

1 larly Paul Ford or Robin Wadley, in fact, had informal meetings
2 with members of the Crime Lab prior to trial?

3 A] Yes, they did.

4 Q] They did?

5 A] Yes, the meetings were - - I know that Mr. Ford went to the
6 Crime Lab on one occasion and talked to Dr. Peretti and some
7 others and I think there were follow-up phone conversations.

8 Q] There were what?

9 A] There were phone follow-up conversations with Kermit
10 Channell.

11 Q] Do you know whether or not there were any conversations
12 with regard to the hypothetical hair we've talked about?

13 A] I don't know.

14 MR. HOLT: Counsel and co-counsel have nothing
15 further.

16 THE COURT: Are we done?

17 MR. PHILLIPSBORN: Yes, Your Honor.

18 THE COURT: Okay.

19 MR. PHILLIPSBORN: Thank you, Mr. Lassiter.

20 THE WITNESS: You're welcome.

21 THE COURT: Do you have another witness?

22 MR. PHILLIPSBORN: Yes, Your Honor. Mr. Burt,
23 Your Honor, is calling that witness. We're getting
24 out of line.

25 THE COURT: Okay.

1 MR. BURT: We call Victoria Hutcheson.

2 THE COURT: Raise your right hand and be sworn.

3 (Witness sworn.)

4 THEREUPON,

5 VICTORIA HUTCHESON

6 was called as a witness by and on behalf of the Petitioner/
7 Defendant and having been duly sworn, was examined and testified
8 as follows, to-wit:

9 DIRECT-EXAMINATION

10 BY MR. BURT:

11 Q] Good afternoon.

12 A] Hi.

13 Q] Would you state your name, please?

14 A] My name is Victoria Hutcheson.

15 Q] And Ms. Hutcheson, uh, did you testify in the trial of
16 Jessie Misskelley back in, uh, I believe, January of 1994?

17 A] Yes, I did.

18 Q] You did not testify in the Baldwin/Echols trial, as I
19 understand it?

20 A] No, I did not.

21 Q] Okay. And, uh, before you took the stand here today, uh,
22 did I advise you that your testimony here was going to involve,
23 uh, some statements that you gave to my investigator back in
24 2004?

25 A] Yes, you did.

1 Q] Uh, do you recall making some statements, some sworn state-
2 ments on video tape with Ms. Pemberton on June 24, 2004?

3 A] Yes, I do.

4 Q] And did I inform you before I put you on the witness stand
5 today that, uh, if you testified in court, you could be stating
6 that you lied under oath?

7 A] Yes, you did.

8 Q] Uh, did you indicate to me that you had consulted with Dan
9 Stidham and that he had advised you that the statute of limita-
10 tions had run on any perjury charges?

11 A] Yes, sir.

12 Q] And do you recall before you took the stand you asked me
13 whether it was okay for you to testify and I told you I couldn't
14 advise you as to that, but I would bring the issue up with the
15 judge before you said anything?

16 A] Yes, sir.

17 Q] Okay. Is there anything you want to discuss with the judge
18 before I ask you questions which could tend to incriminate you
19 as to your prior testimony?

20 A] I would like to know if I am still held liable?

21 THE COURT: All right, gentlemen, approach the
22 bench.

23 (WHEREUPON, a bench conference between Court and counsel was
24 held as follows, to-wit:)

25 THE COURT: I can't remember if the statute of

1 limitations on perjury. I think it occurs at the time
2 it's discovered and then somebody tell me.

3 MR. RAUPP: I don't know.

4 THE COURT: I don't know, either. I think that if
5 you testified ten years ago and then it's discovered
6 ten years later that you committed perjury, that's
7 when the statute of limitations begins to run.

8 But I may be wrong on that. Does anybody know?
9 I don't know. I'm asking you.

10 MR. BURT: Jeff was here and he knows all about
11 it.

12 THE COURT: Well, where is he now?

13 MR. BURT: He does know about it, but I obviously
14 didn't feel comfortable advising her.

15 THE COURT: Jeff, when does the statute of limita-
16 tions begin to run on perjury? At the time it's
17 discovered, so many years forward?

18 MR. ROSENZWEIG: Well, the issue is this: when - -
19 there is a specific part of perjury statute that says
20 that contradictory statements under oath can be
21 perjury and the state doesn't have to prove which is
22 perjurious, just that it's a contradictory statement
23 under oath.

24 MR. HOLT: Well, if she makes a contradictory
25 statement now, perjury has been committed.

1 MR. BURT: Today?

2 MR. HOLT: Today.

3 THE COURT: That's my understanding.

4 MR. ROSENZWEIG: That would be the logical
5 assumption, whether, I don't know if the courts have
6 specifically held that.

7 THE COURT: Well, my thought on it is, and of
8 course, I'm a retired old fart now but if you commit
9 perjury ten years later, it's perjury at the time you
10 do it. Now that's what I'm thinking.

11 MR. RAUPP: That's what I'm thinking.

12 THE COURT: But now I don't know. I'm deferring
13 to somebody who knows.

14 MR. ROSENZWEIG: Well, Your Honor, I would feel
15 more comfortable if you're getting ready to elicit
16 potential perjury from this witness, that she have an
17 independent attorney to counsel with her, because I
18 don't know.

19 MR. BURT: Is there somebody we could get for
20 her?

21 MR. ROSENZWEIG: The public defender was in the
22 building a few minutes ago. I saw him; Bill Howard.

23 THE COURT: Bill is probably running as fast as he
24 can right now. Is he still around?

25 MR. ROSENZWEIG: He was a few minutes ago and we

1 exchanged pleasantries. I have no idea if he's still
2 in the building or not.

