

1 relevant to whether Jason was threatened by the African-American  
2 inmates, as Carson alleged. Is that what you're talking about?

3 A] Right.

4 Q] And so the question would be was there some news account,  
5 and I'm not offering this for the truth of the matter, but was  
6 there some news account about that incident, and then how did  
7 the African-American inmates react?

8 A] They said that he was a liar and that they hoped that he  
9 come back in there.

10 Q] Fair enough.

11 MR. DAVIS: I still object, Your Honor. It's  
12 still hearsay.

13 THE COURT: Sustained. It's hearsay.

14 MR. HENDRIX: That's all. I pass the witness.

15 THE COURT: All right, you may stand down.

16 You're free to go.

17 (Witness excused.)

18 THE COURT: Let's take a ten-minute recess.

19 Court will be in recess ten minutes.

20 (WHEREUPON, a recess was taken; proceedings resume as follows,

21 to-wit:)

22 THE COURT: Call your next witness.

23 MR. BURT: We call Mr. Stidham.

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

25 (Witness sworn.)

1 THEREUPON,

2 DAN STIDHAM

3 was called as a witness by and on behalf of the Petitioner/De-  
4 fendant and having been duly sworn was examined and testified as  
5 follows, to-wit:

6 DIRECT-EXAMINATION

7 BY MR. BURT:

8 Q] Could you state your name for us and tell us your business,  
9 or occupation?

10 A] My name is Dan Stidham; I'm the Greene County District  
11 Court judge.

12 Q] And Mr. Stidham, before you became a judge, what did you  
13 do?

14 Q] I was a, uh, in private practice and also for some period  
15 of time back in the early 90s, was a public defender for Greene  
16 County, part-time.

17 Q] And what period of time were you a public defender in  
18 Greene County?

19 A] Approximately '93, '92 through '95 is the best I can re-  
20 call. I don't know the specific dates. I can't recall.

21 Q] When did you graduate from law school?

22 A] 1987.

23 Q] And what did you do from '87 to '93, professional-wise?

24 A] I was a law clerk for an attorney in Paragould, who is now  
25 deceased, uh, John Williams. And I also studied for the bar

1 exam.

2 Q] And when did you first pass the bar exam?

3 A] In February, or actually, March of 1988 is when I was  
4 licensed.

5 Q] And can you tell me what you did from 1988 to 1993?

6 A] I worked with Mr. Williams as an associate for approximate-  
7 ly six months and at that time I decided to hang out my own  
8 shingle, uh, which I did in October of '88. And I was a solo  
9 practitioner for about a year and I had an associate for a short  
10 period of time, in 1990, a brief partnership, uh, with another  
11 attorney in Paragould. And then I was a solo practitioner from  
12 1990, uh, until 1992, I believe, is when Mr. Crow joined the  
13 firm as an associate.

14 Q] And you got the public defender job in 1992?

15 A] It was about the same time that Mr. Crow arrived, uh, as an  
16 associate with the firm that, uh, the part-time position of pub-  
17 lic defender became open in Greene County and that was a  
18 position that had always interested me. And so Mr. Crow and I  
19 decided to accept that responsibility.

20 Q] What kind of cases were you handling as a public defender  
21 during that time period?

22 A] Primarily misdemeanor cases, uh, also juvenile cases and we  
23 also had about a two hundred to two hundred-fifty felony case  
24 load per year.

25 Q] Was the vast majority of the caseload that you handled ones

1 that pled out?

2 A] During my entire tenure as a public defender in Greene  
3 County, I never tried a case, a jury trial. They were all  
4 pleas, uh, I believe there may have been one or two that were  
5 bench trials, uh, to the court, but there was never a jury trial  
6 that I engaged in as public defender.

7 Q] Now taking you back to this case, uh, State vs. Misskelley,  
8 were you at one point appointed as the lead case counsel?

9 A] I was.

10 Q] And when did that take place?

11 A] My recollection, it was June 6<sup>th</sup> or June 7<sup>th</sup>, 1993. I got a  
12 phone call that morning, uh, I was in the shower, actually, uh,  
13 and my wife came and knocked on the door and said Judge Goodson  
14 was the telephone and needed me to call him back immediately,  
15 which I did. And Judge Goodson was on the bench in Crittenden  
16 County and he had the task of appointing attorneys for all three  
17 of the defendants in the West Memphis case.

18 Q] Was this case within your jurisdiction as a public  
19 defender?

20 A] No, it wasn't; it was outside of my county. And I was ad-  
21 vised by Judge Goodson that the public defender in Crittenden  
22 County had declared a conflict. He did not elaborate, uh, and I  
23 found out later what the conflict was.

24 Q] What was the conflict?

25 A] The conflict was, uh, the public defender was a Christian

1 and he could not represent someone accused of a satanic crime.

2 And so that was his basis for refusing.

3 Q] So the judge did not have a public defender to appoint and  
4 he was seeking counsel from other jurisdictions to come in and  
5 fill the void?

6 A] Yes. Mr. Ford and Mr. Price had already approached Judge  
7 Goodson and volunteered their services, uh, wanted to be the  
8 lawyers for Mr. Baldwin and Mr. Echols. And Judge Goodson was  
9 having trouble finding someone to take on the task of repre-  
10 senting Mr. Misskelley.

11 Q] Why did he come to you; was there a discussion about it,  
12 why he thought you were somebody who should be considered for  
13 this appointment?

14 A] I knew Judge Goodson, first, because he was from Paragould.  
15 He was the only judge we had in the Circuit and was from Para-  
16 gould. He was a former public defender, uh, in Greene County;  
17 in fact, was one of the first public defenders in the entire  
18 state of Arkansas before, uh, Arkansas even had a public defend-  
19 er system. And I assisted him when I was fresh out of law  
20 school, sort of on a volunteer basis and non-compensated basis  
21 and so he knew that I had an interest in criminal law. And I  
22 also volunteered in Greene County, uh, and elsewhere around the  
23 district as well as the 3<sup>rd</sup> Judicial District over in Walnut  
24 Ridge and Pocahontas. I advised the circuit judges over there,  
25 in fact, I think they only had one circuit judge at the time,

1 uh, Judge Irwin, that I would accept any criminal appointment,  
2 uh, that was available, just to gain experience in criminal  
3 matters because that's what I wanted to do.

4 Q] Now at the time you were appointed, were you familiar with  
5 what's been marked as Plaintiff's Exhibit number 28, the  
6 American Bar Association guidelines for the appointment and per-  
7 formance of counsel in death-penalty cases?

8 A] I had never even heard of such a document.

9 Q] You now, however, are aware of that document and you've  
10 read it?

11 A] I'm acutely aware of it now.

12 Q] And are you aware, uh, that back in 1989 there were certain  
13 guidelines for qualifications of lawyers who were appointed on  
14 capital cases as lead counsel and also as, uh, second counsel?

15 A] Yes. I wasn't aware of it then, but I am aware of it now.

16 Q] And you're aware now that requirements for lead trial  
17 counsel included first of all that you "be a member of the bar  
18 admitted to practice in the jurisdiction or admitted to practice  
19 pro hac vice," you certainly qualified for that criteria;  
20 correct?

21 A] Barely, but yes.

22 Q] How old were you when you got this appointment?

23 A] I was twenty-four years old when I graduated from law  
24 school and twenty-five when I was licensed, and so I had just  
25 weeks earlier turned thirty years old before I got this appoint-

1 ment to represent Mr. Misskelley.

2 Q] The second requirement, uh, this is guideline 5.1, uh,  
3 requires that "you be experienced in active trial practitioners  
4 with at least five years litigation experience in the field of  
5 criminal defense." Did you qualify in that criteria?

6 A] Again, barely, but I did.

7 Q] The third criteria is that you have "prior experience as  
8 lead counsel in no fewer than nine jury trials of serious and  
9 complex cases, which were tried to completion, as well as prior  
10 experience in lead counsel or co-counsel in at least one case in  
11 which the death penalty was sought in addition of the non-jury  
12 trials that were tried to completion. The attorney should have  
13 been lead counsel in at least three cases in which the charge  
14 was murder or aggravated murder, or alternatively, of the non-  
15 jury trials at least one was a murder or aggravated murder trial  
16 and an additional five or felony jury trials." Did you qualify  
17 under that criteria?

18 A] Absolutely not. I didn't even remotely come close to being  
19 able to meet those criteria.

20 Q] Your felony trial experience up to that point consisted of  
21 what?

22 A] I was second chair in a felony drug case in the 3<sup>rd</sup> Judicial  
23 Circuit, uh, where I essentially sat at counsel table and  
24 assisted, uh, with questioning, actually didn't participate in  
25 the voir dire but I actually helped formulate questions and in

1 some objections, but I had a very limited role in the case. And  
2 other than that, that's the only jury trial experience I had,  
3 uh, prior to being appointed to represent Mr. Misskelley.

4 Q] Now the next criteria is that you "must be familiar with  
5 the practice and procedure of the criminal courts and  
6 jurisdictions"; you certainly qualified under that criteria,  
7 didn't you?

8 A] Yes, I would say so, uh, at that point in my career, uh, I  
9 think I was still learning the rules of evidence and rules of  
10 procedure, uh, kind of as I went. As a solo practitioner, I  
11 didn't have the luxury of being able to go down the hall and ask  
12 more experienced members of the firm, uh, "how do I approach  
13 this," or "how do I approach that," and so, yes, I was familiar  
14 with the procedure but I had only been practicing just barely  
15 five years.

16 Q] Were you familiar with a procedure and practice as it  
17 related to death-penalty cases?

18 A] Absolutely not.

19 Q] The next criteria is that "you be familiar with and  
20 experienced in the utilization of expert witnesses and evidence,  
21 including but not limited to psychiatry and forensic evidence."  
22 Did you meet that criteria?

23 A] Absolutely not.

24 Q] And explain to me why you think you didn't meet that  
25 criteria?



1 A] I had never prepared an expert witness for trial of any  
2 sorts, uh, in a criminal case. My experience in utilizing an  
3 expert witness would have been limited to, uh, perhaps, a psy-  
4 chologist or a counselor in a child custody matter. That would  
5 have been the extent of it.

6 Q] One of the things that Mr. Crow told us yesterday was that  
7 you hired Dr. Wilkins because you had used him in other cases;  
8 is that true?

9 A] My recollection is that I had used him in a child custody  
10 case previously, and as I was familiar with him and he was the  
11 first person I contacted and he assured me that he was up to the  
12 task and could do competency issues and advised us of what we  
13 needed to do to go forward.

14 Q] And aside from that experience in this child custody  
15 situation, did you have any other background training or exper-  
16 ience in psychiatric expert testimony?

17 A] None whatsoever.

18 Q] Did you have any training and experience in your practice  
19 with DNA evidence?

20 A] None whatsoever.

21 Q] Forensic serology?

22 A] Absolutely not.

23 Q] Forensic pathology?

24 A] No.

25 Q] Forensic entomology?

1 A] No, sir.

2 Q] Crime scene reconstruction?

3 A] No, sir, none whatsoever.

4 Q] Had you done any reading in any of those areas up to the  
5 point when you got appointed to try this case?

6 A] No, not up to the point that I was appointed, but after I  
7 was appointed, I did borrow a book, uh, Dr. Spitzer's book, uh,  
8 and tried to use it as best I could. But, uh, that's it.  
9 That's the extent of my, my knowledge.

10 Q] All right. We're going to talk about, uh, Dr. Spitzer's  
11 book later on, but other than that, some reading while the case  
12 was pending; you had no other training, background experience in  
13 those areas that I alluded to?

14 A] Other than my very limited experience as a law clerk work-  
15 ing on a capital case while I was in law school in Fayetteville  
16 University of Arkansas. I was a law clerk for a lawyer who was  
17 working, had been appointed, he wasn't a public defender, but he  
18 had been appointed on a capital case. And, but my duties in  
19 that case were limited to investigating some of the, uh, talking  
20 to some of the witnesses and filing some research on search  
21 issues.

22 Q] All right. The next requirement is that "you must have  
23 attended and successfully completed within one year of your  
24 appointment a training or educational program like criminal  
25 advocacy which focus on the trial in cases in which the death-

1 penalty was sought."

2           MR. DAVIS: Your Honor, may I enter an objection  
3 at this point. If we're going to go down through the  
4 list of ABA standards, we'd object to the relevancy.  
5 He can ask these questions and not paraphrase in terms  
6 of those standards, because the standards don't apply  
7 or aren't relevant to this case.

8           The Sixth Amendment is the standard that the  
9 court applies in this particular matter was couched in  
10 1800 and it's just not pertinent to this defendant.

11           MR. BURT: Well, actually, Your Honor, the U. S.  
12 Supreme Court has said they're not only pertinent, but  
13 are binding standards. And they said so in a case  
14 called *Wiggins*, a 1990 case and they applied those  
15 standards to a 1989 context.

16           They did it again in a case called *Rompilla*, R-O-  
17 M-P-I-L-L-A, vs. *Beard*, and they indicated that these  
18 standards were binding standards, uh, without  
19 reference to whether the State had adopted them.

20           In other words, the Supreme Court said that these  
21 standards are relevant to what the issue of whether  
22 counsel has met an objective standard of reasonable-  
23 ess. And so it certainly is relevant.

24           THE COURT: Well, go ahead. I'll allow it.

25           MR. BURT: Thank you.

1 DIRECT-EXAMINATION, continuing:

2 Q] The standards required that you "have attended and success-  
3 fully completed within one year of your appointment a training  
4 or educational program on criminal advocacy which focused on the  
5 trial of cases in which the death penalty is sought." Did you  
6 meet that criteria?

7 A] Not only did I not do that, I don't ever recall any  
8 seminars being offered in the state of Arkansas with regard to  
9 that issue.

10 Q] Now you were aware at the outset that the death penalty was  
11 on the table in this case; right?

12 A] I assumed it would be, because of the seriousness of the  
13 alleged crimes, and so I was operating under that assumption.

14 Q] And at some point Judge Burnett asked the State whether  
15 they were seeking the death penalty against Mr. Misskelley  
16 during the pretrial phase of the case and they indicated they  
17 were. And you were present for that, were you not?

18 A] Yes, sir.

19 Q] Once you knew that this was a death penalty case while the  
20 case was pending from the day you were appointed until the time  
21 you went to trial, did you make any effort to attend educational  
22 training on how to handle a death-penalty case?

23 A] No, I didn't. One of the things that I did is that I con-  
24 tacted the newly created Arkansas Death-Penalty Resource Center  
25 in Little Rock that the Legislature had created in the, I want

1 to say it was the '93 session, I think the law became effective  
2 July 1<sup>st</sup> of that year. And the Legislature had talked about  
3 creating a one hundred thousand dollar fund to use to use in  
4 investigation and assisting appointing counsel in death-penalty  
5 cases. And every time we would call down there to talk to Ms.  
6 Sallings, uh, her response was "they've given me an office,  
7 they've given me a salary," uh, "I can't help you because I  
8 don't have any money. I don't have a staff, I've got a  
9 telephone, a desk, and they pay me to be here, but that's it.  
10 That's all there is." And, of course, I was astounded by that  
11 and, uh, but I had no resources available to seek out any type  
12 of learning, uh, seminars, or any help in that regard. I was on  
13 my own.

14 Q] We're talking about formal seminars set up either by the  
15 State or someone else, either in the State or outside of the  
16 State, and you made no effort to reach outside of the State to  
17 people that had done death-penalty cases in other jurisdictions?

18 A] No, sir, I did attempt to, when I would get a situation  
19 that I felt like I didn't understand or needed some assistance,  
20 I would pick up the telephone and make a phone call to, uh, a  
21 local attorney, uh, who had handled death-penalty cases  
22 previously, and I also made a phone call to a lawyer in Florida,  
23 as I recall, and asked for some assistance in a brief, and he  
24 was happy to oblige, but other than that, uh, I made no efforts.  
25 Mr. Crow and I made no efforts to seek out any training.

1 Q] So looking at the standards that we just reviewed for your  
2 appointment, do you think you were qualified to handle this case  
3 as lead counsel?

4 A] Clearly not.

5 Q] There were also requirements for second counsel and I'm not  
6 going to go through all of them, but one of the requirements is  
7 that "second counsel have prior experience as lead counsel or  
8 co-counsel in no fewer than three jury trials of serious and  
9 complex cases which were tried to completion, at least two of  
10 which were trials in which the charge was murder or aggravated  
11 murder." Do you think you were qualified to be appointed as  
12 second counsel under that criteria?

13 A] I wasn't qualified to be second chair and Mr. Crow certain-  
14 ly wasn't.

15 Q] The extent of his experience as he told us, was he did not  
16 have any jury trial experience?

17 A] Yes, he had not had a criminal jury trial of any kind. He  
18 had had several civil trials, jury trials, uh, but no criminal  
19 experience whatsoever.

20 Q] So when you first came into the case, at what, in general  
21 was the first thing you did in terms of your preparation and  
22 your setting up a defense and things of that nature?

23 A] One of the first things I did is I obtained a copy of the  
24 Memphis Commercial Appeal so that I read my client's confession  
25 which had somehow managed to be leaked to the press. And that's

1 how I read my client's confession. And we kept contacting the  
2 prosecutors here and started getting discovery information and  
3 it was very slow in coming. And it was very frustrating. Then  
4 I had to locate my client, uh, no one would tell me at first  
5 where he was located. And once I found where he was located, I  
6 asked that he be moved to Clay County so he would be a little  
7 bit closer to where I was and I would have access to him.

8 Q] And did you eventually obtain some discovery from, from the  
9 State?

10 A] Eventually, uh, the only time the three defense teams  
11 actually worked in concert with each other was, uh, at a hear-  
12 ing relatively early on in Crittenden County when Judge Parker  
13 was on the bench. We had advised the prosecutors that we would  
14 be coming over and making a motion for discovery and, uh, which  
15 we did, and they promised to start sending stuff as quickly as  
16 possible.

17 Q] And did the discovery process, was it a situation where you  
18 got all of the discovery in one time, or did it arrive over time  
19 as the case progressed; would you characterize that?

20 A] It came in boxes sporadically and it was not organized; it  
21 was disheveled, uh, it appeared to me as if they were trying to  
22 basically throw us off, uh, because nothing seemed to be in  
23 order chronologically or logically. And it was just a mess, is  
24 what it was.

