particular county; correct?

4 A] I don't even remember that, but yes, sir, if that's in the
5 record, but I don't recall it.

6 Q] Okay. And in this particular case it was your assessment
7 as well as Dan's that a trial in Crittenden County would not
8 have been helpful to your client; it would have been detri-
9 mental?

10 A] Absolutely.

11 Q] Okay. And so you spent time and effort in obtaining the
12 necessary affidavits in order to have a change of venue motion
13 granted and your case moved to Clay County?

14 A] Yes, I remember even talking to the TV stations to get
15 prints of where they broadcast to and the radio stations where
16 they broadcast to, trying to show how much media coverage there
17 was in northeast Arkansas.

18 MR. DAVIS: One second, Judge.

19 (Pause.)

20 RE-CROSS EXAMINATION, continuing:

21 Q] Mr. Crow, did if you or Mr. Stidham consult with other
22 defense attorneys, either locally or in the area, that had tried
23 capital cases before, uh, discuss with them some of the issues
24 you were facing?

25 A] I don't recall talking to anybody. In the first place, I

1 don't know if there was anybody in Greene County who had tried a
2 capital case. I'm sure there had been, uh, I, I did not.

3 You'll have to ask Dan if he did. I did not, not that I recall.

4 Q] How was it that you got hooked up with Dr. Ofshe?

5 A] If I recall, Dan may remember this better than I will, or
6 know better than I do, but I recall, I believe it was Val Price
7 who knew something about him and suggested to us.

8 Q] Do you remember how you got hooked up with Holmes?

9 A] Holmes came from Ofshe, if I recall. Ofshe suggested we
10 needed someone to review first and foremost the polygraph test
11 and secondly, dealing with police interrogation and he said
12 Holmes was good at both.

13 Q] Okay. Were you aware of any expert witnesses that you
14 contacted and when you talked to them, they either hung up on
15 you or said "thanks, but no thanks, come back when you've got
16 some money"?

17 A] It seems like Dan tried to contact somebody with the
18 forensic, and you'll have to ask him for sure, but it's my
19 recollection there was somebody he contacted back east who
20 wouldn't give him the time of day.

21 Q] Do you remember what area it would have been?

22 A] I was thinking it was something to do with the, uh, --
23 boy, I'm going blank - -it's tough here. I was thinking it was
24 something to do either with the, uh, with some of the, uh,
25 marks, uh, on the bodies, what I think. That may have even been

1 after the trial, but honestly, I don't recall. It seems like
2 that happened before, but Dan would know. It was Dan; I
3 certainly did not contact anybody.

4 MR. DAVIS: Nothing further.

5 RE-REDIRECT-EXAMINATION

6 BY MR. BURT:

7 Q] Just real quickly: On the change of venue motion, do you
8 recall that your motion asked that the case be moved out of the
9 district?

10 A] Yes.

11 Q] And do you recall that at the argument on the change of
12 venue, Mr. Davis stood up and said, "You weren't entitled to be
13 moved out of the district for a number of reasons; mainly,
14 because you didn't present any affidavits showing that you
15 couldn't get a fair trial within this district"?

16 A] I remember I wanted it out of the district. I have to re-
17 read the record to see what Mr. Davis argued. I don't recall.

18 Q] And, uh, do you recall that the Court denied your motion to
19 set the case out of the district?

20 A] They left it in the district.

21 Q] Were you anxious to try the case in Clay County; did you
22 think that was going to be a good venue?

23 A] No, I wanted it as far away from West Memphis, Arkansas
24 that I could get. And I really wanted it in Fayetteville, or
25 Texarkana.

1 Q] Okay. And that's why you had asked to move it out of the
2 district; correct?

3 A] Yes.

4 Q] Did you have any response when Mr. Davis argued that you
5 hadn't done the work to present the facts or showing you needed
6 to make in order to get it out of the district?

7 A] The record ought to reflect that. I do not recall.

8 MR. BURT: That's all I have.

9 MR. DAVIS: Your Honor, if I might request that
10 the Court would make a note to review that particular
11 part of the transcript, because I really - - I read
12 through it last night and I don't think that
13 accurately depicted what was discussed at that,
14 without having the transcript to speak for itself.

15 MR. BURT: And I think I will be covering that
16 with Mr. Stidham.

17 THE COURT: The way I remember it, that was a big
18 issue as to whether or not the Court even had the
19 power to remove the case from the judicial district.

20 MR. BURT: That's right.

21 THE COURT: And I was of the opinion and belief
22 and I think it was later affirmed by the Supreme Court
23 that I could not move it outside of the judicial
24 boundaries, but I could move it, and I did move it as
25 far as possible, which was Clay County, about two

1 hundred and fifty miles from West Memphis.

2 MR. BURT: There was a lot of discussion about
3 that, and I think you came down saying, "If I feel
4 like I've got to move it out of the district, I'll do
5 it but I haven't seen what I need to do change it."

6 THE COURT: Well, I think that's right. I don't
7 at that time there was any law on that particular
8 issue, except maybe the *Sandy Weems* case, uh, but I
9 mean, I'm not even sure that involved removing it out
10 of the judicial district.

11 MR. DAVIS: Judge, if I could interject, what I
12 think the record reflects, and I mean, obviously, it's
13 what's going to be in the record, but what I think the
14 discussion was that under the change of venue
15 statutes, you're supposed to actually have affidavits
16 from townships in the entire county in order to
17 establish that in the entirety of the county where the
18 case is being tried, you can't get a fair trial.

19 What I think the argument was, was that they
20 presented affidavits, but those affidavits covers like
21 maybe Marion and West Memphis, but not the outlying
22 areas of the county.

23 And technically, that was deficient and you
24 shouldn't be able to get one, but the Court granted
25 the change of venue anyway and the issue is whether

1 we're going to end up outside of the county.

2 And I think it was in this transcript, the Court
3 basically said you're really, you know, there's law
4 that says you're only entitled to one change of venue,
5 but that you would reconsider that if at the time
6 we're selecting a jury, it became abundantly clear
7 that there was going to be a difficulty in obtaining a
8 jury that would be fair and impartial.

9 THE COURT: I think that's correct.

10 MR. BURT: I'll review the transcript. I
11 certainly don't mean to misrepresent it. I remember
12 it a little bit differently, but I'll check it tonight
13 and inform the Court tomorrow what I've found.

14 THE COURT: Okay. That's fine. And tomorrow
15 morning we're going to be in 4A, back over where we
16 started yesterday. So y'all will have to haul your
17 gear back over there.

18 I guess you can do it tonight if you want to, but
19 we'll be in courtroom 4A and start at 9:30. Court
20 will be in recess until in the morning.

21 (WHEREUPON, the proceedings in the above-styled cause were
22 adjourned at 4:55 p.m., September 29, 2008.

23 **September 30, 2008**

24 THE COURT: All right, are we ready to proceed?

25 MR. BURT: We are, Your Honor.