3 THE COURT: Well, do you have a different view as
4 to when perjury occurs?

5 MR. ROSENZWEIG: Do I have a different view?

6 THE COURT: Is it the same as mine?

7 MR. ROSENZWEIG: I, I don't, well, let's put it
8 this way: I think that your view is logical. I don't
9 know if the courts have specifically ruled on it.

10 THE COURT: Well, I don't either.

11 MR. ROSENZWEIG: But I think it's, I think it's, I
12 think it is a logical assumption from the idea that
13 contradictory statements under oath, uh, one
14 definition of perjury and you don't have contradictory
15 statements until that statement is made.

16 THE COURT: Until they're made.

17 MR. BURT: I think she's in jeopardy.

18 THE COURT: Have you got another witness?

19 MR. BURT: No, and actually, this is going to be
20 rather long and would take us until 5:00 p.m. She
21 made a lengthy taped statement where she admitted
22 perjury.

23 THE COURT: I was trying to remember what her
24 testimony was. It had something to do with...

25 MR. BURT: ...she...

1 THE COURT: ...she was up in a tree or something
2 and saw something happen.

3 MR. BURT: No, what she said was that, uh, Echols
4 had invited her to a Satanic meeting...

5 THE COURT: ...Satanic, yes. And then she went.

6 MR. BURT: And that Misskelley was there and the
7 orgy was going on and all this other stuff.

8 THE COURT: Yes, but she wasn't using the nectar.

9 MR. BURT: You're right. That's exactly right.
10 So the statement she made to us is that it's perjury
11 as she stated in the process that it's a total lie and
12 she's prepared to testify.

13 THE COURT: Well, what do y'all want to do?

14 MR. HOLT: What's she going to say?

15 THE COURT: Well, I don't know. If she commits
16 perjury, you're going to charge her, is what I under-
17 stand.

18 MR. HOLT: Well, I haven't seen a copy of the
19 statement that's she's purported to have given under
20 oath.

21 MR. BURT: Yeah, you have. It's attached to the
22 confession. How about use immunity?

23 THE COURT: But it might fly under the collar of
24 the Court, too.

25 MR. ROSENZWEIG: Well, the Court can decide

1 whether to grant use immunity, but the appropriate - -
2 the state has to petition.

3 THE COURT: I mean, I'd be angry about the per-
4 jury that occurred years ago. I don't care; whatever
5 y'all want to do. If you want her to testify; fine.
6 Court will be in recess for ten minutes. I'm going to
7 go try to find Bill.

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

10 THE COURT: Court's back in session. I don't
11 really think we need to approach the bench. We can
12 just do it from right here. Go ahead.

13 MR. HOWARD: For the record, I'm Bill Howard, an
14 attorney of the Craighead County public defender's
15 office. I apologize for not being dressed, but I
16 didn't know I was coming up here, uh, but I was
17 advised that I was asked to speak to this lady, uh,
18 about some potential testimony.

19 We've had an opportunity to visit, uh, I think
20 that there is a possibility that some testimony might
21 be contradictory to prior testimony, uh, I have
22 advised her that I couldn't guarantee her that she
23 would not be subject to prosecution.

24 I think she intends to decline to testify and
25 protect the 5th Amendment right she would have. Uh,

1 she does, she would like the opportunity, if the
2 prosecution would agree to be in a position to do
3 this, if she had any kind of immunity, she would do
4 that.

5 And I know that's a decision somebody else would
6 have to make and she would, she wants to testify, but
7 on the other hand, she realizes she might put herself
8 in some jeopardy, and declines to participate at this
9 time.

10 MR. HOLT: We're not inclined to grant her
11 immunity in order for her to testify.

12 THE COURT: All right. Anything else, gentlemen?

13 MR. BURT: Not as to the testimony.

14 THE COURT: Okay.

15 MR. HOWARD: Thank you. May I be excused?

16 THE COURT: Yes. Thanks, Bill.

17 MR. BURT: If we could just hold her, because I
18 think that at this point, Your Honor, we are going to
19 be offering, uh, as a declaration against the subpoena
20 and statement that she made to us, uh, under oath on
21 June 24th, 2004 which is a video taped statement that
22 was, uh, conducted, as I say, June 24th, 2004.

23 And so, and it would be our argument to the Court
24 that at this point she is legally unavailable. As the
25 Court will see when it looks at the transcript, she

1 admits to committing perjury at the prior trial and I
2 think that clearly qualifies that declaration against
3 penal interest.

4 THE COURT: What's the state's position?

5 MR. HOLT: We reserve an objection as to the hear-
6 say that she did, in fact, give it under oath. And we
7 have to make the argument that it's under oath against
8 penal interest.

9 THE COURT: All right, it can be received, but the
10 state can reserve its right to object, and you can
11 brief the issue.

12 MR. BURT: So Your Honor, could I mark as next in
13 order the DVD of the interview with Ms. Hutcherson?

14 THE COURT: Yes.

15 MR. BURT: And then for the Court's convenience,
16 we have a transcript which I'll also mark as an
17 exhibit.

18 Exhibit #67 will be the DVD, which by the way,
19 the transcript is Exhibit C to our petition and I'll
20 mark the transcript as Exhibit #68.

21 THE COURT: Has that already been filed in the
22 petition?

23 MR. BURT: The transcript has, yes.

24 THE COURT: Maybe that's where I've read it.

25 MR. BURT: It could be.

1 THE COURT: It's like that girl that testified
2 this morning. I swear I've heard her testimony
3 before.

4 MR. BURT: Well, she testified at trial, and you
5 probably also looked at the transcript. So at this
6 point, Your Honor, we would move those two exhibits
7 into evidence and, uh, whatever the Court's pleasure,
8 we can continue and play it on screen or we have no
9 objection to the Court looking at it outside of court,
10 if that's your preference.