25 Q] What was the volume of the material that we're talking

1 about here, in terms of discovery?

2 A] It was quite voluminous, uh, uh, seven, eight file boxes  
3 full of information.

4 Q] And what was the nature of the material you, you were  
5 receiving? Was it typed police reports only, or was there  
6 additional material?

7 A] There were police reports, there were interview transcripts  
8 from people that they had contacted. There was one thing of  
9 particular interest to me, uh, that I, was puzzling to me; they  
10 were, uh, seemed to be canvassing the neighborhood where the  
11 bodies were discovered, and they had a formula for doing so,  
12 because they kept asking the same questions over and over. And  
13 I was trying to figure out where this information was coming  
14 from, and, uh, and why they were asking such questions. And I  
15 assumed that it came from Quantico. And, uh, which is not  
16 uncommon in situations like this. And when I asked Detective  
17 Gitchell if he had received any information from Quantico, uh,  
18 he denied it. I confronted him with a newspaper article where  
19 he was quoted in the newspaper article as saying that he had  
20 received information from the Quantico and FBI profilers, but he  
21 said that they had misquoted him and it didn't exist. And then  
22 later that information was provided through discovery, but it  
23 was subsequent to our trial being completed and just immediately  
24 prior to the Baldwin/Echols case being tried.

25 Q] Did you make any effort to mitigate your right of access to



1 that profile?

2 A] Uh, no, I didn't. I assumed Detective Gitchell was honest  
3 and would not mislead me. And obviously I was naive in that  
4 regard.

5 Q] Are you telling me you saw indications from newspaper  
6 articles that such a profile existed, and the discovery suggest-  
7 ed that it existed, and that Detective Gitchell told you it  
8 didn't exist and you let it sit there?

9 A] It didn't arrive until after Mr. Misskelley's trial was  
10 over and he had been convicted. In fact, I think, uh, I think I  
11 filed that issue as part of my motion for a new trial, because I  
12 had been withheld that information.

13 Q] Reviewing the information post-trial, would that have been  
14 helpful to your defense?

15 A] Oh, absolutely.

16 Q] And could you explain why?

17 A] The profile information, uh, they also had a reason for  
18 doing their canvassing and asking particular questions, and if  
19 the FBI profilers were telling them that they needed to be  
20 looking for a particular type of suspect, uh, I was very  
21 interested in trying to determine whether or not, uh, not only  
22 did my client get profiled, but the other two co-defendants get  
23 profiled. And I felt like, uh, if I could get that information  
24 that I might possibly be able to obtain the services of my own  
25 criminal profiler who could then point me in directions that I

1 needed to do as far as investigation is concerned.

2 Q] And you're saying that never happened pretrial, because you  
3 never had access to the FBI profile?

4 A] Detective Gitchell, I don't know if he outright lied to me,  
5 or if he just forgot, but, uh, he misled me in not providing the  
6 information.

7 Q] Now in the discovery, did you receive anything from either  
8 the State Medical Examiner or the Crime Lab fellows?

9 A] Yes, there were reports from the Medical Examiner's office  
10 which included autopsy reports, uh, there was also submissions  
11 from the police department to the Crime Lab asking them for  
12 analysis on certain items of evidence, and those were included  
13 in the discovery.

14 Q] And was there anything, uh, in the nature of lab bench  
15 notes that you received from the Crime Lab?

16 A] No.

17 Q] At not point in time while the case was pending, did you  
18 receive any bench notes from the Crime Lab?

19 A] No, none at all. In fact, I was absolutely stunned when I  
20 later saw them. I assumed that I was receiving everything, pur-  
21 suant to my motion for discovery, and I was stunned that I was  
22 not receiving everything.

23 Q] I'm showing you Exhibit number 21. Would you take a look  
24 at that, and those have been identified by Mr. Channell as his,  
25 uh, bench notes. Could you tell me whether you saw any pages

1 that are in that document?

2 A] (Witness examining same.) The letter from Inspector  
3 Gitchell to the Crime Lab dated May 26, 1993, I did see that.  
4 That was part of the discovery. In fact, that's my handwriting  
5 at the top of that left-hand corner of the document.

6 Q] Okay?

7 A] But, uh, the documents that were attached to - - and I may  
8 not be pronouncing her name correctly - - Doctor Zajac, uh, the  
9 notes regarding false positives, I never saw those. Those are  
10 not in my file; they were not provided to me by the State.

11 Q] And specifically, uh, just so we're clear on this: Of this  
12 document, Exhibit number 21, you are referring to page 4, 5, 6,  
13 7, 8, 9, 10, 12, the first seventeen pages, you never saw?

14 A] I saw the letter from Inspector Gitchell to the Crime Lab  
15 stating that "please help us, we're blindfolded, essentially,  
16 and we need assistance." But that's all they gave me. They did  
17 not provide me with any of these notes.

18 Q] "Any of these," meaning page 4 through the end?

19 A] I'm not sure exactly how you numbered them. I just want to  
20 make sure.

21 THE COURT: Let me clarify something. It's been  
22 represented to the Court that these exhibits came from  
23 Mr. Stidham's file. And I thought Mr. Crow testified  
24 that if they were in the file, then they got them.

25 MR. BURT: Actually, Your Honor, this exhibit came

1 from Mr. Channell's file. And these documents did not  
2 come from Mr. Stidham's file, and we're actually going  
3 to present a witness who reviewed the files and they  
4 will say that they were not in there.

5 THE COURT: All right.

6 DIRECT-EXAMINATION, continuing:

7 A] Page four through seventeen, I never saw those documents  
8 until recently.

9 Q] Okay. And page eighteen is a letter, a typed letter, which  
10 has some handwriting on it, and I have two questions. First,  
11 did you see or were you provided with the typed letter without  
12 the handwriting, in discovery?

13 A] If I received this report, it did not have the handwriting,  
14 uh, in the margin on the right-hand side.

15 Q] And I'll represent to you that letter without the hand-  
16 writing is a reply and the evidence is going to show that.

17 A] I, I never saw those notations.

18 Q] All right. The notation on that page that says "handwrit-  
19 ten note next to the blue jean sample possible bacterial in  
20 nature." If you had seen that, would that have had some  
21 significance to your defense in this case?

22 A] Absolutely.

23 Q] And tell me why?

24 A] Uh, it would have been a red flag that, uh, I needed to  
25 question, uh, DeGuglielmo's analysis, as well as Mr. Channell's

1 analysis and it would have made me realize that I needed an  
2 expert to help explain this to a jury.

3 Q] And because you never saw that notation, uh, you never  
4 asked for such assistance?

5 A] I didn't.

6 Q] Now on page five is the bench notes which indicate " both  
7 blue jean samples were false positive." Did you ever see that  
8 notation of false positive results from Mr. Channell?

9 A] No, sir, absolutely not.

10 Q] Would that have had some significance had you known about  
11 it; had you been in possession of bench notes which said that  
12 the testing would be a false positive.

13 A] Absolutely.

14 Q] Tell me why?

15 A] Well, they testified, uh, at the trial that, uh, there was  
16 semen found on, uh, these cuttings from the blue jeans of the  
17 victims. And, uh, I knew that they were going to testify to  
18 that and if I had known there were false positive results, then  
19 I would have thought to discredit this information, but I didn't  
20 know about it.

21 Q] Was the testimony about the possible semen on the blue  
22 jeans, uh, a damaging quality in the case?

23 A] It was, and I don't think that I failed to realize the  
24 significance of it, uh, at the time. And quite frankly,  
25 Counselor, it's difficult for me to look at this stuff through

1 the prism of 1993 and 1994 because I have continued to work on  
2 this case for what's basically amounted to a third of my life,  
3 and so I did seek out these experts once I became aware of the  
4 issues, uh, but I didn't at the time because I wasn't aware nor  
5 did I realize the significance of it.

6 Q] Now in the pretrial phase of the case and specifically on  
7 September 27<sup>th</sup> 1993, well before trial, there was a hearing at  
8 which you were present and Mr. Price says the following, and  
9 this is on page 27 of the trial transcript: "One other matter to  
10 bring out that we discussed in chambers. I have requested and I  
11 think you said you would grant an order allowing us to go  
12 directly to the Crime Lab to make copies of the entire Crime Lab  
13 file."

14 And the Court says, "Yes, you need to prepare a written order  
15 and that order should include that you be given copies of any  
16 reports that the State Crime Lab might prepare, and that you be  
17 permitted to view the physical evidence and the report in the  
18 presence of the Crime Lab representative."

19 Do you recall being present for that discussion?

20 A] Yes, sir, I do.

21 Q] And what follow-up, if any, did you or your co-counsel do  
22 to implement the Court's order?

23 A] Nothing.

24 Q] Did you ever go to the Crime Lab and get the Crime Lab copy  
25 file, which would have included those documents that we just

1 reviewed?

2 A] No, I did not. But I assumed rather naively that they  
3 would be provided to me along with the other discovery that I  
4 was receiving.

5 Q] Did you have any tactical or strategic reason for failing  
6 to follow-up on the Crime Lab file, pursuant to the Court's  
7 order?

8 Q] No, sir, absolutely not.

9 A] Now when you came into this case, was money or funding a  
10 concern to you in terms of how you were going to conduct this  
11 defense?

12 A] Initially, I wasn't that concerned because of all of the  
13 publicity surrounding the case and the confession being printed  
14 on the front page of the largest newspaper in the mid-South. It  
15 appeared to be, my role appeared to be that of simply preparing  
16 my client to testify against his co-defendants. I didn't expect  
17 the case to go to trial, uh, I didn't expect, uh, that I would  
18 uncover evidence later on, uh, indicating that my client was  
19 actually innocent. And so I wasn't that concerned about the  
20 funding. But as September rolled around and evidence became  
21 clear that Mr. Misskelley was innocent, then I became very  
22 concerned because, uh, I had to make a living to feed my family.  
23 And so I approached Judge Burnett on a couple of occasions just  
24 to get an idea of what was going to happen and how this was  
25 going to work. And I believe the other lawyers had actually

1 filed motions to get paid as we went along, as opposed to  
2 submitting a bill at the end, which His Honor denied. And I  
3 became very concerned, because after the end of September of  
4 1993, I devoted my entire energies to, to representing Mr.  
5 Misskelley. I did nothing else in my practice. Mr. Crow tried  
6 to hold down the fort, uh, take care of our public defender  
7 clients back in Greene County, uh, as well as our private  
8 practice. And so I knew that I was spending a great deal of  
9 time preparing for Mr. Misskelley's defense and I had lost three  
10 months because the first three months from June to September,  
11 uh, I was under the assumption that, uh, I was preparing him to  
12 testify. And so by the time we figured out what had actually  
13 happened and that we were dealing with a false confession, I had  
14 to work very quickly and didn't have a whole lot of time to  
15 operate.

16 Q] The ABA guidelines we referenced before, Exhibit 28, say  
17 "counsel should conduct independent investigations relating to  
18 the guilt/innocence phase and to the penalty phase of a capital  
19 trial. Both investigations should begin immediately upon  
20 counsel's entry into the case and should be pursued  
21 expeditiously. The investigation for preparation of the  
22 guilt/innocence phase of the trial should be conducted regard-  
23 less of any admission or statement by the client concerning  
24 facts constituting guilt." Were you aware of that particular  
25 standard as you went about preparing this case?



1 A] I was not aware of the standard, nor did I comply wit it.  
2 In fact, uh, I'm ashamed to admit it, but the first three months  
3 when I was given discovery and I would give it a cursory  
4 reading, throw it in a box, uh, not index it, not categorize it,  
5 uh, because I wasn't concerned about it. All I was concerned  
6 about was getting Mr. Misskelley ready to testify.

7 Q] So normally in a criminal case if you were concerned about  
8 it, with the practice, even your own practice had been to read  
9 the discovery and then begin to do investigation that might lead  
10 to viable defenses?

11 A] Yes, sir. Absolutely.

12 Q] And are you telling me that never took place in the  
13 beginning phases of this case, because of your assumptions about  
14 Mr. Misskelley's guilt?

15 A] That's correct.

16 Q] And when, uh, did that situation change in terms of the  
17 converse?

18 A] September 24<sup>th</sup>, 1993, uh, I had become extremely frustrated  
19 with Mr. Misskelley and his seemingly unability [sic] - -  
20 inability to discuss facts of the case with me. It was as if he  
21 wasn't there and was trying to tell me about events that he  
22 didn't know anything about. And every time we would discuss it,  
23 uh, he would get significant details wrong. The victims were  
24 wrong. The ligatures were wrong. The times were wrong. Every-  
25 thing was just so, it just didn't make any sense. And, and, uh,

1 of course, my client's father at that time was telling me that  
2 he had all of these alibi witnesses lined up and of course,  
3 considering the fact that I wasn't concerned about anything but  
4 getting him ready to testify against his co-defendants, I  
5 essentially ignored Mr. Misskelley, Sr. and kept telling Mr.  
6 Misskelley, Sr. that "your son's telling me that he was there."  
7 And there was the day, I don't remember the date that Mr. Miss-  
8 kelley, Sr. came to the jail while I was interviewing Mr. Miss-  
9 kelley, Jr., and Mr. Misskelley, Sr. came into the jail cell  
10 there in Clay County. He jumped up and ran to his father and  
11 gave him a big hug and said, "You've gotta get me out of here.  
12 I didn't do it. I wasn't there. I don't know anything about  
13 it, you've gotta help me." And, of course, I became extremely  
14 frustrated because I thought, incorrectly, I assumed that he  
15 just didn't want to admit his, his culpability in front of his  
16 father.

17 Q] There was an accusation made yesterday that the true facts  
18 are that at sometime in August there was a meeting in the  
19 Holiday Inn in Jonesboro, and after that meeting, uh, you and  
20 Mr. Crow went in to the prosecutor and violated your  
21 attorney/client confidentiality obligation to the Court.

22 MR. DAVIS: Your Honor, I think right now for the  
23 question to be posed in terms of recant- - restating  
24 what Mr. Crow said and framing the question that way,  
25 would be improper. That's the only reason the witness

1 is under the Rule in the first place. I think he can  
2 state what he recalls of the incident.

3 THE COURT: Sustained.

4 DIRECT-EXAMINATION, continuing:

5 Q] You said the change in strategy from one where you were not  
6 investigating and were merely preparing the client to testify  
7 against his co-defendants took place in late September?

8 A] That's correct.

9 Q] Did it occur prior to that in August in Jonesboro that at a  
10 meeting in which you met with prosecutors?

11 A] I have no independent recollection of meeting with the  
12 prosecutors in August, although I understand that my billing  
13 records reflect that I did, Mr. Crow and I did. There was very  
14 little discussions, uh, back and forth, uh, with the  
15 prosecutor's office and myself. In fact, that alarmed me some-  
16 what because I assumed that they really needed and desired and  
17 wanted Mr. Misskelley's cooperation, that they were approaching  
18 us. The first time that they ever approached us at all was, uh,  
19 through an emissary, uh, a local deputy prosecutor approached me  
20 at my office in Paragould, or perhaps phoned me and said "Mr.  
21 Misskelley, Sr.'s press conferences at his home each night on TV  
22 news is not helping, uh, the possibility of ever being able to  
23 reach a plea agreement, and that you should do something to stop  
24 that." And that is when I asked Mr. Misskelley, Sr. to come  
25 over and meet with Mr. Misskelley, Jr. and I at the jail so that

1 we could discuss that very issue. And, of course, the episode  
2 that I explained earlier where he told his dad "I wasn't there,  
3 I didn't do it, I was roofing that day with Mr. Deese. I don't  
4 know what happened; I was just telling counselors what they  
5 wanted to hear." And so it was at that time that I remember, it  
6 may have been the meeting that Mr. Davis is alluding to or  
7 what's contained in my billing record, but I remember the  
8 meeting or a conversation with, uh, prosecutor Fogleman where he  
9 had advised me that they had received a DNA analysis on a T-  
10 shirt found in Mr. Misskelley's home, a white T-shirt, uh, and  
11 his assertion to me was that, uh, there was a DNA match to the  
12 victim Moore on this T-shirt, this drop of blood on the T-shirt.  
13 I confronted Mr. Misskelley about that and he said, "No, that's  
14 my blood, because I was throwing Coke bottles up in the air and  
15 breaking them with my fists, the glass kind." And he said, "I  
16 cut my hand and I wiped my hand on my shirt," and he said,  
17 "that's my blood." And so I don't recall specifically meeting  
18 with Mr. Davis and Mr. Fogleman on the 27<sup>th</sup> of August.  
19 Apparently I did, because it's reflected by billing records, uh,  
20 apparently the meeting lasted somewhere around forty-five  
21 minutes to an hour, uh, and it probably, if I had to venture a  
22 guess, uh, I would say it probably had more to do with the fact  
23 that Mr. Misskelley, Sr. seemed to be sabotaging our attempts to  
24 negotiate a plea. And that was the only thing that we  
25 discussed, but I don't ever remember any plea offer being made,

1 specifically an offer being made until we were actually getting  
2 ready to call the first witness in Corning in the trial.

3 Q] Your billing records, this is Exhibit number 29, you have  
4 an entry, 8/27/93, traveled to and from Jonesboro; 8/27, meeting  
5 with prosecutor, one hour; 8/28, conference with attorneys  
6 Davis and Fogleman, 0.75 hours; and two days later, 8/30,  
7 conference with Crow re: plea bargain and research re:  
8 confessions. Does that refresh your memory of when the meeting  
9 took place with the prosecutor either on the 27<sup>th</sup> or it looks  
10 like the 28<sup>th</sup>, as well; right?

11 A] Somewhat. I still don't remember where the location was or  
12 where we met, uh, uh, does it say Mr. Davison and Mr. Price were  
13 there with us?

14 Q] Uh, it says "Conference with Mr. Davis and Mr. Fogleman,  
15 8/28/93, 0.75 hours."

16 A] I, I can't say that I recall with any specificity at all.

17 Q] Do you have any recollection that during the meeting that I  
18 just referenced, that you or Crow laid out in detail statements  
19 that the client had made to you about how the events took place?

20 A] No, I don't recall that at all.

21 Q] Would you have been doing that at that point?

22 A] If I did, it would have been in a hypothetical context, not  
23 a context that would have violated the attorney/client  
24 privilege. And my recollection is that Mr. Fogleman seemed to  
25 be more concerned about Mr. Misskelley sabotaging the- - because

1 the news media were in a frenzy and, uh, every night when  
2 you turned on the television, Mr. Misskelley, Sr. was on the  
3 front porch at his home stating that "so and so was with Mr.  
4 Misskelley that night and there was no way he could have done  
5 it," and Mr. Fogleman was very concerned about that, obviously.  
6 And so he asked me to intervene and put a stop to that. And  
7 shortly thereafter is when I got a phone call from Prosecutor  
8 Fogleman stating that he had made a mistake, that it wasn't Mr.  
9 Moore's blood on the T-shirt, it was Mr. Misskelley's blood on  
10 the T-shirt.

11 Q] Do you remember when this change of strategy took place;  
12 you said it was late September?

13 A] Yes.

14 Q] Not in August?

15 A] It was, uh, September 23<sup>rd</sup>, 1993, it was a memo as I recall,  
16 uh, from Mr. Crow stating that basically, "Wow," uh, "there's a  
17 change, this is different, this is not what we thought it was,"  
18 and then when Mr. Fogleman advised that there had been a mistake  
19 with the Crime Lab on the DNA analysis, we completely totally  
20 switched gears.

21 Q] I have a document I guess to be marked next in order, is a  
22 two-page memo dated September 24, 1993?

23 A] (Witness examining same.) Apparently I have the date wrong  
24 in my file.

25 Q] Could you read that into the record for us, what it says -

1 - well, first of all, can you identify it?

2 A] This is a memo that I prepared on September 24<sup>th</sup>, 1993.

3 Q] And what does it say?

4 A] Do you want me to read it into the record?

5 Q] Yes?

6 A] This is a memo to file from me, "spoke with Jessie today  
7 via telephone and why he tells his dad he wasn't at the crime  
8 scene and why he tells us he was. He relayed the following:  
9 Number one, he has huffed gas for two years and he feels half  
10 his brain is gone. He stopped huffing when he heard someone  
11 died from it and stated David Pereffi is the one who got him  
12 started huffing gasoline." I'm not reading this verbatim.  
13 Maybe I should be?

14 Q] Yeah, if you would?

15 A] Okay.

16 Q] And then we'll talk about it?

17 A] Uh, okay. "He stopped huffing when he heard someone died  
18 from it. David "Deno" Pereffi got him started huffing." Number  
19 two: "He wants us to get him evaluated." Number three: "He says  
20 the police were yelling at him and told him that he failed the  
21 lie detector test and that he better tell them the truth. Said  
22 they got his nerves all messed up. He said he was scared and  
23 that is why he told us that he was there. He said this is where  
24 he was on May 5<sup>th</sup>, 1993: 9:00 a.m., he said his dad woke him up  
25 and said Ricky Deese was there to pick him up. 9:00 a.m. to

1 12:00 noon worked with Ricky Deese and John Darby" - - actually,  
2 that should be Josh Darby but it says John in the memo, "roofing  
3 house in West Memphis. 12:00 noon to 1:00p.m. lunch at home  
4 with dad. 1:00 p.m. to 6:30 p.m., roofed house in West Memphis  
5 with Ricky and John. They dropped him off at 6:30 at home.  
6 6:30 p.m. he talked with Lee at home." Lee was his dad's  
7 girlfriend at the time. "6:30 p.m. to 7:15 p.m., walked down to  
8 Stephanie's house, she wasn't home. Police pulled up in  
9 driveway, said someone had assaulted Stephanie's son. He told  
10 police that Steph was not home. Walked down to his aunt's  
11 house, seen Johnny Hamilton on way there. Went home and then  
12 left to go to Dyess. 7:15 p.m. to 11:30 p.m., left home with  
13 Johnny Hamilton, Freddy Revelle, Dennis Carter and one of  
14 Freddy's friends. Let's interview the alibi witnesses and  
15 compare this to their version of events." And it's got my  
16 signature.

17 Q] And was that memo dictated to document this change in your  
18 approach to this case?

19 A] Absolutely.

20 Q] The one where you were just preparing him to testify  
21 against his co-defendants, the one where now you were going to  
22 do some investigation?

23 A] And then it was three days later that Prosecutor Fogleman  
24 walked up to me in Crittenden County at the courthouse at that  
25 hearing and said, "Oh, by the way, we made a mistake. It wasn't



1 Mr. Misskelley's," or, "it wasn't Michael Moore's blood on the  
2 T-shirt, it was Mr. Misskelley's," and then it was like a light  
3 bulb went off in my head, because Jessie had told me that it was  
4 his blood. And so for the first time I realized that we've got  
5 to change strategy and move in an entirely different direction.  
6 The problem is, we've lost June, July, August and September - -  
7 we've lost four months of our, uh, preparation time and His  
8 Honor was pushing us for a trial date, uh, despite my  
9 objections.

10 Q] A December trial date; do you recall that, December,  
11 January is what you were saying?

12 A] He was talking December, January and I asked for a contin-  
13 uance and he, he denied it and we then ended up in going to  
14 trial in January.

15 Q] All right. Now you said in this memo, uh, the very last  
16 line says, "let's interview the alibi witnesses and compare this  
17 to their version of events." I take it from that sentence that  
18 up to this point you had made no effort to alibi, uh, to  
19 interview or investigate any of the alibi witnesses that either  
20 Mr. Misskelley, Sr. or anybody else had been encouraging you to  
21 do?

22 A] None whatsoever.

23 Q] Was your change in strategy motivated not by what you out-  
24 lined in this memo, but rather that Jessie Misskelley, Sr. was  
25 complaining to the press that you were not doing your job?

1 A] Mr. Misskelley, Sr. was not happy, because his son was  
2 telling him one thing and his son was telling me a different  
3 version. I remember meeting with Mr. Misskelley, Sr. and  
4 explaining the situation and, uh, telling him that, uh, I had to  
5 do some research on false confessions and was an interesting  
6 phenomenon which was a relatively new phenomenon at the time  
7 and, uh, and that we were changing strategies and, uh, uh, that  
8 Jessie, Sr. was delighted that that was taking place.

9 MR. BURT: Let's go on and move to another  
10 subject. This might be a good time if the Court  
11 wanted to take a break.

12 THE COURT: All right, court will be in recess  
13 until 1:15.

14 (recess.)

15 THE COURT: All right, you may proceed.

16 MR. BURT: Thank you. Judge, before I begin, I  
17 wanted to correct a mistake I made this morning, which  
18 is the *Wiggins* case I cited to you. It's a 2003 case  
19 but it deals, my recollection, was that it dealt with  
20 a case in the early 90s, and there is actually a bunch  
21 of federal cases that say that these guidelines apply  
22 for these standards.

23 THE COURT: Well, I need to see a brief on it.

24 MR. BURT: Sure. We'll supply that. Thank you.

25 DIRECT-EXAMINATION, continuing:

1 Q] Mr. Stidham, uh, one more question about this exhibit  
2 number 34 this memo you wrote on September 24<sup>th</sup>, 1993, uh, it  
3 says in here "said he was scared and that is why he told us he  
4 was there." What is that referring to in terms of prior con-  
5 versations you had had with him?

6 A] Mr. Misskelley recited to me that the West Memphis police  
7 had threatened him with the electric chair and he was very, very  
8 afraid of dying in the electric chair.

9 Q] And you said that your efforts with him up to the point of  
10 the time this memo had been written, had been focused on getting  
11 him ready to testify against his co-defendants; correct?

12 A] And it, it had been, and it was almost an adversarial type  
13 of relationship because of the frustration that I was ex-  
14 perencing in him not being able to get his story right.

15 Q] When you said "get his story right," you had when you went  
16 to see him, I assume, a copy of the confession?

17 A] I did.

18 Q] All right. And what do you mean by "get his story right"?

19 A] Well, the first time that I sat down and visited with him,  
20 he insisted that it was a blonde-haired victim who had been sex-  
21 ually mutilated, and of course, I knew that that wasn't the  
22 case. When I tried to press him on that, he just stood on it.  
23 He wouldn't come off of it at all. And he, uh, in his con-  
24 fession, uh, he referred to the victims as "the Byers," and "the  
25 Moore," and "the Branch" and it was almost, you know, that he

1 was being fed these details and he was afraid to stray from them  
2 because out of fear, uh, and then when he ultimately told me  
3 that he didn't understand what a lawyer was, that he thought Mr.  
4 Crow and I were, I think he said, police officers that were  
5 continuing this long interrogation process and, uh, and that I  
6 finally realized at the time I drafted that memo that what was  
7 going on. That's why he would run to his father and say, "I  
8 didn't do it; I wasn't there; you know I wasn't there," and that  
9 was the first time I began to realize his ability to understand  
10 what was going on.

11 Q] Well, did you explain to him in the very beginning of the  
12 case who you were and what your role was, that you in fact were  
13 not a police officer; that you were there to help him?

14 A] We told him that we were court appointed lawyers, that we  
15 were on his side and that we were there to help him. And, uh,  
16 which I imagine is pretty much what the police told him, uh, on  
17 June 3<sup>rd</sup>.

18 Q] And, and when in point in time did he tell you he thought  
19 that you and Mr. Crow were affiliated with the police?

20 A] It was shortly after that memo or contemporaneously with  
21 that memo, uh, I began to ask him if he understood what, what my  
22 role was and what a defense lawyer did and, and he said, "I  
23 thought you were the police and I didn't want to die in that  
24 electric chair." And that's exactly what he told me.

25 Q] Up to that point had you and Mr. Crow engaged in efforts to

1 make his, uh, what he was telling you consistent with what he  
2 had told the police?

3 A] Oh, we worked day and night. I mean, it was just so  
4 frustrating to me as an attorney because I had had, you know, I,  
5 in the past when I had dealt with people who turned State's  
6 evidence, you know, they, they were consistent with their  
7 stories from the beginning. And every time I talked to Mr.  
8 Misskelley, it was something different. And he couldn't elabo-  
9 rate on any of the facts; it would almost, you would have to  
10 say, "so this happened," or "that happened," and his response  
11 would be, "yeah," "uh-huh," "yeah," "uh-huh," much like his  
12 confession used against him in trial. Uh, I think there's two  
13 hundred and forty-six questions that were asked during the con-  
14 fession and introduced in trial, and the average response Mr.  
15 Misskelley gave was a two- or three-word response.

16 Q] Did you think in the early phase of the case before  
17 September 24<sup>th</sup> that it was important for you to take statements  
18 from him that were consistent with what he told the police?

19 A] Yes, absolutely.

20 Q] Why?

21 A] Because that was my goal, because I knew that if he test-  
22 ified inconsistently with his statement, the official state-  
23 ments, then of course, the defense lawyers would tear him to  
24 shreds at the trial of Echols and Baldwin, and that the offer,  
25 and I have to explain what I mean by "the offer," uh, would be

1 withdrawn because part of the deal was "there is no deal," and  
2 at that time in our judicial circuit prosecutor, uh, Mr. Davis  
3 and his deputies would not make a deal with someone who turned  
4 state's evidence. They would merely say "if you cooperate and  
5 testify then we'll reward you handsomely, but we're not going to  
6 tell you we're going to give you this amount or this amount,"  
7 because they didn't want the co-defendants lawyers to say "isn't  
8 it true that you're just testifying because you're going to get  
9 a forty-year sentence, or a twenty-year sentence, or an eight-  
10 year sentence" or whatever the case may be. So I knew that one  
11 of the elements of quote, unquote "deal" would be, uh, that he  
12 testify truthfully, and I began to panic, frankly, by August  
13 because we could not get Mr. Misskelley to tell us what  
14 happened. And I had no idea how I was going to prepare him to  
15 testify in the rigors of direct, much less cross-examination by  
16 the defense lawyers.

17 Q] Well, let me see if I understand this. Before September  
18 24<sup>th</sup>, your strategy was to try and get him to give statements to  
19 you that were consistent with what he had told the police?

20 A] Exactly.

21 Q] And the purpose in doing that was in the hope that if he  
22 cooperated with the prosecution and testified consistently with  
23 what he told the police, that they would then show him some  
24 leniency?

25 A] Obviously, our big concern was that the death penalty had

1 been waived, and uh, our second goal was to get the best  
2 possible sentence as part of the negotiated plea.

3 Q] And as went along and you got to interact with Mr.  
4 Misskelley and see his limitations, if any, did you realize that  
5 your strategy was not going to be viable?

6 A] Oh, absolutely. Uh, about the same time as that memo, uh,  
7 occurred, uh, I went to the jail to visit him one day and he  
8 handed me, when I walked in he said, "Hey, Dan," and he handed  
9 me this little pamphlet and on the front of it was - - some  
10 religious person had come by, a preacher or someone, and handed  
11 him this pamphlet and on the front of it - - it looked like  
12 things they hand out at airports, uh, and, and it said on the  
13 front cover, uh, "Do you know Satan?" or "Who is Satan?" And  
14 Jessie walked up to me and said, "Dan, who's Satin?" And I  
15 said, "What do you mean?" And he goes, "Satin. Who's Satin?"  
16 And he handed me the book and of course I remember just being  
17 stunned that he didn't know who Satan or the devil was, because  
18 that's what he was accused of doing. And so it became very,  
19 very clear that I needed to change strategies and directions  
20 very, very quickly, because I was running out of time, uh, and  
21 that I needed to do a mental evaluation and to start moving  
22 towards, uh, investigating the alibi witnesses that obviously by  
23 the ABA standards, I should have been doing from day one as  
24 opposed to four months into the case.

25 Q] So just to summarize, is it accurate to say that up to the

1 point in September 24<sup>th</sup>, you didn't really have any sort of  
2 strategy, other than trying to get him to plead and cooperate  
3 and get a deal?

4 A] That's a one hundred percent accurate assessment.

5 Q] And after September 24<sup>th</sup>, uh, your strategy radically  
6 changed in the sense that it was now a situation where you  
7 believed that your client was innocent and now you had an  
8 obligation to thoroughly investigate the case?

9 A] Exactly. And it was just a few days later at the September  
10 27<sup>th</sup> hearing that Prosecutor Fogleman advised me that there had  
11 been a mistake with regard to the DNA match on the T-shirt and  
12 it was at that time that I met Mr. Lax and he introduced me to  
13 Dr. Richard Ofshe.

14 Q] Okay. I want to ask you about that. Did you realize when  
15 you had this change in strategy that your obligation at this  
16 point was going to be different than it was up to September 24?

17 A] Sure.

18 Q] Did you realize that part of your obligation was not only  
19 to investigate the alibi, but also to utilize and employ expert  
20 witnesses in your defense?

21 A] Yes.

22 Q] And, uh, the ABA guidelines that we have referred to say  
23 "counsel should secure the assistance of experts where it is  
24 necessary or appropriate for preparation of a defense, adequate  
25 understanding of prosecution's case, rebuttal of any portion of



1 the prosecution's case in the guilt/innocence phase or the  
2 sentencing phase of the trial," and then last, "a presentation  
3 of mitigation." And it goes on to say "experts assisting in  
4 investigation and other preparation of the facts should be  
5 independent and their work product should be confidential to the  
6 extent allowed by law. Counsel and support staff should use all  
7 available means necessary to obtain all necessary information."  
8 Although you weren't aware of that guideline, did you have some  
9 sense that you were going to need assistance of experts in order  
10 to further this lately-formed strategy?

11 A] I did and of course, I was in a bit of a panic at that  
12 point because here it was, uh, at the end of September and, uh,  
13 Judge Burnett had made it clear that if, uh, insanity, uh, was  
14 going to be an issue that he was going to send Mr. Misskelley to  
15 the State Hospital for evaluation, which I did not want to  
16 happen, because the State Hospital is essentially an arm of the  
17 prosecution. And so I began to immediately try to retain an  
18 expert to, to assist us with, uh, a determination as to whether  
19 or not Mr. Misskelley was competent to stand trial and whether  
20 or not he was, uh, had any ability at all to assist us in  
21 presenting his defense.

22 Q] Did you personally think that he was not competent to stand  
23 trial?

24 A] After he asked me who "Satin" was and he couldn't tell me  
25 who the president of the United States was, even though every-

1 body in Arkansas knew Bill Clinton was the president, and it was  
2 pretty obvious to everyone, I began to realize that I didn't  
3 have any experience in dealing with persons who were mentally  
4 handicapped and I just, it was something I wasn't prepared for,  
5 and so that's when I began to seek out help in that regard.

6 Q] So one thing you were looking at was psychiatric or mental  
7 health assistance; correct?

8 A] Yes.

9 Q] Were there other avenues of expert assistance that you knew  
10 you were going to have to use now that you have this new  
11 strategy?

12 A] Well, since Prosecutor Fogleman had advised me that the DNA  
13 issue was no longer, uh, going to be used, uh, I had already  
14 filed a motion to the Court asking for assistance in obtaining  
15 funding or a DNA expert, but I withdrew it after Fogleman told  
16 me that that was no longer going to be an issue. So, uh,  
17 looking back now through, through the prism of what I know now  
18 compared to what I knew then and my experience I had at the  
19 time, that was a very poor choice to have made on my part,  
20 because I did need, still, that DNA expert or serology expert to  
21 help me deal with understanding, uh, DeGuglielmo's, uh,  
22 testimony and some of the other evidence that the State, uh, was  
23 going to use to corroborate Mr. Misskelley's confession.

24 Q] You said that on September 27<sup>th</sup> that you had been informed  
25 by the prosecution that it did not intend to use serology or DNA

1 evidence; correct?

2 A] On that particular piece of evidence.

3 Q] Okay. And was there an indication that they were going to  
4 put on evidence of serology or DNA regarding the pants samples?

5 A] At that point in time I don't believe that had been done  
6 yet. I, again, it's been a long time since I've reviewed my  
7 files, uh, but I don't think that we had gotten that discovery  
8 from the prosecutor at that point. I may be incorrect.

9 Q] Let's take a look. I'm referring you to Exhibit number 21,  
10 the, uh, report by Genetic Design, it's dated July 13, 1993?

11 A] (Witness examining same.) I stand corrected. I certainly  
12 wasn't aware of it but I didn't make the connection that I  
13 needed the expert to refute this.

14 Q] In other words, you were in possession or you were in pos-  
15 session of that report probably around July of 1993; right?

16 A] I, I couldn't tell you from looking at this document,  
17 exactly when I received it, uh, but it certainly would have been  
18 before the September 27<sup>th</sup> hearing.