11 THE COURT: I'll just read it.

12 MR. BURT: That's fine. And the DVD is available,
13 as well. And other than that, Your Honor, I think on
14 behalf of Mr. Misskelly, we would move into evidence
15 whatever exhibits have not been moved in, and we would
16 rest on behalf of Mr. Misskelley.

17 There are two housekeeping matters, uh, I'm going
18 to mark, ask to be marked, uh, two other portions of
19 Mr. Stidham's trial file.

20 One is a file marked Vickie Hutcheson, which
21 comes out of box C and also from that same box, a file
22 marked Aaron Hutcheson.

23 THE COURT: All right, they may be received.

24 (WHEREUPON, Petitioner/Defendant's Exhibit # 68 was admitted and
25 received into evidence and is appended on page.)

1 (WHEREUPON, Petitioner/Defendant's Exhibit #69 was admitted and
2 received into evidence and is appended on page .)

3 THE COURT: Now this last exhibit you introduced
4 would only apply to Mr. Misskelley.

5 MR. BURT: I believe that's correct.

6 THE COURT: Well, she didn't testify in the sub-
7 sequent trial.

8 MR. BURT: That's right.

9 MR. PHILLIPSBORN: That's correct, Your Honor, as
10 to Mr. Baldwin.

11 MR. BURT: And then, Your Honor, next in order
12 would be the mental health records of Ms. Hutcherson
13 and, uh, these were received pursuant to a subpoena
14 and I believe the state is prepared to stipulate that
15 they were properly received into court sealed, uh,
16 they were opened by agreement and, uh, we ask that
17 those be marked, as well.

18 MR. HOLT: No objection.

19 THE COURT: All right. They may be received.

20 (WHEREUPON, Petitioner/Defendant's Exhibit #70 was admitted and
21 received into evidence and is appended on page .)

22 MR. BURT: Next in order would be the file from
23 trial counsel box C file marked Vickie Hutcheson.

24 THE COURT: There's something in my mind that she
25 worked for a lawyer in Fayetteville around the time of

1 this trial.

2 MR. BURT: That could be.

3 THE COURT: I think she worked for a Fayetteville
4 lawyer about the time of the trial, didn't she?

5 MR. BURT: Exhibit #70 would be the Aaron
6 Hutcheson file and #71 would be the mental health
7 records and then I need to put Ms. Pemberton back on
8 the stand.

9 (WHEREUPON, Petitioner/Defendant's Exhibit #71 was admitted and
10 received into evidence and is appended on page .)

11 THEREUPON,

12 NANCY PEMBERTON

13 was recalled as a witness by and on behalf of the Petitioner/
14 Defendant and having been duly sworn, was examined and testified
15 as follows, to-wit:

16 DIRECT-EXAMINATION

17 BY MR. BURT:

18 Q] Ms. Pemberton, I believe you have already been sworn as a
19 witness?

20 A] Yes, I have.

21 Q] Uh, first of all, with regard to these exhibits, number 69,
22 did you retrieve that from Mr. Stidham's trial counsel file?

23 A] Yes, I did.

24 Q] And, uh, Exhibit 70, did you retrieve that from Mr. Stid-
25 ham's trial counsel file?

PROPERTY OF ARKANSAS SUPREME COURT/COURT OF APPEALS

CR 10 00456

Appellant(s)

Charles Jason Baldwin
Jessie Lloyd Misskelley, Jr.

v. Craighead Circuit, Western District
Hon. Charles David Burnett, JUDGE
CR93-450 (BALDWIN), CR93-47 (MISSKELLEY)

Appellee(s)

State Of Arkansas

25 Volume Supplemental Record Lodged
3 Envelopes Exhibits
1 Small Box Exhibits

Writ Returned
Supplemental Record Filed
June 11, 2010
Leslie W. Steen, Clerk
By Renee Herndon

Volume 10

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IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
CRIMINAL DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CR-93-~~4~~ 4506

JASON CHARLES BALDWIN

DEFENDANT

VOLUME IX of X

FILED

APR 21 2010

Ann Hudson
Circuit Court Clerk

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8

1 A] Yes, I did.

2 Q] Are those both in the condition they were in when you
3 received them Mr. Stidham.

4 A] Yes, but there's a sticker that I put on one of the files
5 from box C.

6 Q] Is that were you obtained them from?

7 A] Yes, the trial counsel's box.

8 THE COURT: They've been offered without
9 objection and the Court has received them, but those
10 are files that are approximately half an inch to inch-
11 thick. I don't what's in them. What's in them?

12 MR. BURT: Well, I was going to go through that.

13 THE COURT: Okay.

14 DIRECT-EXAMINATION, continuing:

15 Q] And 71, do you recognize those as the mental health records
16 that were subpoenaed?

17 A] Yes, and we opened them here in court and reviewed them.

18 THE COURT: Well, that was received without
19 objection.

20 DIRECT-EXAMINATION, continuing:

21 Q] Now were you the person who conducted the interview of Ms.
22 Hutcheson in June of 2004?

23 A] Yes, I was.

24 Q] And can you tell me how it was that she came to your
25 attention and was interviewed at that time?

1 A] She, uh, contacted Dan Stidham through her attorney, uh,
2 Mena Cozart, uh, and she said that she wanted to talk to us,
3 that she had things she wanted to say. So I arranged an inter-
4 view with her in Ms. Cozart's law office, uh, and Jeff
5 Rosenzweig, another attorney accompanied me.

6 Q] Okay. And before you interviewed her, did somebody
7 administer an oath to her.

8 A] Ms. Cozart administered an oath to her.

9 Q] And before you interviewed her, were you familiar with Ms.
10 Hutcherson's testimony at the Misskelley trial?

11 A] Yes, I had reviewed the testimony both on a VHS and a tran-
12 script.

13 Q] And were you familiar with the fact that she had testified
14 at the Misskelley trial that she had been - - well, let me read
15 it to you and ask you - - you read the testimony; right?