19 Q] And yet you say you withdrew your motion for, uh, the  
20 assistance of a DNA expert because you were informed that they  
21 weren't going to make any use of DNA testimony or serology?

22 A] It's hard for me to say this, uh, without just saying it.  
23 I, I, I was not sophisticated enough nor did I have the ex-  
24 perience to understand the importance of having that expert  
25 assist me in refuting, uh, that evidence that the State was

1 going to present in regard to the DNA.

2 Q] I'm on page...

3 A] ...I did understand how important it would be with regard  
4 to that one piece of evidence; that being the T-shirt that had  
5 blood on it, but it never occurred to me, uh, because I had no  
6 experience in dealing with DNA and those issues. I focused my  
7 attention to the confession and, uh, failed to recognize the  
8 importance of, of having the experts come in to refute things  
9 like fiber, uh, the hair evidence and fingerprints, things of  
10 those nature.

11 Q] You were present in September, uh, September 27<sup>th</sup> when there  
12 was a discussion between the Court and Mr. Ford about expert  
13 assistance, and I'll read it to you. It's page 139: Mr. Ford  
14 says, he's talking about the need for expert assistance here and  
15 he says, "I don't know anything about hair or fibers or DNA.  
16 I'm an attorney, not a scientist. I don't know if there's any  
17 basis to question that or not." And then he further says on  
18 139: "It's easy to say retain someone and do that, who can give  
19 me reasons to call into question your credibility, but number  
20 one, I don't have money to get these people to talk to me." And  
21 the Court says: "I told you I'd take care of that. That's not  
22 the issue. The issue is whether or not you need to have fifteen  
23 different experts." And the Court says on the next page: "Find  
24 somebody that can do it, send me an order that reflects that  
25 they can do it and what the circumstances are. You waive the

1 chain of custody and I'll grant the order and order it paid."  
2 Did that colloquy indicate to you that the Court was receptive  
3 to requests for funding this case and granting whatever motions  
4 you were going to make for expert witnesses?

5 A] With all due respect, I heard it and I understood what the  
6 Court was saying, but my experience was that wasn't going to  
7 happen.

8 Q] Despite what the Court was saying?

9 A] Yes.

10 Q] Now was there some tactile or strategic reason why you  
11 failed to ask for expert assistance, even if you believed right-  
12 ly or wrongly, that the Court was going to deny that request.  
13 Did you think, "Well, I've still got to make the request and if  
14 he denies it, we have made a record that I asked for something,  
15 I needed something, but it was denied to me." Did that thought  
16 process ever go through your mind?

17 A] The only way that I can answer that question is to divide  
18 it into the categories and it did obviously occur to me that I  
19 needed the expert on false confessions and I needed an expert on  
20 Satanic activities, uh, it also occurred to me that I needed an  
21 expert, uh, on polygraph, because that was a major, uh, issue  
22 in, uh, how the police were able to obtain Mr. Misskelley's  
23 statement in the first place. My focus and concentration was on  
24 those areas and after Prosecutor Fogleman advised me that the T-  
25 shirt would no longer be an issue since there was no fibers or

1 hairs or anything linking Mr. Misskelley to the crimes, other  
2 than his ridiculous statement that he made to the police that  
3 was so riddled with errors, inconsistencies and falsehoods, I  
4 didn't think that it was important for me to retain experts on  
5 hair and fiber and fingerprints and serology and pathology, be-  
6 cause I felt like the only thing I had to fight and overcome was  
7 the confession. Looking back I see that that was not a correct  
8 way to proceed and the only way I can describe it, Counselor, is  
9 I just was not, I didn't have the experience to see what I  
10 really needed. So I never got to the point to where I actually  
11 filed the motion with the court to, to, uh, ask for that assist-  
12 ance because I failed to recognize that I needed it in the first  
13 place.

14 Q] Well, part of your strategy, once you decided that this is  
15 a case in which guilt was going to be contested, did you also  
16 realize as part of that strategy that if it was going to have  
17 any chance of success, you were going to have to do something  
18 with the confession?

19 A] Yes. And the reason I didn't ask Judge Burnett to award me  
20 funds to, uh, secure an expert in the area of confessions,  
21 police interrogation tactics and polygraph, was because I knew I  
22 would have to lay my cards on the table and, and the Court and  
23 the prosecutor would know who I was talking to and if I didn't  
24 like what I got back, that they were going to be privy to my  
25 defense and I wasn't comfortable with that.

1 Q] At any point in time while the case was pending, did you  
2 have occasion to do any research into whether you might be per-  
3 mitted to make an ex parte request to the Court, or to move the  
4 Court to hold your experts under some sort of confidentiality  
5 arrangement?

6 A] It never occurred to me.

7 Q] Do you recall reading a case called *Ake vs. Oklahoma*, which  
8 deals with the indigent's right for expert assistance and also  
9 with the procedural right to file papers ex parte in order to,  
10 uh, protect the attorney/client relationship?

11 A] I'm aware of it now, but I can't say that I was aware of it  
12 in 1993, 1994.

13 Q] Now at, at one point in the proceedings -- it's page 434,  
14 I think this is December, uh, you're arguing about some issues  
15 and you say, "Back in September at the September 27<sup>th</sup> hearing in  
16 Marion, the Court will recall we raised an issue by motion,  
17 written motion, that we wanted to have the assistance of an  
18 expert to conduct DNA testing on a T-shirt that was found in Mr.  
19 Misskelley's home. At that point in open court, and I believe  
20 Mr. Ford and Mr. Price will remember this, I was told by the  
21 prosecutor that that was not necessary, that issue was moot be-  
22 cause they had no intention of using that piece of evidence at  
23 trial; therefore, I withdrew my motion." And you go on,  
24 "Yesterday in discussing this case with Mr. Fogleman, he inform-  
25 ed me that he intends to use that piece of evidence at trial and

1 now we're four weeks away and now suddenly I'm going to have to  
2 have an independent DNA expert. I don't think the evidence is  
3 relevant and also with regard to probative value that it is  
4 inclusive, it has no probative value, it's simply nothing more  
5 than pure unadulterated prejudicial impact on the jury regarding  
6 this blood that they can't do anything with it, other than to  
7 say it's the same as the victim's, it's also the same as Mr.  
8 Misskelley's. To allow the State to use it at this late date  
9 would be error." Do you recall that exchange?

10 A] Very well.

11 Q] And is that, in refreshing your memory there, what the  
12 prosecutors told you back in September was not that they were  
13 not going to use any serology or DNA evidence, but that they  
14 were only not going to use the evidence relating to the T-shirt?

15 A] That's correct.

16 Q] Nobody ever told you they were going to use the serology or  
17 DNA evidence that was reflected in that July report?

18 A] They did not tell me. The only thing they told me was they  
19 would not be using T-shirt evidence and then I think later on in  
20 the record, you'll see that the prosecution withdrew its intent  
21 to use that as opposed to having the court delay the proceedings  
22 and allowing me time to obtain an expert.

23 Q] Well, when you reviewed, uh, when you received that July  
24 report indicating that there was, uh, DNA present on those  
25 pants, did you recognize the significance of it in terms of how



1 that could impact the jury's assessment of the reliability of  
2 that confession, since Mr. Misskelley had stated in the confes-  
3 sion that there was sexual activity and now you had a DNA report  
4 that seemed to corroborate that?

5 A] I recognize it now, but I didn't at the time.

6 Q] Why, in your mind back then, didn't it have any signif-  
7 icance in terms of damage in your attempts to discredit that  
8 confession?

9 A] Well, there is no substitute for experience, and I had  
10 none.

11 Q] So you did recognize at some point that you could use ex-  
12 perts to contradict what was in the confession; right?

13 A] I did, but I did not adequately educate myself on the  
14 dynamics of DNA evidence, uh, or have a firm enough under-  
15 standing of what was going to be testified to, uh, they were  
16 talking about primate evidence, they were talking about it could  
17 be this, it could be a monkey, it could be a gorilla, and so to  
18 me, I failed to see the real significance in it corroborating  
19 testimony. Had I known about the notes from the Crime Lab that  
20 said there was false positives, it certainly would have occurred  
21 to me that frankly I just failed to recognize just how damaging  
22 that testimony was. And in the affidavits of, uh, that are  
23 attached to my declaration, it's very, very clear that, uh, that  
24 it did have a tremendous impact on the jury. In looking at some  
25 of the juror's notes, it's obvious it did have an impact.

1 Q] Did you, uh, do any research into issues regarding the ad-  
2 missibility of expert testimony and specifically, were you aware  
3 in the pretrial phase of the case what the Arkansas Supreme  
4 Court had said in the *Prater* case about the admissibility of  
5 scientific evidence?

6 A] Yes, there was I think there was some debate at the time  
7 about the Pryor standard and the Dalbert standard and I think  
8 all of that was kind of happening at the same time. And as I  
9 recall, there may have been some degree of uncertainty as to  
10 exactly what, which way Arkansas was heading in that regard.  
11 And we researched it extensively because our position was that  
12 Dr. Ofshe's testimony was certainly relevant and scientifically  
13 reliable as was Mr. Holmes' regarding polygraph. Uh, but,  
14 again, uh, I guess I failed to recognize the importance of the  
15 hair, fiber, DNA evidence because none of that seemed to be re-  
16 lated to Mr. Misskelley. The only thing that they had was the  
17 confession and so I focused my attack entirely on the confe-  
18 sion. And I simply failed to recognize the importance of it.

19 Q] And, and when you say none of it related to Mr. Misskelley,  
20 uh, how did that follow given the fact that Mr. Misskelley was  
21 saying in his confession that there had been sex, and now you  
22 had a DNA report that said there was possibly some semen on  
23 those jeans. Why didn't that, in your mind, relate to Mr. Miss-  
24 kelley. Who did it relate to?

25 MR. DAVIS: Your Honor, may I ask for clarifi-

1 cation on something?

2 THE COURT: Yes.

3 MR. DAVIS: Are we talking - - is that in July,  
4 on the semen, because you're referring to the July  
5 report that refers to some sort of semen on the jeans.

6 MR. BURT: Correct.

7 MR. DAVIS: Well, I mean, if you look at that  
8 July report I don't think that that's - - it says May  
9 19.

10 THE WITNESS: I interpreted the question as to  
11 mean just before trial. I didn't know there was a  
12 time reference.

13 MR. DAVIS: Maybe I missed something there.

14 DIRECT-EXAMINATION, continuing:

15 Q] "DNA isolated from the blue jeans could not be amplified,"  
16 in other words, the report indicates that they had DNA isolated?

17 A] The implication was that there was sperm present and that  
18 it was male sperm, but they couldn't, they couldn't tell whether  
19 it was, all they could say was it was from a primate. They  
20 couldn't say that it was human in origin. And I wish that I had  
21 a better answer for your questions that make sense, that it  
22 makes me look a little more, uh, sophisticated, but I simply  
23 didn't have the experience to understand how important it was to  
24 attack this evidence in an effort to keep the State from being  
25 able to corroborate Mr. Misskelley's confession.

1 Q] So I take it from what you said that you didn't have any  
2 strategy for objecting to the admissibility of the serology or  
3 DNA evidence?

4 A] None whatsoever.

5 Q] And, of course, had you known there were false positives  
6 and that some of the evidence may have been microbial DNA as  
7 opposed to human DNA?

8 A] And bacteria.

9 Q] Are you saying you might have formulated a strategy?

10 A] I think that certainly would have been a red flag and it  
11 would have put me back in the position of renewing my motion for  
12 a DNA expert, because at the time I came to the conclusion that,  
13 that, uh, that really didn't hurt us that much. And it certain-  
14 ly was the wrong conclusion to gather looking back now, hind-  
15 sight 20/20, but, uh, we had three or four months to get ready  
16 for trial. I had asked for a continuance; His Honor made it  
17 clear that we were going to trial in January. I had to concen-  
18 trate on the confession. The confession was the main focus of  
19 their case and our only strategy was when they put on their  
20 witnesses, I would stand up for the cross-examination and say  
21 "did you find anything that related back to Mr. Misskelley,"  
22 whether it was a fingerprint, or their fiber expert, their hair  
23 experts, uh, serology expert and they all said no. And I said  
24 "no further questions" and sat down. That was my strategy and  
25 it was a poor one. And it was based on simply the lack of ex-

1 perience. I just didn't know and understand the dynamics of how  
2 to attack that evidence. And I think had I done so, I think the  
3 results would have been dramatically different.

4 Q] Well, at some level you must have known that the DNA and  
5 the serology evidence hurt you, because you did make an attempt  
6 to cross-examine both of those experts. Do you recall that?

7 A] I did.

8 Q] Very, very brief cross-examination, but it was not a  
9 situation where you just stood up and said "no questions"?

10 A] No, no, the fingerprint, the hair and fiber guys, I think  
11 it was simply me standing up and saying "none of this links Mr.  
12 Misskelley," and they said "yes," and I said "no further  
13 questions." I did make an attempt to cross-examine, uh, path-  
14 ologist, uh, Dr. Peretti and also DeGuglielmo and clarify a few  
15 things, but I think anyone who looks back at that can certainly  
16 just say it was cursory in nature and peripheral at best, and I  
17 simply didn't have the experience that I needed to be able to  
18 effectively cross-examine an expert of that sort.

19 Q] Now you said you cross-examined Dr. Peretti, and one of the  
20 things you cross-examined him about, and it's reflected in the  
21 record, is that the autopsy findings did not include any  
22 injuries to any of the three victims' necks. Do you recall  
23 that?

24 A] Yes, I do.

25 Q] And was the reason you were asking those questions, because

1 Mr. Misskelley, in his confession had said something about chok-  
2 ing, uh, somebody choking one of the victims?

3 A] That's correct.

4 Q] And so you realized when you were cross-examining Dr.  
5 Peretti that you could use a forensic pathologist to bring out  
6 contradictions between the physical evidence and what Mr. Miss-  
7 kelley had told the police had happened; right?

8 A] I made the mistake, Counselor, of assuming that Dr. Peretti  
9 the Medical Examiner was an unbiased witness and he was there to  
10 testify about the facts before him. I failed to recognize that  
11 the Medical Examiner's office is simply an arm of the prosecu-  
12 tion and the State, and even though I was able to use some of  
13 his testimony to contradict, uh, the confession, uh, the Med-  
14 ical Examiner's office, uh, and the Crime Lab are controlled by  
15 the prosecutor. And it never occurred to me that I needed my  
16 own pathologist until probably 1995. But unfortunately, Mr.  
17 Misskelley was convicted in 1994 and by the time I started  
18 consulting with these experts in 1995 and '96 and '97 and '98,  
19 uh, I, I began to realize that "wow, I wish I would have known  
20 this then," but at the time I didn't have the experience to  
21 understand how important it was.

22 Q] You mentioned this morning that you did do some research in  
23 the forensic pathology; you mentioned Dr. Spitzer's book?

24 A] I did. I read his book and I was able to determine that if  
25 someone had been choked as severely as Mr. Misskelley indicated

1 in his confession, that the hyoid bone would have had to have  
2 been not intact. And that's why I specifically asked Dr. Peretti  
3 whether or not any of the hyoid bones in any of the three  
4 victims had been torn or broken. And, of course, his response  
5 was no, they hadn't been.

6 Q] And you also talked to Dr. Peretti prior to trial; correct?  
7 I think you indicated in your new trial motion that when you  
8 talked to him prior to the case going to trial?

9 A] And his testimony changed from time to time and his testi-  
10 mony at my trial in Corning is dramatically different than what  
11 he testified to at the subsequent trial here in Jonesboro. In  
12 fact, it was so dramatically different that it either had to be  
13 perjury or, or, uh, just, uh, gross incompetence. And so I  
14 filed a motion for a new trial, which was denied.

15 Q] And also in regard to Dr. Peretti, you were getting some  
16 information from your co-counsel regarding what he was going to  
17 testify to; right?

18 A] Uh, Mr. Ford and Mr. Wadley, uh, were kind enough to share,  
19 uh, one tidbit of information with, uh, Mr. Price, Mr. Davidson,  
20 Mr. Crow and myself and that was the fact that he had tape re-  
21 corded a conversation with Dr. Peretti regarding the lack of any  
22 findings to support sodomy.

23 Q] And the exhibit next in order is a transcript of the tape  
24 recorder and also attached to that is page 44 of a textbook en-  
25 titled Medicolegal Investigation of Death.

1           MR. DAVIS: What edition is that?

2           MR. BURT: All I know it is established this  
3 document was in his trial file, so I assume this  
4 edition is sometime prior to January 13<sup>th</sup>, 1994.

5           MR. DAVIS: Now this transcript, this is a trans-  
6 cript of a telephone conversation of Dr. Peretti?

7           MR. BURT: Correct. And what I'm going to show  
8 is that it was the faxed to Dan, he put them in his  
9 trial file and stapled to it was this page from Dr.  
10 Spitzer's book.

11           MR. DAVIS: Okay.

12 DIRECT-EXAMINATION, continuing:

13 Q] What I'm showing you Exhibit 35 and I'll ask you to note  
14 that on the top of that is a fax stamp of January 13, 1994. Do  
15 you see that?

16 A] I do.

17 Q] Is that document in your trial file?

18 A] It is.

19 Q] What, what is that transcript; where did you get that and  
20 what does that relate to?

21 A] Mr. Ford or Mr. Wadley, I can't remember which, uh, faxed  
22 this to us pretty much on the eve of our trial and shared this  
23 information with us. And of course, it was very important to  
24 me, because basically Dr. Peretti was stating that, uh, the fact  
25 that the victims' anuses were dilated, and in no way meant that



1 there was a sexual assault and, uh, there was no tearing or  
2 anything essentially indicative of sexual assault, including the  
3 finding of any semen.

4 Q] And that was important to you because...

5 A] ...because it directly contradicted Misskelley's statement  
6 to the police.

7 Q] Now at the trial Dr. Peretti actually, uh, did give some  
8 evidence that suggested there was sexual assault?

9 A] He waffled around quite a bit but, uh, once he realized  
10 that there was a tape recording, he pretty much had to acquiesce  
11 to his earlier statement to Mr. Ford on the telephone, much like  
12 he did in the second trial. When he realized he was on tape and  
13 with regard to the time of death, he suddenly had to change his  
14 opinion because he knew Mr. Ford had him on tape again. Unfor-  
15 tunately, Mr. Ford didn't see fit to share that with me in my  
16 trial.