16 A] I did.

17 Q] And do you recall she was asked this question: And this is
18 at page 971.

19 Question: "At some point after the murders did you decide that
20 you wanted to play detective?"

21 Answer: "I thought I would play detective."

22 Question: "And in the course of that and without saying what you
23 had heard, had you heard some things about Damien Echols?"

24 She said, "I had heard a lot of things about Damien Echols."

25 "What did you do to try to learn more about this person?"

1 "I had Jessie Misskelley introduce us."

2 And then she goes on to talk about attending an esbat E-S-B-A-T,
3 with Mr. Echols and Mr. Misskelley?

4 A] Yes, I remember that.

5 Q] And she identified the esbat as some sort of Satanic meet-
6 ing; is that correct?

7 A] Yes.

8 Q] Was that the focus of the interview in June of 2004?

9 A] That was part of the focus of the interview; yes.

10 Q] And, uh, can you just sort of summarize what she told you
11 under oath at that time?

12 MR. HOLT: Objection, Your Honor, this is in the
13 documents that have been entered into evidence.

14 THE COURT: Yes, I'm going to sustain the
15 objection to that.

16 DIRECT-EXAMINATION, continuing:

17 Q] Now as far as you know, uh, did Ms. Hutcherson make state-
18 ments to you that indicated she had lied at the trial?

19 A] Yes, she did.

20 Q] And, uh, after she made those statements to you, did you
21 discover that she was telling other people that she had lied at
22 the trial?

23 A] Yes, uh, there were statements on the Internet, uh, that I
24 found where she said that were news articles that said that she
25 had lied at the trial.

1 Q] As part of your investigation, did you collect those news
2 articles?

3 A] I did collect the articles that I found; yes.

4 MR. BURT: Let me have this marked as next in
5 order; it's an *Arkansas Times* article of October 7,
6 2004.

7 DIRECT-EXAMINATION, continuing:

8 Q] And that's after your interview; correct?

9 A] Yes, it is.

10 Q] I'm showing you what's been marked as Exhibit #72, which is
11 an article dated October 7, 2004 entitled "Every word was a
12 lie." Is that an article that you gathered in the course of
13 your investigation?

14 A] Yes, it is.

15 Q] And does it depict Ms. Hutcherson on the front cover of
16 that publication?

17 A] Yes, it does.

18 Q] All right. Now, uh, were you familiar with Dan Stidham's
19 efforts to investigate Ms. Hutcheson before she testified?

20 A] I had his trial, uh, I had access to his trial file, uh,
21 and I had seen what he had in his file for her and I had read
22 the testimony, so I knew what he had cross-examined her on.

23 Q] Okay. And did his trial file indicate that he had inter-
24 viewed Ms. Hutcheson himself?

25 A] No.

1 Q] Did it indicate that his investigator had interviewed Ms.
2 Hutcheson?

3 A] To the best of my knowledge, he didn't actually have his
4 own investigator, uh, and Mr. Lax, who did some work for him,
5 uh, had not interviewed Ms. Hutcheson prior to Mr. Misskelley's
6 trial.

7 Q] When you got the mental health records from East Arkansas
8 pursuant to the subpoena that you issued during this case, did
9 you learn that Ms. Hutcheson had an extensive history of drug
10 usage up to and including the time that she testified at trial?

11 A] Yes.

12 Q] And do the records, the East Arkansas Mental Health records
13 reflect that she was taking Xanax, Prozac and other powerful
14 anti-psychotic drugs?

15 A] Yes, and Valium.

16 Q] Okay. Now, uh, did Mr. Stidham's trial file, the Vickie
17 Hutcheson trial file, have within it some indication that Ms.
18 Hutcheson had a connection with the East Arkansas Mental Health
19 Hospital?

20 A] Yes, there was a, uh, one page dated April 2, 1993, uh,
21 stating that she had gone there for emergency services.

22 Q] And that was provided during Discovery, according to the
23 stamp on the top of the page?

24 A] Yes, it says "DIS," which I understand to be Discovery.

25 Q] How long have you been investigating homicide cases?

1 A] Since 1992.

2 Q] And is part of standard investigative technique in a homi-
3 cide case, when the prosecutor hands over Discovery that indica-
4 tes that an important witness has some sort of mental health
5 history, what do you do as an investigator in a homicide case
6 involving three defendants?

7 A] Ask the attorney to obtain a subpoena so that we can get
8 those records, uh, directly from the Mental Health center where
9 the person received, or preferably, go and talk to the witness
10 and ask them to sign a release so that you can get the records,
11 uh, without a subpoena.

12 Q] Uh, did you attempt, in this case when you started doing
13 the investigation, get a release from Ms. Hutcheson?

14 A] I got a signed release from her, uh, in connection with a
15 subpoena.

16 Q] Okay. So was that difficult to do?

17 A] No, she just signed it.

18 Q] Okay. Now during the course of your interview with Ms.
19 Hutcheson, do you recall her saying that while she was on the
20 stand, she was just really waiting for Mr. Stidham to sort of
21 discover that she was lying?

22 A] Yes, and that she was trying to send him signals in her
23 testimony that she was lying.

24 Q] Are there ways, before a witness takes the stand, if the
25 witness is lying, that, for instance, by interviewing that per-

1 son, that you can establish some sort of rapport and get that
2 person to tell you that in fact, they're about to lie?

3 A] Yes, or at least, you know, what the truth is. I mean,
4 they may not say something like "I intend to lie on the stand,"
5 but in my interview, I hope to develop a relationship with them.
6 And my expectation is that I will develop a relationship with
7 them in which they will tell me the truth, and then you will
8 know that they are lying.

9 Q] The Court is going to read the interview, but is one of the
10 things she told you, that the West Memphis police had threatened
11 her and had isolated her and had coerced her into lying at Mr.
12 Misskelley's trial?