17 Q] Well, are you saying you cross-examined Dr. Peretti with  
18 this tape recorded statement, because I didn't see that reflect-  
19 ed in this?

20 A] Well, I used the information that I had gotten from Ford  
21 and Wadley to cross-examine him on that issue.

22 Q] Do you, do you recall that at, uh, during his direct-exam-  
23 ination, Dr. Peretti said that there were indicators of sexual  
24 assault, specifically that, uh, there was dilation of the anus  
25 and there was some, uh, markings around the ears that he said

1 were consistent with forced sexual activity?

2 A] That's correct. And I cross-examined him and impeached him  
3 with this information, and also, I had photocopied these por-  
4 tions out of Dr. Spitzer's book, uh, showing similar marks and  
5 abrasions on victims that were caused by things other than, uh,  
6 what Peretti was saying were scratches on the ears, or the ears  
7 were pulled, indicative of forced oral sex. How robust my  
8 cross-examination was, Counselor, I cannot recall with  
9 specificity. It's been fifteen years.

10 Q] The problem I'm having is that I'm not recalling cross-  
11 examination. You have the transcript that's in front of you  
12 there; right - - in other words that was faxed, that transcript  
13 was in your hands on January 13<sup>th</sup>?

14 A] I don't remember exactly when our trial started.

15 Q] Well, Dr. Peretti testified on January 19<sup>th</sup>?

16 A] So I had it a week in advance; six days in advance.

17 Q] And his cross-examination, on page eight-fifty of the  
18 transcript and you say:

19 Question: "The injuries that you were describing for the  
20 victims' ears, you laid out some possibility about how it could  
21 have been caused. Is there any evidence that it was definitely  
22 caused by oral sex?"

23 Answer: "I found no evidence of semen in the oral cavities."

24 Question: "Dr. Peretti, you talked about the victims' anal  
25 orifices being dilated. Isn't it true that that could be caused

1 by the fact that bodies were in water?"

2 Answer: "That's correct."

3 Question: "Was there any evidence whatsoever to indicate that  
4 these victims were sodomized or raped anally?"

5 Answer: "No semen was detected in the anal orifice."

6 Question: "Was there evidence of trauma or lacerations or any-  
7 thing of that nature?"

8 Answer: "There were no injuries noted in the anal orifice or  
9 the anal mucosa. The only thing I saw was the hyperemia or  
10 reddening of the mucosa."

11 Question: "Isn't it true, Doctor, that if someone was sodomized  
12 or raped, that you would expect to find these types of  
13 injuries?"

14 Answer: "My experience dealing with the many children of rape,  
15 I have found anal trauma."

16 Question: "So you would expect to find that if the victim had  
17 been sodomized?"

18 Answer: "Yes."

19 And then you go on to a different topic about whether the  
20 victims had been choked. And then at the very end of your cross:

21 Question: "So does there appear to be any evidence of sodomy or  
22 choking of any of the victims?"

23 Answer: "No."

24 Question: "Most likely source of the dilation of the anus is  
25 probably the water?"

1 Answer: "You get dilation from being in the water, postmortem  
2 relaxation or a small object such as a finger may have been  
3 inserted into the anus before decomposition."

4 And then their re-direct is "would you indicate that there was  
5 no sign of semen in the anal or oral cavities; all that  
6 indicates to you is there was no ejaculation if there was a  
7 sexual assault; correct?"

8 Answer: "That's correct."

9 Question: "There can be a sexual assault and that evidence does  
10 not..." and then there's an objection.

11 Question: "The absence of semen does not rule out sexual  
12 assault?"

13 Answer: "It indicates there was no ejaculation."

14 And then there's further cross-examination along those lines.

15 And there's a re-cross by you: "If there was a witness to these  
16 homicides, then that witness purported to say that these victims  
17 were sodomized, would you expect to find tears or trauma to  
18 their anal orifices?"

19 Answer: "If there was forceful penetration into the orifice and  
20 into the rectum, I would expect to find trauma."

21 "In the absence of those injuries, you would expect that didn't  
22 occur?"

23 "I would expect there was no penetration in the canal with  
24 ejaculation of the semen."

25 And then re-direct is: "Dr. Peretti, are you familiar with med-

1 ical literature that indicates there can be sodomy to young  
2 children without evidence of tears or lacerations?"

3 Answer: "There is published medical literature on those facts,  
4 yes."

5 Then you re-cross: "Dr. Peretti, more times than not, there  
6 would be trauma if that occurred?"

7 He says: "My experience in the cases that I have dealt with,  
8 I've always seen trauma."

9 Question: "Always seen trauma?"

10 Answer: "The cases that I have previously autopsied."

11 And that's the end of the cross-examination. So does that re-  
12 fresh your memory that you did not in fact use this transcript  
13 to impeach him on the issue of whether there was sodomy or not?

14 A] Not as well as I should of or could of.

15 Q] Well, when you say "not as well," you mean use it at all?

16 A] Well, I knew that the transcript existed and I knew that  
17 Peretti had told Ford that, uh, that within a reasonable degree  
18 of medical certainty, he couldn't say that they had been  
19 sodomized. And so that's the direction that I headed.

20 Q] But you never got there, according to the transcript;  
21 right?

22 A] No, sir, I didn't.

23 Q] And specifically one of the questions that Wadley asked Dr.  
24 Peretti on the telephone was, uh, this is on page 3. Question:  
25 "Doctor, do you think the prosecutor in this case can stand in

1 front of the jury and in good faith tell the jury that they  
2 expected to, that the proof will be that these boys were  
3 sodomized?"

4 Answer: "I would say not in good faith. That's his decision,  
5 not mine."

6 That's a pretty good item of impeachment, is it not?

7 A] It sure looks like it now.

8 Q] Well, is there any reason why it wouldn't have looked like  
9 it back then; in other words, if you had been in possession of  
10 that transcript with that question and answer that I just read  
11 to you, can you see any tactile or strategic reason why you  
12 would not have impeached Dr. Peretti with that particular line  
13 of questioning from that transcript?

14 A] The only thing I can attribute it to would be lack of ex-  
15 perience in cross-examining an expert in pathology.

16 Q] Now attached in your file, uh, attached to that transcript,  
17 is page 44 of Medicolegal Investigation of Death, which is Dr.  
18 Spitzer's book; correct?

19 A] That's correct.

20 Q] And that's the book you said you reviewed prior to trial?

21 A] I did.

22 Q] And this, uh, particular page from the book shows two  
23 photographs both of which have to do with animal predation and  
24 the injuries that are caused by animal predation; right?

25 A] That's correct.

1 Q] The first photo shows postmortem artifacts produced by ants  
2 and the second photograph shows postmortem artifacts caused by  
3 roaches; right?

4 A] That's correct.

5 Q] When you, when you saw these photographs, did the injuries  
6 that are depicted in these photographs look to you like injuries  
7 that you saw in the autopsy photos in this case?

8 A] They looked almost identical.

9 Q] Did that get you to thinking that perhaps you ought to  
10 check with a forensic pathologist to see if any of the injuries  
11 could be caused by animal predation?

12 A] I wish I could say that it did, but it didn't. It did in  
13 post-conviction and it did in 1998 when I actually did seek out  
14 the services of a forensic entomologist and a forensic path-  
15 ologist, but I failed to see the importance of it in 1993 and  
16 1994.

17 Q] Do you know why you would have Xeroxed that, which you took  
18 a page from a book, if you were not thinking about it? In other  
19 words, doesn't the fact that that photo is in your file attached  
20 to that interview with Peretti indicate to you that back in  
21 early 1994 before the trial began that you were at least think-  
22 ing about animal predation as a possible theory to explain the  
23 injuries that were depicted in your autopsy photos?

24 A] It's certainly indicative that I was thinking that, but I  
25 failed to follow up on it.

1 Q] If you had been able to follow up on it by hiring a  
2 forensic pathologist to examine the autopsy photos, and if you  
3 had obtained the kind of evidence that you have obtained which  
4 you reviewed, did you not, the declaration from this pathologist  
5 and attached to the petition?

6 A] I have. Particularly Dr. - - I can't say her name - - I'm  
7 sorry. Zagic?

8 Q] Zajac is the serologist.

9 A] Oh, I'm sorry. The one from Minnesota whose name is...?

10 Q] ...Ophoven?

11 A] Yes.

12 Q] And did you review Dr. Spitzer's book?

13 A] I did.

14 Q] And Dr. Ophoven and Dr. Haddock?

15 A] I did. I reviewed them all.

16 Q] And did you review the declarations or other information  
17 when it came from the forensic odontologist?

18 A] Yes, and they're the same things that the experts told me  
19 in 1998.

20 A] And having reviewed those declarations, uh, was there any  
21 reason, had you been provided with that information, not that  
22 exact information but had you been provided with that evidence  
23 back in 1993, was there any tactical or strategic reason why you  
24 would not have employed that evidence in defense of Jessie  
25 Misskelley?



1 A] None whatsoever. Had I had the experience that I do now or  
2 had acquired by 1998 when I did seek out these experts, I  
3 certainly would have utilized it. I just was not experienced  
4 enough to understand the importance of it and move forward. I,  
5 obviously, I got close, but I didn't quite connect the dots.

6 Q] Well, when you say you "obviously got close," at no point  
7 in time did you, uh, employ the services of a forensic path-  
8 logist; correct?

9 A] No, sir.

10 Q] Did you ever ask Dr. Peretti whether the injuries that he  
11 observed were caused by animal predation?

12 A] I know I didn't during the trial and I don't think that I  
13 did during any of my conversations with him on the telephone,  
14 which were not, there were very few conversations that I had.

15 Q] And is the first conversation with a forensic pathologist  
16 or even an independent forensic pathologist that you had about  
17 this issue, is it true that that conversation never took place  
18 until 1998?

19 A] 1998, in San Francisco.

20 Q] What, what had changed between 1993 and '98 that allowed  
21 you to have this conversation in which, uh, on this issue that  
22 we're talking about?

23 A] I was a little older and a little wiser and with the help  
24 of a profiler, uh, I was able to move forward and start consult-  
25 ing experts that I should have consulted back in '93 and '94.

1 Q] And did you document the conversation you had in '98 with  
2 these experts, which of course, is long after the trial?

3 A] I did.

4 Q] I'm showing you this which is marked as next, Exhibit #36,  
5 you did a declaration in this case, did you not?

6 A] I did.

7 Q] Exhibit B?

8 A] I'm not sure of the number. I know I prepared one.

9 MR. DAVIS: Your Honor, as I understand it, and  
10 Mr. Burt can correct me if I'm wrong, but this is a,  
11 this was an attachment to the affidavit that Mr. Stid-  
12 ham, who is on the witness stand and here to provide  
13 testimony, they attached to his affidavit that was  
14 part of their petition, this is a letter from  
15 apparently, from Dan to the defense attorney that  
16 represented Mr. Echols in the Rule 37 hearing.

17 And as I understand it, part of it is Dan's  
18 discussion in a letter to him about something to do  
19 with a forensic expert that Dan talked with.

20 I would object to it because I think it's just a  
21 back-door way of in some form or fashion to try to get  
22 in what information may have come from experts, only  
23 this is Dan's words, not the expert's.

24 It's not an affidavit of the expert, it's not a  
25 report from the expert and, plus, it's from February

1 of 1998 in a letter to Echols' defense attorney at  
2 that time.

3 I don't see what possible relevancy it has.

4 THE COURT: Mr. <sup>Mullalloy</sup> ~~Mallett~~, who represented Echols  
5 in his Rule 37 petition, I think, uh, Mr. Stidham  
6 testified in it, but that's a memorandum of 1998, five  
7 years after that trial. I'm not going to allow it.

8 MR. BURT: Could we just make an offer of proof  
9 for the record, then, as I understand the Court's  
10 ruling?

11 THE COURT: Okay.

12 MR. BURT: But the offer of proof will be this:  
13 that, uh, Mr. Stidham, too late, realized the  
14 importance of consulting with a forensic pathologist  
15 and when he did that and for the first time when he  
16 did it, he very quickly came into possession of  
17 information that could have been crucial to Mr. Miss-  
18 kelley's defense.

19 And I'm not offering the memo for the truth of  
20 the statements in there, but rather to show his  
21 conduct in documenting this contact with the experts.

22 We're going to call the expert; we're going to  
23 put these experts on the stand.

24 THE COURT: Well, is somebody going to lay the  
25 ground, I mean, I saw some pictures of roaches and

1 ants.

2 MR. BURT: Yeah, we're going to...

3 THE COURT: ...these bodies were found in water.

4 There are no roaches and ants in water.

5 MR. BURT: Right.

6 THE COURT: Is there going to be any proof what-  
7 soever whether there were any fish, turtles...

8 MR. BURT: ...there is going to be...

9 THE COURT: ...insects or anything in that body  
10 of water?

11 MR. BURT: There is going to be proof that the in-  
12 juries, uh, and we're not saying of ants or roaches,  
13 but the point of the document I've showed you was that  
14 he was at least thinking about animal predation, and  
15 the testimony from the forensic pathologist...

16 THE COURT: ...is there going to be any proof  
17 that that body of water was evacuated and that they  
18 found fish and turtles and crawdads and water insects  
19 that would leave marks on a human?

20 MR. BURT: Well, I don't know about that, but...

21 THE COURT: ...well, I mean...

22 MR. BURT: ...I do know that the experts are  
23 going to say that, uh, unanimously say that the  
24 evidence from their perspective shows animal  
25 predation. Whether those animals were...

1           MR. DAVIS: ...I disagree with the characteriza-  
2           tion of "unanimous." Their people are unanimous;  
3           however, unanimously opposed.

4           THE WITNESS: Your Honor, if it's helpful to the  
5           Court, the experts that I consulted with said that  
6           they had examined the body, not that particular body  
7           of water, but bodies of water in this locale and that  
8           these insects and other rodents and animals were  
9           capable of putting marks...

10          THE COURT: ...I don't see how anybody can opine  
11          as to whether or not it was animal predation, unless  
12          they establish that those animals are in that body of  
13          water. If you've got somebody that's going to do  
14          that, fine.

15          MR. BURT: And I think we will address that. I  
16          think this is just, as I say indications of what in-  
17          vestigations he did too late.

18          THE COURT: All right. Go ahead. I'll let it  
19          in.

20          MR. BURT: Thank you.

21 DIRECT-EXAMINATION, continuing:

22 Q] I have this marked at Exhibit number 36. Do you recognize  
23 this?

24 A] (Witness examining same.) I do. This is an e-mail that I  
25 sent to Mr. Mallett.

1 Q] And was the purpose of that e-mail to document your con-  
2 versations with certain forensic pathology and certain forensic  
3 entomology experts that you did not conduct until 1998?

4 A] That's correct. These are things that I should have been  
5 doing in 1993 that I failed to recognize that were important.

6 Q] And does the e-mail in fact document that, again, not for  
7 its truth, but that you were informed by those experts that the  
8 injuries depicted in the autopsy, uh, photos in this case were  
9 caused, could have been caused by animal predation?

10 A] That's the first thing out of Dr. Baden's mouth when he  
11 looked at the photographs.

12 Q] And who were the experts you were consulting with in '98  
13 that gave you this information about animal predation?

14 A] Dr. Baden.

15 Q] Michael Baden, B-A-D-E-N?

16 A] B-A-D-E-N, uh, and, uh, also I spoke to Dr. Neil Haskell,  
17 who is perhaps the best known forensic entomologist in the  
18 world, uh, that I'm aware of. And, uh, he and I actually talked  
19 about doing experiments with pigs in the creek-bed where the  
20 bodies were found. Of course, by now the crime scene had been  
21 bulldozed over, so that would be impossible to do, but  
22 obviously, there are similar bodies of water nearby. But, uh,  
23 he was able to tell me exactly what insects were present and  
24 what animals were present and, uh, they, they vary by geography,  
25 of course, but these, he told me he had catalogued insects from

1 the North Pole to the South Pole, uh, was quite familiar with -  
2 - and, of course, the importance of the entomology is that they  
3 determine time of death based on forensic entomology.

4 Q] How did you gather together these experts, Dr. Baden and  
5 the entomologist? What was it that caused you in 1998 to start  
6 thinking, "Hey, these folks might be of assistance."

7 A] Primarily, my continued research into the case and my con-  
8 sultation with Mr. Turvey and, uh, I essentially went to a  
9 American Academy of Forensic Science meeting in San Francisco  
10 and stalked these people until they got tired of me stalking  
11 them and they agreed to look at my file. I didn't have any  
12 money to pay them.

13 Q] And you're saying that none of this took place at the time  
14 of the trial; correct?

15 A] No, I didn't understand the importance of it in 1993 and  
16 1994.

17 Q] Okay. Let's talk about now, uh, the importance of that now  
18 is that could have been used to impeach the confession?

19 A] Absolutely.

20 Q] Uh, your strategy of trying to discredit the confession was  
21 based on the fact that the confession was coming into evidence  
22 against you; right?

23 A] That's correct. Once Judge Burnett ruled that the  
24 confession would not be suppressed, uh, we focused our entire  
25 energies and attention to, uh, police interrogation tactics, the

1 polygraph expert, Mr. Holmes, and of course, Dr. Richard Ofshe.

2 Q] Did you also have a strategy to get the, uh, get the  
3 confession suppressed?

4 A] We did. It obviously didn't meet with any success, uh, but  
5 we did.

6 Q] Do you recall that on July 26, 1993, and this I think was  
7 reflected in the record, you filed a motion to suppress evidence  
8 which didn't specify any grounds for the motion, other than the  
9 fact you were moving to suppress pretty much everything in your  
10 case?

11 A] Yes, that's correct.

12 Q] Kind of a shot-gun approach?

13 A] And facts of discovery, other issues came up and we tried  
14 to fine-tune the motion as best we could.

15 Q] Okay?

16 A] We were hampered by the fact that the officers would not  
17 talk to us, despite of the fact that Judge Burnett ordered them  
18 to make themselves available, and they wouldn't talk to us.

19 Q] Do you recall at the suppression hearing on the confession  
20 didn't take place until January, 1994?

21 A] It was right on the eve of trial.

22 Q] Okay. And do you recall that on October 12<sup>th</sup> before the  
23 suppression hearing you filed an amended motion to suppress in  
24 which you set forth specific grounds for challenging the  
25 confession?