13 A] Yes, that was what she explained to me.

14 Q] And did she also explain to you that nobody else at that
15 time on the defense side was reaching out to her and giving her
16 any sort of counter balance in giving her a platform so that she
17 could say what was going on?

18 A] Yes, she said that she had kept expecting to hear from Mr.
19 Stidham and she never - - well, Mr. Misskelley's lawyers, uh,
20 she referred to Mr. Stidham but I'm sure she meant either him or
21 somebody from Mr. Misskelley's team and did not, was never con-
22 tacted.

23 Q] Now she gave you a very detailed accounting of how the
24 police coerced her into making false statements, did she not?

25 A] Yes, she did.

1 Q] And that statement, uh, included people in the police de-
2 partment and also the prosecutor being aware of her extensive
3 drug usage during the time that she was being interviewed by the
4 police, and also during her testimony?

5 A] Yes.

6 Q] And did the mental health records, which were obtained pur-
7 suant to the release and the subpoena, did they back up to a
8 certain incident that she was in fact heavily under the
9 influence of drugs around this time period when she was being
10 interviewed and when she was testifying?

11 A] Yes, she reported shortly after - - she reported to the
12 mental health worker shortly after she testified that she had
13 taken more than the normal dosage during her testimony.

14 Q] And is that something that, uh, if the lawyers had sub-
15 poenaed these records or obtained a release prior to her testi-
16 mony, they would have at least seen that she was taking drugs
17 over a long period of time?

18 A] Yes.

19 Q] And do the mental health records also indicate entries
20 prior to her testimony wherein she indicated that the West
21 Memphis police were applying some sort of pressure on her and
22 she was having some difficulty with that?

23 A] Yes, there's...

24 MR. HOLT: ...objection to hearsay, Your Honor.

25 THE COURT: Sustained. Where did she live at the

1 time? Did you determine that?

2 THE WITNESS: The address is in that paperwork.
3 She was living in the West Memphis area, I think,
4 still, at the point of trial, uh, and then after trial
5 my understanding is that she was with DeLay and put up
6 in a hotel in Memphis by the West Memphis police de-
7 partment to make her unavailable for the second trial.

8 DIRECT-EXAMINATION, continuing:

9 Q] That's what she told you in the sworn statement?

10 A] Yes.

11 MR. BURT: I believe that's all.

12 MR. HOLT: I want to object to that hearsay, too.
13 I don't think that's the statement that she made.

14 MR. BURT: Object to what?

15 MR. HOLT: The last statement that the witness
16 made is what is hearsay.

17 MR. BURT: Well, it's in the transcript.

18 THE COURT: Well, I'm going to sustain the
19 objection. It's hearsay, but that wouldn't have been
20 a statement that I wouldn't have considered as
21 perjury.

22 MR. HOLT: Well, I wouldn't have either, and
23 that's so it wouldn't have been against her, you know,
24 penal interest.

25 THE COURT: Yeah.

1 MR. HOLT: So it's essentially Ms. Pemberton
2 testifying as to what she said.

3 MR. BURT: Well, the statement is before the
4 Court. I think that's all I have of this witness.
5 Thank you, Ms. Pemberton.

6 MR. HENDRIX: Your Honor, may I ask a few
7 questions of Ms. Pemberton?

8 THE COURT: Yes.

9 DIRECT-EXAMINATION

10 BY MR. HENDRIX:

11 Q] Did you review the Vickie Hutcheson file testimony of the
12 Misskelley case?

13 A] Yes, I have.

14 Q] And it involved the concept of Satanic ritualism; is that
15 correct?

16 A] That's correct.

17 Q] And, and that was the state's theory, at least, partially
18 the motive in the case?

19 A] Yes, it was.

20 Q] And that theory was consistent; that applied to all three
21 defendants, did it not?

22 A] Yes.

23 Q] In other words, at both trials?

24 A] Yes.

25 MR. HENDRIX: Your Honor, I think that we

1 misspoke earlier about the Hutcherson exhibits, uh,
2 we'd like to withdraw out position in that they're not
3 relevant to Baldwin; and we'd ask that they also be
4 included in the Baldwin transcript, or the Baldwin
5 record, rather.

6 THE COURT: Well, she didn't testify in the Bald-
7 win case.

8 MR. HENDRIX: True. What's interesting is what
9 Ms. Pemberton was just saying that an allegation that
10 Ms. Hutcherson had been whisked away and held away
11 from the second trial, which leaves a fairly
12 interesting inference that she could have been
13 available.

14 THE COURT: That's just what it is, an inference.

15 MR. HENDRIX: But she could have been called as a
16 witness.

17 THE COURT: To that point, I suppose it would
18 apply to both.

19 MR. HENDRIX: And so may we move for introduction
20 into the Baldwin record, as well?

21 MR. HOLT: I have no objection.

22 THE COURT: All right.

23 (WHEREUPON, Petitioner/Defendant Exhibits 69 and 70 were
24 admitted and received into the Baldwin record.)

25 CROSS-EXAMINATION

1 BY MR. HOLT:

2 Q] I just have one question. Did she indicate -- Mr. Burt
3 indicated that, or you testified that your response to his
4 question, he was referring to "other anti-psychotic drugs" and
5 referred to Xanax and Prozac. Do you recall at the time in 2004
6 whether or not she was on Xanax or Prozac or any other anti-
7 psychotic drug?

8 A] I don't know the answer to that question, uh, uh, I don't
9 know the answer to that question.

10 MR. HOLT: That's a good answer. Thank you.

11 THE COURT: All right, I guess that's it.

12 MR. BURT: I just have one more, Your Honor.

13 RE-DIRECT EXAMINATION

14 BY MR. BURT:

15 Q] There's an entry in the file, 2/3/94; correct?

16 A] Yes.

17 Q] Uh, where she told her psychiatrist she states that during
18 the trial she was very nervous and expectant and she required
19 that she did take more than Xanax that was prescribed to her.
20 "She took one within the half hour of each other just before
21 getting on the stand last week."

22 A] Yes.

23 Q] So that's in reference to her trial testimony in Miss-
24 kelley; right?

25 A] That's correct.

1 Q] And elsewhere in the record is her entire drug history
2 showing prescriptions for Prozac, Xanax and other drugs?

3 A] That's correct.

4 Q] And in addition to those drugs, she told you in her state-
5 ment that...

6 MR. HOLT: ...objection, Your Honor.

7 THE COURT: I'll sustain the objection as hearsay.

8 MR. HOLT: All right, that's all I have. Thanks.

9 THE COURT: Is that it?

10 MR. BURT: And we move in whatever remaining
11 exhibits that we have outstanding that are not
12 previously admitted at this point.

13 THE COURT: Well, that's kind of hard for the
14 Court, because I don't know what they are. The
15 exhibits that have been tendered, I'll receive. But
16 anything that you've got in mind that hasn't been ten-
17 dered or spoken of, there's no way I can know what
18 you're talking about.

19 MR. HOLT: We don't have any objection to anything
20 they've marked.

21 THE COURT: Well, that's what I'm saying. All of
22 the exhibits that have been marked, the court reporter
23 has either for identification or otherwise, will be
24 received.

25 MR. BURT: Thank you. And then Mr. Misskelley

1 would rest, uh, let me clarify one point, which is
2 that as the Court will see when you read that trans-
3 cript of her testimony, she, uh, she admits to commit-
4 ting perjury and the perjury part of the statement,
5 uh, she says is that there never was any esbet, that
6 that was all a lie, that Ridge and other people were
7 putting her up to concocting those lies, that they
8 threatened her, etc cetera, and, uh, my assumption is
9 that the Court will would sustain privileges to
10 questions about anything leaning to that topic,
11 including not only the admission that she committed
12 perjury, but what led to that perjury, and then if I'm
13 correct in that, then I would seek to question her on
14 a question by question basis. But I just want to
15 clarify my understanding, because if it's wrong, then
16 I'm going to weigh heavy to examine her. I think that
17 argument could be made by her lawyer that anything in
18 that transcript is, uh, potentially self-
19 incriminating.

20 THE COURT: Well, she's outlining what, well, if
21 the testimony contains what you're indicating, uh,
22 potential crimes that the prosecuting attorney needs
23 to investigate.

24 MR. BURT: Right.

25 THE COURT: And that's what I would want to do

1 with it.

2 MR. BURT: So in other words, I would ask her...

3 THE COURT: ...I'm not talking about her being
4 charged with perjury. I'm talking about the
5 activities you're talking about would be contrary to
6 the law and be law violations.

7 MR. BURT: Right.

8 THE COURT: So what are you asking me?

9 MR. BURT: Well, I guess what I'm asking is, if we
10 put her on the stand at this point and I skate away
11 from the question of whether she committed perjury and
12 ask her, for instance, isn't it true that Mr. Ridge
13 threatened you with the death penalty; and isn't it
14 true that Mr. Davis and Mr. Ridge were giving you
15 drugs during your trial testimony; uh, the question is
16 whether that would fall within...

17 THE COURT: ...are you saying that's her state-
18 ment?

19 MR. BURT: It is in her statement. And the
20 question is whether now that would fall within her
21 assertion of her privilege and if it does not, then I
22 would seek to elicit that from her on the stand. I
23 guess it depends on how corroborative it is.

24 THE COURT: Well, it's already in evidence, so
25 I'll just read it. That's the best way to handle it.

1 Did you have something else, Kent?

2 MR. HOLT: We'll withdraw our hearsay objection as
3 to the testimony that Ms. Pemberton was giving as to
4 the statement itself and we'll object to her saying it
5 on the basis of it being cumulative and we don't have
6 an objection as to the statement in its entirety, the
7 statement against penal interests.

8 MR. BURT: That's fine, as long as it comes in, I
9 think that will solve it, Your Honor.

10 THE COURT: All right. That's fine.

11 MR. BURT: That's fine. Uh, Your Honor, in terms
12 of asking that the Echols team rests as well, but
13 there was some discussion yesterday about scheduling
14 and I wanted to let the Court know that we are
15 prepared to proceed. We came here with the
16 expectation that we were going to finish this hearing,
17 uh, everybody had scheduling problems that got
18 resolved so that we could be here for two weeks, and
19 my understanding is the state, at least as of
20 yesterday, was saying they were not prepared to
21 proceed and we would ask the Court to, uh, order them
22 to proceed on Monday, because this is not a situation
23 where any of the testimony is going to be a surprise
24 to anybody, uh, and in terms of when we ever will be
25 able to come back here, I can indicate to the Court my

1 own schedule is not good in the next, uh, probably
2 from now until the end of the year. I have a federal
3 capital case that starts on October 24th in New Mexico
4 and the judge in that case actually rearranged his
5 schedule so I could be here for two weeks now. We
6 have in liminie motions starting in that case starting
7 on August 24th and I'm not sure how long they will last
8 but it has a potential of going into September, right
9 up to the point of the trial, uh, and we're prepared
10 to proceed with whatever the state has got in the way
11 of rebuttal evidence.