1 A] That's correct.

2 Q] Do you recall that you alleged in that amended motion that  
3 the confessions were involuntary, illegal and unlawful and un-  
4 constitutionally obtained, and taken in violation of the defend-  
5 ant's constitutional rights under the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amend-  
6 ments of the U. S. Constitution?

7 A] That's correct.

8 Q] Do you recall you also alleged that his statements were  
9 taken in violation of the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments in that  
10 they did not comply with the Constitutional Mandate set forth in  
11 the following areas, and you list them: Any waiver of the right  
12 to counsel was not voluntary; the defendant was wrongfully re-  
13 fused his right to counsel; the defendant was not provided  
14 counsel after being taken into custody; and although the defend-  
15 ant indicated his desire to stop questioning, the officers  
16 continued. The next one was any waiver, uh, invalid, was un-  
17 constitutionally obtained. The next ground you alleged was the  
18 taking of the statements were violative of the defendant's right  
19 under Arkansas Constitution in Rule 16.2, and the last ground  
20 alleged was that the statements were violative of the  
21 defendant's rights guaranteed, pursuant to Arkansas Code  
22 Annotated 9-27-317, the Arkansas and U. S. Constitution. Do you  
23 remember that's what you alleged?

24 A] Yes, that's correct.

25 Q] You didn't allege in that motion that there was a Rule 2.3

1 violation; correct?

2 A] No, I did not.

3 Q] Was there a reason for that?

4 A] Yes. We weren't aware of any 2.3 violation because, uh,  
5 Mr. Misskelley, despite his best efforts, was essentially unable  
6 to assist us in trying to figure out what had occurred that day  
7 and, uh, I had filed at least two motions with the Court asking  
8 to conduct the depositions of the interrogating officers so that  
9 I could find out what happened. All we had was their, their  
10 notes and the transcript and the recording of the confession,  
11 and that's all we had to go on. And so I was very interested in  
12 determining what the officers' version of the events were, but  
13 they wouldn't talk to us. And Judge Burnett denied our motion  
14 to conduct their depositions, but he did order them to make them  
15 selves available, which they did not.

16 Q] Which they did not?

17 A] (Witness shaking head negatively.)

18 Q] Are you saying that that is the only avenue that you had  
19 for determining the facts in support of your suppression motion?

20 A] At the time I thought it was.

21 Q] Well, at the suppression motion you actually put on the  
22 stand, uh, Jessie Misskelley, Sr.; right?

23 A] Correct.

24 Q] And you asked him on direct-examination, and this is on  
25 page 621: "Can you tell the Court what happened - - strike that.

1 You asked the question: "Do you remember on June 3<sup>rd</sup> coming into  
2 contact with Detective Allen?"

3 Answer: "Yes, sir."

4 Question: "Can you tell the Court what happened and what went  
5 down?"

6 Answer: "Well, I was at work down at the shop and Mike Allen  
7 came up there and my boss met him at the door. And Mike Allen  
8 wanted to see me so he called me over there and Mike told me he  
9 wanted to ask Jessie some questions. I said if he is not home  
10 he is at Vickie's house. He said he's not at home because I  
11 just came from there. So I went down to Vickie's house and I  
12 got him and carried him home and he put some shoes on and I  
13 carried him back to the shop and he got in the car with Mike  
14 Allen and then left."

15 Question: "Did the officer Allen explain to Jessie what his  
16 rights were?"

17 Answer: "No, sir, he said he just wanted to ask him some  
18 questions. That's all."

19 Do you recall that testimony you put on?

20 A] I do.

21 Q] And obviously you must have interviewed Mr. Misskelley, Sr.  
22 before you put him on the stand; right?

23 A] I did.

24 Q] And didn't that passage I just read to you alert you to a  
25 Rule 2.3 violation?

1 A] It should have, but it didn't become clear until Officer  
2 Allen testified.

3 Q] When did you interview Jessie, Sr. in relation to the sup-  
4 pression hearing in January?

5 A] My billing records would reflect, but I can't recall a  
6 specific day. I assume several times.

7 Q] And, uh, it was only after the suppression hearing that you  
8 actually included a Rule 2.3 violation in your papers?

9 A] After Officer Allen testified that he did not advise him of  
10 any rights prior to taking him to the station for questioning,  
11 uh, I turned to Mr. Crow and said, "We have to file an amended  
12 motion and amended brief. And at the conclusion of the hearing,  
13 please don't let me forget to ask Judge Burnett time to file an  
14 amended and, uh, which we did. And with some degree of  
15 reluctance, uh, His Honor gave me twenty-four hours to submit a  
16 written amended motion and a trial brief, or a hearing brief,  
17 which we did and we faxed it to Judge Burnett and faxed it to  
18 Brent Davis and, uh, I believe the next day Judge Burnett issued  
19 his ruling.

20 Q] Okay. And in that brief which you filed on, uh, January  
21 18<sup>th</sup>, I believe it's a matter of record, January 18<sup>th</sup>, 1994 at  
22 page 21 through 25, you argued Rule 2.3 for the first time;  
23 correct?

24 A] That's correct.

25 Q] And you cited the rule in *Burks vs. State* and *Keifer vs.*

1 State?

2 A] There was a long line of cases.

3 Q] *Addison vs. State*, all of which established at the time of  
4 your hearing, a per se rule of admissibility if there was a 2.3  
5 violation?

6 A] Absolutely. It was a very important issue and that's why  
7 we felt the need, obviously, to amend our brief, or amend our  
8 motion and supplement it with a brief. Had we been permitted to  
9 talk to the officers ahead of time, we could have raised the  
10 issue sooner but, uh, since they wouldn't talk to us, uh, I  
11 wasn't aware of the 2.3 violation until that moment when Officer  
12 Allen answered my question "what, if any, rights did you advise  
13 Mr. Misskelley of prior to taking him to the police station?"

14 Q] Did you, when you wrote that, uh, post-hearing brief, did  
15 you in fact think the Rule 2.3 motion was your strongest  
16 argument?

17 A] Absolutely.

18 Q] Fast forward for a moment to the time when post-conviction  
19 there was a discussion about whether Mr. Misskelley should co-  
20 operate; do you recall that?

21 A] After his conviction?

22 Q] After he was convicted and they took him to prison and  
23 there was a whole new issue about him wanting, or not wanting to  
24 testify on behalf of the State in the Echols/Baldwin case?

25 A] Yes, I do recall that.

1 Q] And you recall that you adamantly advised Mr. Misskelley  
2 not to do so, because you felt strongly that he had a strong  
3 case on appeal; right?

4 A] I felt that he couldn't get any stronger a case on appeal.

5 Q] And the issue you were referring to was what?

6 A] 2.3; that, coupled with the fact that under Arkansas law in  
7 1993, a juvenile could not waive their right, uh, *Miranda Rights*  
8 without written consent of their parents. And we felt those two  
9 issues, coupled together made it an incredibly strong argument  
10 on appeal.

11 Q] And, and you thought that juvenile waiver was a strong  
12 issue?

13 A] Not as strong as 2.3, but we felt like, and in fact, I  
14 think there was colloquy between Judge Burnett and I during the  
15 suppression hearing where I asked him, "Mr. Misskelley was  
16 accused of throwing rocks through the school window. His  
17 parents should be required to sign the *Miranda* waiver, but since  
18 he's being charged with capital-murder and he has no such  
19 rights," and it didn't make sense. So we were making a good-  
20 faith challenge to the law.

21 Q] And you thought that was a strong ground, even though the  
22 Arkansas Supreme Court in the *Boyd* case had ruled that, uh, and  
23 the Court in this case, the trial court, according to the write-  
24 up in *Boyd*, ruled that there was no issue?

25 A] Uh-huh. I believe that there was dicta in the *Boyd* case

1 that said that had equal protection been argued, the result  
2 might have been different. Then we raised the equal protection  
3 argument.

4 Q] And that was the basis for your advice to Mr. Misskelley  
5 that he shouldn't cooperate, because he had these two strong  
6 issues?

7 A] I never advised Mr. Misskelley he shouldn't cooperate, uh,  
8 I advised Mr. Misskelley what I thought were our chances on  
9 appeal and what his options were. I went over that with Mr.  
10 Misskelley, Sr., uh, the Court, to my surprise, actually done  
11 [sic] something I had never seen happen before, but he appointed  
12 a outside attorney to meet with Mr. Misskelley and Mr.  
13 Misskelley, Sr. to go over the same issue with them. And he  
14 reported back to the Court the same thing, that Mr. Misskelley  
15 was not interested in cooperating.

16 Q] And he reported that back after you informed Mr. Misskelley  
17 what his chances were on appeal?

18 A] Yes. I obviously told him that it was no sure thing, but I  
19 thought it was a very strong, I mean, case law said that if  
20 there's a 2.3 violation, the confession will be thrown out.  
21 There was no other evidence linking Mr. Misskelley to these  
22 crimes. It was a slam-dunk.

23 Q] Is that the way you characterized this? I mean, I know you  
24 said that you stated that you felt there were no sure things,  
25 but how did you characterize the strength of the appeal on 2.3?

1 A] Mr. Crow and I felt like it was very, very strong.

2 Q] And now, uh, Judge Burnett denied your suppression motion;  
3 correct?

4 A] He did.

5 Q] And who had the responsibility for drafting the order in  
6 which it was being denied?

7 A] That would be me.

8 Q] I have this marked which would be next in order, which is  
9 copy of the order, two pages.

10 A] For what it's worth, Counselor, I don't know that it  
11 matters as far as this proceeding is concerned, but the prose-  
12 cution never responded at all to our amended motion or brief,  
13 nor did they ask to re-open the record, with regard to that  
14 issue. I assumed that they had waived it.

15 Q] The exhibit I just put in front of you, do you recognize  
16 that order?

17 A] (Witness examining same.) That's the order I drafted back  
18 in January, 1994.

19 Q] And did you notice in that order there is no, uh, mention  
20 of Rule 2.3; right?

21 A] No, the only mention that I made was that the Court, in  
22 making its determination, uh, considered, uh, the defendant's  
23 motion, amended motion, and uh, in the hearing where the motion  
24 was submitted. After the hearing was over I felt that that was  
25 sufficient to preserve the issue.



1 Q] Well, was there any...

2 A] ...but I did not answer your question. I did not specific-  
3 ally mention Rule 2.3 in the order.

4 Q] Yeah. And was there any, uh, tactical or strategic reason  
5 for failing to include the 2.3 issue in the order that was going  
6 to be signed by the judge?

7 A] I thought, I thought I did. I thought I had preserved the  
8 issue correctly.

9 Q] Two separate things here: I understand you thought you  
10 preserved it correctly. My question is: did you have any  
11 strategic or tactical reason?

12 A] No, sir. I'm sorry.

13 Q] In other words, did you think it was "we're gonna sort of  
14 preserve it better by not mentioning"?

15 A] No, there was no tactical or strategic decision. I just  
16 simply assumed that I was preserving it, so I didn't make any  
17 conscious effort to exclude it. I hope I'm answering your  
18 question correctly.

19 Q] I think you have. Thank you. And you argued the, uh, or  
20 you briefed the appeal to the Arkansas Supreme Court?

21 A] We did.

22 Q] Did you raise the 2.3 issue?

23 A] It was our primary issue on appeal.

24 Q] And what happened?

25 A] Uh, at oral arguments, three or four of the Supreme Court

1 justices seemed to be compelled by the argument and, uh, we  
2 thought we were going to be successful. And we were stunned, to  
3 say the least, uh, in 1996 when they came down with a 7-0  
4 decision affirming the conviction.

5 Q] And did they reach the merits of the 2.3 issue?

6 A] Uh, they didn't. They stated in their opinion that Mr.  
7 Crow and I failed to raise the 2.3 issue in a timely fashion. I  
8 immediately filed a petition for rehearing, and directed the  
9 Court to the page number of the transcript of the trial where  
10 the amended motion and the brief, the hearing brief was attached  
11 and the order stating the order that the Court consider, it's a  
12 hearing brief, thinking that maybe somehow they might have over-  
13 looked it during their haste to affirm the conviction. I  
14 assumed maybe they just didn't notice it, and so, uh, they  
15 denied the motion for rehearing in a one-sentence opinion that  
16 was unpublished.

17 Q] Well, let's see what they said. This is quoted from the  
18 opinion: "The appellant next contends that his confession  
19 should have been suppressed due to the failure of Detective  
20 Allen to comply with Rule 2.3. That rule requires an officer  
21 who asks a person to come to the police station to take  
22 reasonable steps to make it clear that there is no legal obli-  
23 gation to comply with their request. This issue arose in a  
24 unique procedural way at the trial level. The appellant never  
25 raised the point in his motion to suppress, or at any time

1 during the suppression hearing. During the suppression hearing  
2 Detective Allen testified that he asked the appellant if he  
3 would come with him to the station and the defendant voluntarily  
4 did so; however, the State at this point was unaware of any Rule  
5 2.3 problem, and no further testimony was elicited. After the  
6 suppression hearing, the appellant, in a post-hearing brief,  
7 raised the issue for the first time. We recognize that the  
8 State has the burden of proving the voluntariness of the  
9 custodial confession; however, we are hesitant to hold that the  
10 defendant may file a general motion to suppress and taking no  
11 notice of any tactical deficiency, then require the State to put  
12 on evidence of complying with all of conceivable technical re-  
13 quirements, the Rules of Criminal Procedure. This is totally  
14 contrary to our rule that objections must be raised in a timely  
15 fashion, timely manner. However, just as importantly, the  
16 appellant did not obtain a ruling from the trial court on this  
17 specific issue. The Court's order in denying the motion to sup-  
18 press was drafted by appellant's counsel. It is clear that  
19 appellant's statements were voluntarily given, that the  
20 appellant was afforded his rights under the Constitution, that  
21 his rights were knowingly waived. There is no mention in the  
22 order, nor during the course of any hearing of a violation of  
23 Rule 2.3. An issue precluded from review on appeal, an issue  
24 was precluded from review on appeal where there is no clear rule  
25 by the trial court." So that was the ruling; correct?

1 A] That's what they said.

2 Q] And apparently the Court said in its opinion, recognized  
3 that you had raised the issue in a post-hearing brief?

4 THE COURT: What is the relevancy of raising this  
5 issue now? It's precluded. It's the law of the case,  
6 unless you're just trying to establish that he was  
7 utterly incompetent. Is that what your point is?

8 MR. BURT: Well, I don't, I don't think that the  
9 Court, uh, the Arkansas Supreme Court was ruling on  
10 the merits of the issue. I think they're saying that  
11 the merits of the issue are precluded because Dan and  
12 Mr. Crow did not...

13 THE COURT: ...I know, but at this hearing, I'm,  
14 I'm concerned with the competency of the attorney.

15 MR. BURT: Right.

16 THE COURT: Are you offering it to show that Mr.  
17 Stidham was utterly incompetent?

18 MR. BURT: Well, one of many examples.

19 THE COURT: All right, I'll accept it for that.

20 MR. BURT: Yeah, that's really the relevancy of  
21 it is, that the Arkansas Supreme Court found that they  
22 had defaulted this issue.

23 THE COURT: I understand. And that issue is  
24 barred at this point.

25 MR. BURT: Well, I don't think it's, it's, in

1 other words, if it's part of an ineffectiveness claim,  
2 in other words, that he should have adequately  
3 preserved it, uh, then I think the issue would...

4 THE COURT: ...I understand it from that stand-  
5 point.

6 MR. BURT: Yeah, that's what I'm offering it for.

7 THE COURT: All right.

8 MR. BURT: That's the issue.

9 THE WITNESS: I thought I was preserving it; they  
10 said I didn't. I don't know what else to say about  
11 that.

12 DIRECT-EXAMINATION, continuing:

13 Q] Now again, on the issue of ineffective assistance, you also  
14 raised in your appeal, uh, new evidence that you learned after  
15 your trial regarding time of death and evidence that Dr. Peretti  
16 offered in the Baldwin/Echols matter; correct?

17 A] That's correct. Dr. Peretti either perjured himself or,  
18 uh, had a stroke or something, because he changed his, uh,  
19 testimony on the time of death from "I don't know when it was,"  
20 in the Misskelley trial to "it was between one and five a.m.,"  
21 uh, in the Echols/Baldwin trial. Obviously, that's very  
22 important because, uh, had he testified to that at our trial,  
23 and I asked him point blank, uh, it would have made a tremendous  
24 difference in us being able to cast reasonable doubt on the  
25 confession. In addition, he testified at the Misskelley trial

1 that the injuries inflicted on victim Byers could have been done  
2 with a piece of broken glass, uh, and any kind of sharp object.  
3 Suddenly two weeks later, he's testifying that, uh, it was done  
4 with surgical precision by someone with the knowledge of  
5 medical, uh, procedures and, uh, under almost laboratory condi-  
6 tions. I mean, it was just so dramatically different that, uh,  
7 that we felt like that certainly was grounds for a new trial  
8 motion.

9 Q] All right. And you allege in support of your new trial  
10 motion that you would ask Dr. Peretti about the time of death  
11 and he had stated to you on two occasions prior to trial that he  
12 had no opinion?

13 A] He said that the local coroner had botched it up so badly,  
14 uh, by not getting to the scene in a timely fashion, not taking  
15 body temps, not taking water temps, not, uh, not making  
16 notations with regard to rigor mortis, livor mortis, uh, all of  
17 those other issues, that there is no way we're going to be able  
18 to calculate the time of death.

19 Q] So one thing you were raising is time of death and on the  
20 second claim you were raising, uh, according to the Supreme  
21 Court opinion, "he also claimed that at the Baldwin/Echols trial  
22 Dr. Peretti offered testimony that lacked of blood at the scene,  
23 indicating that the victims might have been killed elsewhere and  
24 that the type of cuts in Christopher Byers's genital area would  
25 require some skilled precision." You raised that as well;

1 right?

2 A] That's correct.

3 Q] And what the Supreme Court said was, again, quoting: "The  
4 appellant used due diligence in seeking an opinion from Dr.  
5 Peretti regarding time of death. The same cannot be said of the  
6 other evidence, the evidence regarding the use of the knife and  
7 the scene of the murders was brought out in Baldwin/Echols trial  
8 on vigorous cross-examination. The appellant has not shown that  
9 prior to his conviction he could not have discovered such  
10 evidence." So there they're faulting you for not, uh, discover-  
11 ing that evidence through investigation prior to trial; right?

12 A] That's what they said.

13 Q] And did you have any tactical reason for not investigating  
14 the issues concerning lack of blood at the scene and whether the  
15 genital injuries required such surgical precision, that it must  
16 have been done by someone with some skill?

17 A] No, sir. Which I now know that all of that's not correct,  
18 because of the animal predation issue.

19 Q] Let's talk about your mental health investigation in this  
20 case. I think you said, and from your memo in September  
21 indicates that Jessie was asking you that he needed to be  
22 evaluated; correct?

23 A] That's correct.

24 Q] And I think you said from the outset of the case, uh, you  
25 realized that there were some issues about his competency to

1 stand trial?

2 A] He could not seem to assist us in any meaningful way in  
3 preparing a defense. And certainly not in preparing him to tes-  
4 tify, which was out initial strategy. And, uh, we were also  
5 having a tremendous time with trying to debrief him, for lack of  
6 a better word, uh, and how did the interrogation take place and  
7 under what circumstances and what tactics that were employed by  
8 the West Memphis police. So we got a waiver signed and obtained  
9 copies of the Mental Health records from previous sessions in  
10 school, grade school, and then, of course, we employed, uh, had  
11 Dr. Wilkins volunteer to assist us, with disastrous results.

12 Q] And why did you choose Dr. Watkins [sic]; what was there  
13 about your prior contact with him, or were there any other  
14 factors that led you to choose him as an expert?

15 A] Well, there were several factors that came into play.  
16 Number one, he was the only one that I knew of, uh, he was wil-  
17 ling to volunteer in the hope that he might get paid. And  
18 number three, I would have done anything to avoid Mr. Misskelley  
19 going to the State Hospital to be evaluated.

20 Q] Before you retained him, did you do any sort of background  
21 investigation by talking to other lawyers, or any independent  
22 investigation to see what his qualifications were and his train-  
23 ing and experience, and whether there any problems with him?

24 A] Unfortunately, I did not.

25 Q] Do you know when you retained him in the case?



1 A] Not without looking at my billing records or a memo or  
2 something. I, I honestly can't recall. I would imagine it  
3 would have been some time shortly after the September, uh, memo.

4 Q] If your billing records, which are Exhibit 29, uh, indicate  
5 a billing by Dr. Watkins [sic] attached to Wilkins - - I'm sorry  
6 - - and that billing lists his initial interview on October 15<sup>th</sup>,  
7 1993. Does that refresh your memory at all as to when he would  
8 have gotten involved in the case?

9 A] Yes. That would have been just a couple of weeks prior to  
10 the hearing with regard to the mental retardation issue of the  
11 death-penalty, which was held in Osceola.

12 Q] And beside the mental retardation hearing, there was also a  
13 hearing on juvenile fitness; correct?

14 A] That's correct. Those may have been conducted simul-  
15 aneously.

16 THE COURT: It was done at the same time.

17 MR. BURT: Uh, I think there were done in  
18 separate hearings, but close in time. I think you had  
19 one hearing on...

20 THE WITNESS: ...it seems like it was October  
21 13<sup>th</sup>. That date stands out in my mind, and the 15<sup>th</sup>.

22 THE COURT: The way I remember it, it was all  
23 done on the same day, but I might be wrong.

24 MR. BURT: The mental retardation hearing was  
25 December 21<sup>st</sup>, 1993 and the...

1           THE WITNESS: ...the transfer to Juvenile Court  
2 was probably in October.

3           THE COURT: That was a separate motion; the  
4 motion to transfer to Juvenile.

5           MR. BURT: I think that's right.

6           THE COURT: Well, that is correct, but the compe-  
7 tency issue was done on the same day.

8           MR. BURT: Yeah, that's correct.

9           THE COURT: Okay.

10          MR. BURT: I was focused on mental retardation  
11 versus the fitness, competency. The fitness and com-  
12 petency were conducted in one hearing.

13          THE COURT: Yes.

14          MR. BURT: And then after that, you had the  
15 mental retardation hearing.

16 DIRECT-EXAMINATION, continuing:

17 Q] Is that how you remember that?

18 A] That's my recollection.

19 Q] And so the, uh, fitness competency hearing took place not  
20 too long after he had this initial interview Mr. Misskelley,  
21 according to this billing?

22 A] That's correct.

23 Q] And how did you define what his past was; what was the re-  
24 ferral question to the doctor?

25 A] I asked him to conduct a forensic, what we refer to as a

1 forensic evaluation, uh, to determine whether Mr. Misskelley was  
2 competent to stand trial, uh, I asked him, uh, if he could also  
3 give an IQ test to determine what his level of functioning was  
4 in regard to the death-penalty and mental retardation issue,  
5 which obviously was of grave importance to us. And, uh, Mr. or  
6 Dr. Wilkins came to the jail in Corning and conducted a series  
7 of tests, uh, ink blot stuff and, uh, the other tests, the  
8 Rorschach or whatever they call them. And then a couple of  
9 weeks later, uh, he sent in a report indicating that Mr. Miss-  
10 kelley was capable of understanding right from wrong and was  
11 competent to stand trial. But at the same time he indicated  
12 that his IQ was around 72 and that he was functioning around the  
13 level of a 5-year-old child, which I found to be quite con-  
14 flicting with, uh, I was having a hard time in my mind trying to  
15 figure out how a 5-year-old child could assist their attorneys  
16 in preparing a defense. But he's the horse we rode in on and so  
17 I was pretty much stuck with what I had.

18 Q] When you said "he's the horse you rode in on," uh, did you  
19 have any prior experience with mental health experts on the  
20 issue of competency or insanity?

21 A] Yes.

22 Q] Had you ever conducted competency evaluations before?

23 A] I've sent them to the State Hospital and it didn't matter  
24 whether they were barking at the moon or claiming to be the  
25 Pope, they were always competent and they were always able to

1 assist their lawyers in their defense.

2 Q] That's in the situation where you declare that he is incom-  
3 petent and now the Court orders the person transported to the  
4 State Hospital?

5 A] In my experience as public defender, any time I raise the  
6 insanity defense or a competency issue, the order would be  
7 entered by the Court, the defendant would be sent to the State  
8 Hospital and usually the prosecutor would have the report before  
9 I did.

10 Q] And aside from that kind of experience, did you have any  
11 experience relating to working with an independent expert out-  
12 side the State Hospital system on issues of competency and  
13 insanity?

14 A] This was the first time ever.

15 Q] Did you have any idea from reading or some other source as  
16 to what kind of information you should be conveying to that ex-  
17 pert so that expert could form a reliable opinion?

18 A] No, sir, I did not.

19 Q] Did you realize that one aspect of competency determination  
20 was not only whether the client could understand the nature and  
21 purpose of the proceeding, but also whether he could rationally  
22 assist you in his defense?

23 A] I did understand that, and that's why I was somewhat con-  
24 fused by Wilkins' findings.

25 Q] And because one of the things - - and in fact, that was the

1 prong of the competency standard, that you were, you felt he was  
2 incompetent on; right?

3 A] I did.

4 Q] Did you give any input to the doctor about the problems you  
5 were having communicating with Mr. Misskelley, so that he would  
6 know what the issues were in terms of his rationally assisting  
7 you or not assisting you?

8 A] If I did I don't specifically recall. I do recall we  
9 talked about the, uh, suggestibility scale, which was a  
10 relatively new development at the time. Dr. Gudjonsson and Dr.  
11 Ofshe I had consulted, uh, Dr. Gudjonsson had written a book on  
12 the psychology and interrogation of the police - - I can't  
13 recall the exact specific title of the book - - Psychology of  
14 Interrogation, I believe is the name of the book. And Dr. Ofshe  
15 was listed as a contributor to the text. Dr. Ofshe recommended  
16 that I read it, and so I conveyed what I read in Dr.  
17 Gudjonsson's book to Wilkins and asked him to test Mr. Miss-  
18 kelley in this regard to that specific scale.

19 Q] But that took place after the fitness hearing and the  
20 mental retardation hearing; right?

21 A] Yes, I believe so.

22 Q] I'll have Dr. Wilkins' report marked next. Is this the  
23 report that Dr. Wilkins produced to you as a result of your  
24 initial referral to him?

25 (Witness examining same.) Yes.

1 Q] That report is dated November 8, 1993; right?

2 A] That's correct.

3 Q] And the first page of the report lists the tests, but  
4 there's no indication that he was given this suggestibility  
5 test; correct?

6 A] Dr. Wilkins had never used that test before and as a  
7 result, had to do some research, uh, in order to be able to  
8 conduct the test; it was that new, I believe.

9 Q] Well, when did - - he had not previously used that test;  
10 when did you learn that?

11 A] I asked him if he was aware of it.

12 Q] And when was that?

13 A] Uh, as we were preparing Dr. Ofshe for his testimony, and  
14 Dr. Wilkins for his testimony at the trial.

15 Q] But your initial role for Dr. Wilkins was competency, not  
16 guilty by reason of insanity and fitness, and mental retard-  
17 ation; right?

18 A] That's correct.

19 Q] Uh, and at the back of the report, the summary of his con-  
20 clusions, he says "In the strictest interpretation of the legal  
21 statute, Jessie appears to be able to distinguish between right  
22 and wrong. He also appears to be able to aid in his defense."  
23 Did you take that as him addressing the two issues of compe-  
24 tency and not guilty by reason of insanity?

25 A] Yes, but I didn't agree with him.

1 Q] And why didn't you agree with him?

2 A] Because I had sat in the jail cell with Mr. Misskelley for  
3 four months and I couldn't communicate with him sufficiently to  
4 prepare him to testify against the co-defendants when that was  
5 our strategy. And I also could not get him to coherently de-  
6 scribe to me exactly what happened in the interrogation room,  
7 uh, on June 3<sup>rd</sup>.

8 Q] Well, I'm looking at the first page of his report and he  
9 says this: "The following report is based on a variety of  
10 sources." And then he lists them, but I don't see him listing  
11 any conversations with you about the problems you were having  
12 with Mr. Misskelley, or any conversations with Mr. Crow about  
13 that. Did you have it?

14 A] I specifically didn't have those, because I didn't - - I  
15 knew I was going to have to turn this report over to the pro-  
16 secution and I didn't want to violate any attorney/client  
17 privileges in that regard.

18 Q] Did you think that, uh, telling the doctor that you were  
19 having specific problems with Mr. Misskelley communicating with  
20 him would violate your attorney/client privilege?

21 A] I was afraid it would end up in this report and that I  
22 would be beaten over the head with it later.

23 Q] Do you do any research as to whether or not information  
24 developed in competency proceedings can be used against you in  
25 the guilt phase of the trial?

1 A] No, sir, I did not.

2 Q] Do you know if that mistake was wise on that issue, now?

3 A] I believe that I could file for a protective order, uh, and  
4 not have to worry about that issue. Mr. Crow and I failed mis-  
5 erably, just to be blunt, uh, to prepare for the sentencing  
6 phase and the mitigation phase. I'm not saying that we were  
7 cocky and felt like we were winning, although we were very con-  
8 fident we did put on a good case and were able to poke holes in  
9 the confession, but that we just didn't prepare for mitigation.  
10 Certainly, we didn't comply with the ABA standards, uh, in the,  
11 uh, we just didn't prepare and weren't very professional.

12 Q] Had you asked Dr. Wilkins to address and investigate  
13 mitigation?

14 A] No, by that time I was so angry with him, I didn't want to  
15 ask him to do anything but leave.

16 Q] And I notice in his report on page eight where he says:  
17 "One final thing of importance to note is since Jessie first  
18 entered into school, in fact even prior to that time when his  
19 biological mother left him at age 4, Jessie has suffered from a  
20 fair amount of family and emotional dysfunction. Repeatedly  
21 throughout all medical records are indications Jessie was in  
22 need of counseling. However, all of these recommendations where  
23 in terms of learning better adjustment skills and coping skills  
24 and no one ever seriously considered the possibility of severe  
25 personality or psychotic dysfunction. All indications reveal



1 Jessie's emotional difficulties are not of the type which would  
2 lead one to enter into a long complicated crime as the one under  
3 current adjudication." Did that paragraph give you, uh, some  
4 leads in terms of investigating possible areas of mitigation for  
5 Jessie?

6 A] It should have, but it didn't.

7 Q] And, and why didn't it?

8 A] Mr. Crow and I did not spend the time dealing with miti-  
9 gation issues. We sort of focused on trying to combat, uh, we  
10 obviously, were hoping about ever having to worry about getting  
11 to that point, but also at that point, and His Honor may be able  
12 to correct me if I'm about to misstate this, but I believe  
13 Arkansas had just adopted bifurcated trials, uh, in capital  
14 cases and perhaps in all cases, and there was some question at  
15 the end of the trial whether or not we were even entitled to put  
16 on evidence, uh, in mitigation. And, uh, because the law was in  
17 a current state of change, I, I, again, that's a fifteen-year-  
18 old memory. I don't know for certain, but I believe there was  
19 some - - after the trial was over and the jury had rendered  
20 their verdicts, I believe that Mr. Davis and Mr. Fogleman and  
21 Mr. Crow and myself agreed we would dismiss arguments and would  
22 not be putting on any evidence, which of course, was a violation  
23 of the ABA standards and certainly not the appropriate way to  
24 handle it.

25 Q] Are you saying that you thought even though this was a

1 capital case, that there was not going to be a bifurcated  
2 sentencing procedure?

3 A] We knew that there would be if he was found guilty, but we  
4 just failed miserably to prepare for it. In other words, I wish  
5 I could sit here and say - - and this is very unpleasant for me  
6 to have to admit these things and I don't like it, but the truth  
7 is the truth and we just were not prepared to deal with it. We  
8 had no assistance, our psychologist had been, uh, crucified, uh,  
9 I asked His Honor for some time to retain a new, uh,  
10 psychologist, uh, I can't remember exactly, but I think His  
11 Honor gave me twelve hours to do that and I had no money to do  
12 it. And I thought it was just an impossible task, and by the  
13 time we got to that stage of the proceedings, there was just,  
14 there was just nothing else we could do.

15 Q] Do you recall reading in Dr. Wilkins' report way back in  
16 November '93 before the trial began that according to his inter-  
17 view with Jessie, he said "Jessie was abandoned by his  
18 biological mother around age 4, and apparently from records he  
19 had a significant amount of trauma dealing with that. Jessie  
20 has basically been raised by his father and step-mother. His  
21 step-mother, for all practical purposes, is his primary maternal  
22 care giver." And it goes on to document, uh, abuse and things  
23 of that nature. Did you think that was mitigating information,  
24 that if there was going to be a capital prosecution, could be  
25 used at the sentencing phase of the case?

1 A] Again, with some considerable sort of degree of shame, I  
2 must admit that I failed to see the significance of it before,  
3 but I certainly see it now.

4 Q] And now do you remember at the fitness competency hearing  
5 that Dr. Wilkins testified that he used a mental status  
6 examination to determine competency?

7 A] I remember there was a series of tests performed, but I  
8 don't remember specifically the names of each one of them. I'd  
9 have to read this. Again, it's been a long time.

10 Q] Did you have any familiarity with how mental health experts  
11 determined competency and what test they used to do so?

12 A] I do now, based on the affidavit of Dr. Dering and the ex-  
13 perience that I have gained since 1993, but at the time, I  
14 failed to recognize that.

15 Q] Did you, uh, were you alerted or was there any sort of in-  
16 dication when Dr. Wilkins testified that he used the mental  
17 status examination to determine competency that perhaps he  
18 hadn't used correct procedure?

19 A] It didn't occur to me.

20 Q] And after you saw his findings, did you attempt to say to  
21 him, "hey, wait a minute, how do you conclude that this guy has  
22 got the reasoning ability of a four- or five-year-old and also  
23 conclude that he can rationally assist counsel"?

24 A] It never, it never occurred to me. I wasn't sophisticated  
25 enough to understand the importance of it. Uh, Dr. Dering's

1 declaration and my consultation with him in 2000, uh, and then  
2 receiving his report, uh, and suddenly, it all made sense to me.  
3 And his interpretation and evaluation of Mr. Misskelley was dead  
4 on and it made sense for the first time.

5 Q] When, when you say "Dr. Darning's report," you are refer-  
6 ring to the declaration that's attached to the amended petition?

7 A] That's correct.

8 Q] That's Exhibit H, I believe?

9 A] That's correct. I'll check and make sure that's it, but  
10 I'm pretty sure that's correct.

11 (Pause.)

12 I don't have a copy of it with me. I'm sorry.

13 MR. DAVIS: For clarification on this, when is  
14 this reference with some other doctor and what cases  
15 do they refer to?

16 THE COURT: I think he's talking about an affi-  
17 davit that was attached to their amended petition for  
18 Rule 37 relief. Is that what you're talking about?

19 MR. BURT: It is, Your Honor. I'm going to have  
20 it marked so we know what we're talking about. Again,  
21 I'm not offering it for its truth, but only to  
22 indicate that...

23 THE COURT: ...of course, he wasn't subject to  
24 cross-examination or anything, I mean, it's just an  
25 affidavit.

1           MR. BURT: Yeah, and we're going to call Dr.  
2           Derning, but for purposes of having Mr. Stidham tes-  
3           tify about whether he would present this kind of  
4           evidence.

5           THE COURT: Well, what's the purpose of calling  
6           the doctor, if he admits that he didn't live up to the  
7           ABA standard? That's what this is all about.

8           MR. BURT: Yeah, it is and I think the second  
9           part of it is prejudice. In other words, I think we  
10          have to show both, uh, substandard performance and  
11          we've got to show prejudice.

12          And the only way to do that is to put on the  
13          doctor to say here is what I would have said at some  
14          point.

15          THE COURT: All right. I understand.

16          MR. BURT: That's it.

17          DIRECT-EXAMINATION, continuing:

18          Q] The declaration you were referring to, uh, I'm handing to  
19          you Exhibit 39, the declaration of Dr. Derning?

20          A] (Witness examining same.) I'm familiar with this declara-  
21          tion.

22          Q] And isn't there information in that declaration, infor-  
23          mation that if you had it available to you at the time of trial,  
24          you would have presented not only at the fitness hearing, but  
25          also at the suppression hearing, and also at trial?