12 MR. HOLT: Well, Your Honor, I understand counsel
13 making the objection now, but in discussing this case
14 with counsel yesterday, they indicated they did have
15 some time in October. And, uh, the petition in this
16 particular case was filed March 10, 1997. And all of
17 the continuances in the case have been on the request
18 of the petitioners, and this most recent set of
19 hearings have also been at the request of the
20 petitioners. I was under the impression that at the
21 last March date that it was going to finish and
22 defense counsel had another continuance in that sense.
23 We've also gotten a supplemental petition that has a
24 hundred and sixty claims and for all of those reasons,
25 the state, considering the fact that under Rule 37

1 Supreme Court, we don't get Discovery, and the late-
2 ness of receiving both the file and the tapes and the
3 names of witnesses in this particular case, we would
4 ask for a short amount of time to prepare a brief
5 rebuttal, or to assess the necessity of that, in view
6 of the record itself.

7 MR. BURT: In terms of the late notice, Your
8 Honor, the Court has heard testimony that the defense
9 experts in this case, and that with Dr. Peretti, had
10 laid out the substance of their testimony, uh, the
11 state has had the declarations from these experts for
12 some time.

13 The cross-examination by the state indicated that
14 they had retained an expert, uh, you recall during the
15 cross-examination of Dr. Spitz, they made reference to
16 an expert who had a contrary opinion to Dr. Spitz. So
17 this is not a situation where we sprung expert
18 witnesses on them at the last minute and they haven't
19 been prepared.

20 The last calling of this case, the Court said
21 "this is it. We're coming back, the case is going to
22 end, we're going to wrap this up and that's going to
23 be the end of it."

24 And I think all of counsel arranged their
25 schedules accordingly. I haven't heard why they need

1 additional time, other than a general desire to step
2 back and decide what they want to do. But in terms of
3 the specific testimony that was elicited here, they
4 were given a witness list, they were given reports of
5 these experts they've obviously consulted with people,
6 uh, there's been no showing as to why they can't
7 proceed on Monday morning.

8 In terms of counsel's availability, uh, I did
9 state to them, you know, that if I'm going to be
10 available at all, it might be a few days in October,
11 but I cannot predict what this federal judge in New
12 Mexico is going to do, and he's not going to be real
13 pleased with having to let me go again. And, and I do
14 feel that if it's going to be expert witnesses, that I
15 have to be here, because that part of the case, I
16 handle.

17 THE COURT: Do you have witnesses?

18 MR. HOLT: We have retained an expert witness, but
19 considering the timeframe involved here, the last two
20 continuances that the defense got because they could
21 not obtain the presence of an expert witness at a
22 particular time, and that's a part of our problem, as
23 well.

24 MR. BURT: Well, that's pretty vague. I'm not
25 sure what that means. If the have an expert, and if

1 so, why can't it be on Monday, and I haven't heard why
2 not.

3 THE COURT: Can he not be here next week?

4 MR. HOLT: No, he cannot.

5 THE COURT: When can he be here?

6 MR. HOLT: His scheduling, uh, late September,
7 early October.

8 MR. BURT: Also, Judge, we finished a week early,
9 uh, you know, ahead one week earlier than we said we
10 would finish. And that should give them plenty of
11 time.

12 THE COURT: Well, it was my intention to proceed
13 through next week to finish the case, but have you
14 made any effort to find out when your expert can be
15 here?

16 MR. HOLT: Yes, Your Honor, we have.

17 THE COURT: And when is that?

18 MR. HOLT: Late September or early October.

19 MR. BURT: Also, the other thing I would ask the
20 Court to weigh is the expense of this. Every counsel
21 in the case are here now, and are without payment and
22 as the Court knows, we've come from far away and it's
23 been a tremendous expense to get all of the files here
24 and get it geared up.

25 THE COURT: I understand all of that and that's

1 why I wanted to finish it, but I understand also that
2 the state may have the same problem you had as far as
3 getting their experts lined up.

4 MR. HOLT: We promised not to conduct it over four
5 different separate hearings, though.

6 MR. BURT: Well, I think what we made showing as
7 to the unavailability of experts, we had specific
8 information as to why they could not be here. And we
9 named the experts and we indicated to the Court what
10 the problems are. What I'm hearing from the other
11 side is, I don't even hear the name of this expert. I
12 don't understand why, uh, we need an entire two months
13 to get an expert in.

14 One expert, if that's what we're talking about
15 here, and why it has to go that far in order to get
16 that person here and why this guy or woman is not
17 ready to go, since they were on notice of his
18 testimony, and obviously, from the cross-examination
19 of Dr. Spitz, they've got this person lined up,
20 because he said during the cross-examination, well,
21 Dr., uh, I forget his name...

22 MR. HOLT: ...Perpher.

23 MR. BURT: Perpher, uh, has got a contrary
24 opinion. So he apparently has already formed his
25 opinions. Is he out of the country? Can he not be

1 here? Is he unavailable because of other commitments?
2 I, I, all I've heard is he is not around.

3 MR. HOLT: He's unavailable because of other
4 commitments; also, there is a scheduling issue with
5 Dr. Sterner, who now lives in North Carolina.

6 MR. BURT: Judge, I think in light of the fact
7 that the Court set this time specifically to finish
8 this hearing, the number of counsel involved, that
9 there should be a little better showing as to good
10 cause to continue this matter and I don't think there
11 has been a good showing.

12 MR. HENDRIX: Well, I thought Sturner was retired,
13 so I wonder what scheduling problem he is having?

14 THE COURT: How many witnesses will you have?

15 MR. HOLT: At the most, three. We're asking for
16 two days.

17 THE COURT: When is the earliest date you can have
18 them here, all three of them?

19 MR. HOLT: All three, well, in terms of their
20 availability with that first week in October. I think
21 there was some re- - uh, we discussed this
22 preliminarily, I believe, uh, Mr. Burt has a trial
23 starting on the 26th?

24 MR. BURT: No, October 14th and as I say, I cannot
25 predict what this judge is going to do in terms of in

1 liminie motions and we start on August 24th with the
2 possibility that it's going to be continued right up
3 to the time of the trial.

4 MR. HOLT: It starts the 24th?

5 MR. BURT: No, it starts October 14th is the jury
6 selection, in liminie motions start on August 24th.

7 THE COURT: What about the 1st and 2nd of October;
8 can you get through in two days?

9 MR. HOLT: Yes, Your Honor.

10 THE COURT: All right, I'm opening up the 1st and
11 2nd of October. Any objection to those two days, and
12 that's got to be the absolute end of it.

13 MR. ROSENZWEIG: Your Honor, I won't be here but
14 Mr. Burt will be here. I will not be here.

15 MR. BURT: I hope I will be here. As I indicated,
16 I have to report to this other judge.

17 THE COURT: On October the 1st and 2nd? I thought
18 you said the 14th.

19 MR. BURT: Yes, that's when jury selection starts.
20 But as I indicated to the Court, we have in liminie
21 motions starting August 24th and I'm not sure how long
22 they're going to run. So the only thing I can do is
23 say that Your Honor has said October 1st and 2nd but I
24 can indicate to the Court that this judge has already
25 not pleased with having to continue to allow me to

1 free up for these two weeks, because he had in liminie
2 scheduled for this week and next.

3 He had to change his schedule to accommodate
4 this. Now I've got to go back to him and say I've got
5 to go back to Arkansas, and I'll plead and beg to do
6 that, but the Court knows federal judges, and so the
7 only thing I can say is, I'll do my best.

8 THE COURT: Well, I'm going to set it for a final
9 wrap-up on October 1st and 2nd and then I want your
10 briefing and your proposed precedents shortly after
11 that - - thirty days, sixty days after that?

12 MR. PHILLIPSBORN: Your Honor, for the record,
13 this is John Phillipsborn on behalf of Mr. Baldwin. I
14 will indicate that I am, I have less pressing
15 difficulty than Mr. Burt, though I'm somewhat
16 similarly scheduled and ask that again in October in a
17 federal capital case, I simply ask for permission from
18 the Court to represent that the Court has emphasized
19 the urgency of these proceedings and if the Court
20 would like counsel present and available, and as with
21 Mr. Burt, I'll do my best.

22 And as I said, to be perfectly upfront with the
23 Court, I know that the Court was actually lenient with
24 me because the Court allowed a continuance so that I
25 could try a six-month federal death penalty case. I

1 appreciate that and I will do my best to make sure to
2 be available.

3 THE COURT: That's the reason I'm giving the state
4 additional time, because I did it for you all the last
5 time we were here. I mean, goose for the gander.

6 MR. PHILLIPSBORN: And I understand that and
7 that's why I wanted, I mean, I wanted to acknowledge
8 that that had occurred. Uh, two things with respect
9 with the Baldwin defense, and I understand my friend,
10 Mr. Burt's statement about where we are procedurally.
11 There's one witness that the Baldwin defense had
12 intended to present this week, Ann Tate, T-A-T-E, who
13 had been a matron and a staff member at the juvenile
14 detention unit, uh, she was informed this week.

15 THE COURT: She's already given testimony in
16 Echols, in his Rule 37.

17 MR. PHILLIPSBORN: That, I didn't know. Ms.
18 Cureton had testified here.

19 THE COURT: Maybe that's who I'm thinking of.

20 MR. PHILLIPSBORN: Ms. Tate actually was specific
21 to some other matter, uh, Mr. Holt and I had a brief
22 conversation and I'm not, uh, he didn't commit himself
23 or indicate in any way to accepting her affidavit in
24 lieu of her testimony, but we continue to discuss that
25 matter.

1 It may be that we will need at that time to
2 present brief testimony from her. My hope is not, but
3 I didn't want to surprise the Court with that, and
4 other than that, I appreciate the Court's indulgence.

5 THE COURT: Okay.

6 MR. BURT: Judge, one more issue, so that we don't
7 show up here again and say we need a continuance, I
8 wonder if the Court would set some sort of a deadline
9 for us getting in whatever reports that come from
10 their experts, because we've not seen any work
11 product. I think, so that we are prepared, we ought
12 to get them well in advance.

13 THE COURT: Fifteen days, prior to that? Is that
14 sufficient?

15 MR. BURT: That will be fine.

16 THE COURT: Okay.

17 MR. BURT: Thank you.

18 MR. ROSENZWEIG: Your Honor, you, you made a
19 fragmentary remark about the proposed precedents and
20 then you said thirty or sixty.

21 THE COURT: Well, yesterday I was willing to give
22 you sixty days, but now I'm wanting to cut it down.
23 I'll stick with the original sixty days. That seems
24 just like an awful long time for you to brief that.

25 MR. ROSENZWEIG: Well, the issue, Your Honor, and

1 of course, the voluminous nature of the case;
2 secondly, the particular schedulings, uh, the time for
3 that sixty days will fall and we will really need to
4 use that sixty. For instance, I'm going to be in a
5 capital case that's going to go close to October, I
6 think.

7 THE COURT: Okay, well, I mean, we can do that.
8 We'll finish it up on the 2nd of October and then sixty
9 days later your simultaneous briefs and proposed
10 findings. All right, court will be in recess until
11 October 1.

12 (WHEREUPON, on August 14th, 2009, a recess was taken until October
13 1, 2009.

14 **OCTOBER 1, 2009**

15 THE COURT: All right, are we ready?

16 MR. HOLT: Yes, Your Honor.

17 THE COURT: All right, call your witness.

18 MR. HOLT: Before we start with witnesses, though,
19 we did have one issue that we wanted to deal with.

20 THE COURT: All right.

21 MR. HOLT: During the course of looking at the
22 evidence in this case, in preparation of the State's
23 rebuttal case, uh, one of the things that came to our
24 attention was the fact that pursuant to the testimony
25 at trial and the exhibits that were introduced, there