1 A] Without a doubt.

2 Q] And would you have used the information in that declaration  
3 to establish Mr. Misskelley's incompetency to stand trial?

4 A] Absolutely. There would have been additional motions that  
5 would have been filed, based on, uh, this report and, uh, it, it  
6 helped me understand and explain Mr. Misskelley in being able to  
7 assist Mr. Crow and I in his defense.

8 Q] Did you see in that declaration that Dr. Darning actually  
9 used tests and instruments which were designed to assess compe-  
10 tency?

11 A] Yes.

12 Q] Is that the first you learned that there are in fact tests  
13 that can be employed to test someone's competency to stand  
14 trial?

15 A] I was unaware of that until I consulted with Dr. Darning in  
16 2000.

17 Q] How did you get to Dr. Darning in 2000?

18 A] As I recall, uh, I received a referral, uh, from, uh, John  
19 Phillipsborn.

20 Q] Counsel for Mr. Baldwin?

21 A] John Phillipsborn put me in touch with Dr. Darning.

22 Q] And had you contacted Mr. Phillipsborn, uh, for what  
23 reason? How did you first get in contact with Dr. Darning?

24 A] How did I first get in contact with Mr. Phillipsborn?

25 Q] Yeah, how did his name first come to your attention and at

1 what point in the trial process - - was it while the case was  
2 pending trial, or was it after trial?

3 A] My recollection is that Mr. Phillipsborn contacted me in  
4 the year 2000 and, uh, expressed, uh, interest in assisting, uh,  
5 in the defense of, uh, Mr. Misskelley and Mr. Baldwin. Uh, Mr.  
6 Echols had, uh, post-conviction counsel but Mr. Misskelley and  
7 Mr. Baldwin did not. And, uh, I had been trying to do whatever  
8 I could do since '94 to keep the ship afloat and make sure all  
9 of the deadlines, uh, did not come and go for both Mr. Miss-  
10 kelley and Mr. Baldwin, uh, keep their appeals alive. But  
11 having no post-conviction litigation experience, I, I, did wish  
12 to try to recruit lawyers. And I tried unsuccessfully for years  
13 to do that and, uh, it was a very pleasant surprise to hear from  
14 Mr. Phillipsborn.

15 Q] And, and you learned that he had some experience in the de-  
16 fense of capital cases?

17 A] That's correct.

18 Q] And you got a recommendation from an experienced capital  
19 litigator as to what mental health experts might be used?

20 A] Exactly. He asked me what evaluations had been conducted  
21 on Mr. Misskelley and I advised him, in fact, I think I e-mailed  
22 or faxed him a copy and he suggested that I contact Dr. Darning.

23 Q] Did you ever make any kind of attempt while the case was  
24 pending trial to contact experienced capital defense lawyers and  
25 ask them whether they had any recommendations as who might help

1 you out on issues of competency, insanity, suggestibility,  
2 juvenile fitness and mental retardation?

3 A] No, the only attorney that I contacted, uh, was a local  
4 attorney here in Jonesboro, uh, and he gave me, a, uh, a lot of  
5 good advice and counsel and, uh, I also contacted an attorney in  
6 Florida, uh, he gave me a recommendation and some background on  
7 Warren Holmes, who was our polygraph expert and our expert on  
8 police interrogation.

9 Q] Mr. Holmes related to another area of expertise that you  
10 needed; right?

11 A] He did.

12 Q] There was more than one area of expertise needed in this  
13 case; was there not?

14 A] There was. We needed a police interrogation, uh, tactics  
15 expert, as well as a polygraph expert. And, uh, the lawyer that  
16 I consulted here in Jonesboro, uh, he advised me that in his  
17 opinion that there was a good chance that I could get the poly-  
18 graph evidence introduced under *Brock v. State* and *Patrick v.*  
19 *State*, under cases that had held in Arkansas that any evidence,  
20 uh, uh, that tends to show the innocence of the accused, whether  
21 scientifically reliable or not, uh, the *Patrick* case involved a  
22 portable breath test on the side of the road that the officers  
23 routinely, uh, give to determine probable cause, and we attempt-  
24 ed to convince Judge Burnett to allow us to introduce the poly-  
25 graph evidence, uh, in that regard because Mr. Misskelley passed



1 the polygraph test.

2 Q] Well, let me ask you this: This is on a different topic,  
3 but do you recall, uh, that when you called Dr. Wilkins at the  
4 mental retardation hearing, that he mentioned in passing, some  
5 *Miranda* issues?

6 A] He did.

7 Q] Do you remember he said, this is at 399, "Jessie has a hard  
8 time understanding a variety of things. From my point of view  
9 there is some issue involved as to whether or not Jessie even  
10 understood his *Miranda* rights. For example, his ability to  
11 understand very complicated or not even very complicated  
12 concepts are very difficult for him. For example, with *Miranda*,  
13 even the most conservative estimates say you have to read at  
14 least a 6<sup>th</sup> grade level to understand those. And Jessie reads at  
15 a 3<sup>rd</sup> grade level." Do you recall he gave that testimony at the  
16 mental retardation hearing?

17 A] I do recall that. Yes, sir.

18 Q] Almost kind of in passing?

19 A] Yes.

20 Q] And do you remember that thereafter, you had a hearing on  
21 the admissibility of the confession in which you raised the  
22 issue of whether Mr. Misskelley could knowingly, voluntarily and  
23 intelligently waive his *Miranda* rights?

24 A] We did, and, uh, as opposed to calling Dr. Wilkins again to  
25 testify live, I asked His Honor, Judge Burnett, to take judicial

1 notice of the previous testimony at the earlier hearing.

2 Q] And had Dr. Wilkins been asked to assess his competency at  
3 any time, or was that comment he made in the mental retardation  
4 hearing almost kind of...

5 A] ...no, I asked him to do that.

6 Q] And was there any tactical reason in not developing that  
7 issue further at the suppression hearing?

8 A] No, I just felt like Judge Burnett probably didn't want to  
9 hear it again.

10 Q] And why did you believe that?

11 A] He, uh, he seemed to be eager to move on and that ended it.

12 Q] Did you consider that although you thought Judge Burnett  
13 didn't want to hear it, that there were going to be courts  
14 beyond Judge Burnett who were going to be reviewing the record  
15 on the confession issue and that it was very important for you  
16 to get into evidence all possible factual grounds for your  
17 motion to suppress?

18 A] It didn't occur to me then, but it certainly does now,  
19 especially in light of the Arkansas Supreme Court's ruling that  
20 I failed to preserve the 2.3 issue.

21 Q] Do you think you performed, uh, competently at the  
22 suppression hearing in not calling experts to back up your, uh,  
23 your *Miranda* and voluntariness arguments?

24 A] Frankly, I just didn't have the experience - - there's no  
25 substitute for experience, uh, and I didn't have it. I wish

1 Judge Burnett would give me another shot at it. I'd like to  
2 have another shot at it right now.

3 Q] Your suppression motion was denied, was it not?

4 A] I'm sorry, sir?

5 Q] I'm sorry. I'm facing the wrong way there. Your, your  
6 motion to suppress the confession was denied and then you were  
7 facing a trial in which the confession was going to come in;  
8 right?

9 A] That's correct.

10 Q] And the only witness which you had going into trial was Dr.  
11 Wilkins?

12 A] And he had been seriously undermined, uh, and that's really  
13 an understatement, actually.

14 Q] And you are referring to the fact that on the verge of  
15 trial and some serious issues developed with regard to not only  
16 his credibility, but his competency?

17 A] I had mental health competency issues with my mental health  
18 expert.

19 Q] Okay. And is it true that you were alerted to those prob-  
20 lems in advance of putting him on the stand?

21 A] I was and I confronted Dr. Wilkins with those allegations  
22 that Mr. Davis had advised me of, and Mr. Wilkins denied them.

23 Q] Do you recall that on January 19<sup>th</sup> before the trial began,  
24 you said to the Court - - this is at 654 - - "we need to move on  
25 to another issue. I'm worried that there is a possibility that

1 the prosecution is going to impeach our expert, Dr. Wilkins,  
2 with regard to some allegations about him, some ethical viola-  
3 tions that perhaps the State Psychological Board is investi-  
4 gating and we're asking in liminie that the prosecution be  
5 prohibited from trying to impeach him in that regard."

6 A] I remember making that motion; yes, sir.

7 Q] And what was that motion based on; where did you, where did  
8 you receive the information that there was a problem?

9 A] Mr. Davis presented me with documents - - I don't know  
10 where he obtained them, but documents indicating that Dr.  
11 Wilkins, uh, was only licensed under the supervision of a super-  
12 vising, uh, psychologist to not practice without being super-  
13 vised and that there were allegations that he engaged in sexual  
14 misconduct with one of his patients. And we felt that was  
15 devastating to our case.

16 Q] And did he actually present you with documentation on  
17 January 19<sup>th</sup>, or was it just word of mouth at that point?

18 A] In all honesty, Counselor, I can't remember specifically.  
19 I just remember getting the phone call from Mr. Davis and him  
20 telling me that "did you know A, B, C and D?" And I said "no,"  
21 and when I called Dr. Wilkins and confronted him, his response  
22 was "that's not true," uh, "that's just not true." And then  
23 later on I was given documents and when I confronted Dr. Wilkins  
24 with the documents he finally said, "Yeah, I'm in the process of  
25 appealing all of that."

1 Q] So did that, uh, combination of facts, namely that, uh, the  
2 prosecutor was informing you he had some pretty serious im-  
3 peachment evidence against Wilkins; Wilkins lying to you about  
4 it and then learning through documents that in fact what the  
5 prosecutor was saying was true, did that cause you to  
6 investigate Dr. Wilkins's background to see whether the prose-  
7 cution, uh, had anything that could be used to really impeach  
8 the doctor?

9 A] This literally happened the night before he was scheduled  
10 to testify and, uh, all I could do was ask His Honor for time to  
11 retain another expert. And when that didn't happen, I was  
12 forced to proceed with Dr. Wilkins.

13 Q] And you said you were forced to proceed with Dr. Wilkins,  
14 before you proceeded with him, did you make any attempt to  
15 investigate how bad this impeachment was before you actually put  
16 him on the stand?

17 A] The documents spoke for themselves.

18 Q] And what documents, I mean, when you actually put him on,  
19 Mr. Crow, uh, attempts to qualify him and then Brent Davis does  
20 a voir dire in which he reveals that he has a psychological  
21 evaluation of your mental health expert indicating some, uh,  
22 psychiatric problems and some competency problems in using the  
23 very tests that he had used in your case?

24 A] The best way I can describe it is, is like a nuclear bomb  
25 had gone off in the courtroom.

1 Q] And this, when did you get access to the report that Mr.  
2 Davis was referencing during his voir dire of the witness?

3 A] Twenty-four to forty-eight hours.

4 Q] Ahead of time, and you had to put him on the stand?

5 A] Yes, sir.

6 Q] And when you saw a psychiatric report on your own psych-  
7 iatric witness, uh, did that cause you to say "I better look  
8 further into this and see what else is out there on this guy"?

9 A] It caused me to want to get a new expert but, uh, His Honor  
10 would not grant me a continuance to do that.

11 Q] And when the Court would not grant you a continuance to do  
12 that, what made you think that you could go ahead and put on the  
13 stand a guy who was going to be, uh, impeached in the way that  
14 he was impeached?

15 A] Since Doctor, excuse me, since Judge Burnett had such  
16 crippled our defense with Dr. Ofshe and only allowed him to  
17 testify, uh, to certain things, I had to be able to get in the  
18 suggestibility scale, uh, in order to make our defense work.  
19 And I felt like I had no other option but to go ahead and move  
20 forward in spite of retaining Dr. Wilkins.

21 Q] And as it turns out when you couldn't get in the suggest-  
22 ibility test because Wilkins had never given it before, he was  
23 not qualified to give it; right?

24 A] Although I disagree with the Court's ruling, that's what  
25 the ruling was.

1 Q] Well, was that foreseeable, I mean, did you sit down with  
2 him and say "have you used this test before; how reliable is it;  
3 what's the reliability data on this test; are we going to run  
4 into any problems with it"?

5 A] It was a relatively new test and the only literature avail-  
6 able, scientific literature, available on that test I think was  
7 done by Dr. Gudjonsson himself.

8 Q] You state that this was a relatively new test. You did  
9 realize the importance of the suggestibility test; right?

10 A] Yes, sir.

11 Q] And once you realized that you were going to have to use  
12 it, did you do any research into the reliability of the test?

13 A] None other than what I read in Dr. Gudjonsson's book and in  
14 my discussions with Dr. Ofshe.

15 Q] Specifically, did you read an article, which is attached to  
16 our petition and is Petition T, whereas Exhibit T, called the  
17 Gudjonsson, which is G-U-D-J-O-N-S-S-O-N, suggestibility scale,  
18 further data on the reliability, validity of the Meadow  
19 Cognition and Computation, do you recall doing any research?

20 A] I've never seen this before.

21 Q] Researching that edition, and do you know whether there was  
22 any reliability studies on that test prior to your trying to use  
23 through Dr. Wilkins?

24 A] Dr. Ofshe and Dr. Wilkins both assured me that it was  
25 scientifically reliable and used by practitioners with that

1 particular field, and His Honor, uh, Judge Burnett, disagreed.

2 Q] You knew that Dr. Ofshe had some pretty good credentials in  
3 this area; right?

4 A] I thought he did. Yes, sir.

5 Q] In fact, I think Mr. Davis has characterized him as a  
6 "world renowned expert" in his cross-examination, and you with  
7 the Rule 37 petition in the Echols case, and yesterday with Mr.  
8 Crow. Would you agree with that assessment?

9 A] I think he is. I mean, he's probably the leading expert on  
10 the, on the issue of false confessions - - he and Dr. Lee.

11 Q] And when you started to run into the prosecutor's objection  
12 about the admissibility of the suggestibility scale, and Wilkins  
13 was kind of stumbling through, uh, trying to validate him, did  
14 you call Dr. Ofshe at the admissibility hearing to show to the  
15 Court that in fact it was a reliable instrument?

16 A] I'm not even sure if Dr. Ofshe was in Arkansas that day.

17 Q] Well, did you ask the Court, uh, in light of the importance  
18 of that suggestibility test for a continuance in order to get  
19 him there so that you could lay the foundation that you needed  
20 for a way to get the scale and data into evidence?

21 A] No, sir, it never occurred to me.

22 Q] Did it really matter at that point, since Dr. Wilkins was  
23 so severely impeached?

24 A] Because of Judge Burnett's limited Dr. Ofshe's ability to  
25 testify, we made a huge proffer, but he really would not let him



1 testify as to his opinions about interrogations or the suggest-  
2 ibility scale, uh, I don't know that it would have made that  
3 much difference frankly, but, uh, I certainly have made the  
4 effort.

5 Q] Did you know that, uh...

6 THE COURT: ...just a minute. Have you got an  
7 objection?

8 MR. DAVIS: Yes, sir.

9 THE COURT: He stood up.

10 MR. DAVIS: Yes, sir. I don't know if it's an  
11 objection, but it goes back and I just realized this.  
12 There was a question asked of Mr. Stidham regarding an  
13 article that was part of that exhibit regarding the  
14 issue...

15 THE COURT: ...he said he wasn't familiar with it  
16 and hadn't read it.

17 MR. BURT: Right.

18 MR. DAVIS: But the article also referred to  
19 items that occurred in 1997 as the basis for the  
20 article. So the State has some serious concerns that  
21 could have been posed with the reliability of any  
22 suggestibility test, based on that article itself.

23 MR. BURT: I agree; that's why I didn't offer it.

24 THE COURT: As I recall, we had a, uh, an in-  
25 camera hearing on Dr. Ofshea's testimony; just exactly

1           what his expertise was and what he could testify to,  
2           and he certainly testified in that. And then I  
3           believe I allowed him to testify for approximately an  
4           hour or more as an offer of proof for appeal purposes,  
5           but I've got vague recollections on it now.

6           I kind of felt like it was a novel scientific  
7           approach and that it wasn't based on scientific facts,  
8           and for that reason, didn't allow him to opine on  
9           suggestibility.

10          I believed that's what he was trying to do.

11          MR. BURT: Well, I think the Court allowed Dr.  
12          Ofshe to testify. Your recollection is absolutely  
13          right but I think what you didn't allow was Dr.  
14          Wilkins to use this suggestibility test.

15          THE COURT: That's right.

16          MR. BURT: And you ruled that it was, they hadn't  
17          laid a foundation for it; they hadn't shown it was  
18          reliable.

19          THE COURT: That's right.

20          MR. BURT: So what I'm asking him is...

21          THE COURT: ...wasn't that an appeal point, too?

22          MR. BURT: It was an appellant point.

23          THE COURT: Okay. So it's moot for this hearing.

24          MR. BURT: Well, it's not, because the issue now  
25          is, could he have done something to lay the foundation

1           that he didn't do? In other words, the Supreme Court  
2           said on the record that he made, it was proper to rule  
3           it inadmissible. And the record he made was, he had  
4           Wilkins offer opinions and, of course, Wilkins, at  
5           that point had been severely impeached.

6           My question is how come he didn't call Ofshe to  
7           talk about this and that would have bolstered...

8           THE COURT: ...I thought he did, but maybe he  
9           didn't.

10          MR. BURT: Well, not at the admissibility hear-  
11          ing, you didn't call him; right?

12          THE WITNESS: No, sir, I didn't.

13 DIRECT-EXAMINATION, continuing:

14 Q] So the only thing the Court had in front of it on the ad-  
15 missibility issue was Dr. Wilkins himself; right?

16 A] And we were still suffering the effects of the nuclear  
17 blast at that point.

18 Q] Right. And the nuclear blast was played out prior to,  
19 prior to you putting him on the stand, and in fact, it was play-  
20 ed out in the newspapers, wasn't it? So you had lots of notice  
21 that you had lots of problems with this guy; right?

22 A] We did and we chose to call him anyway, because that's all  
23 we had.

24 Q] And in fact, Judge Burnett commented on the record in the  
25 midst of this controversy that although the judge ruled that the

1 prosecutor was not going to be able to get into his sexual im-  
2 proprieties, that Wilkins was out to impress interviews and  
3 appearing on the nightly news, uh, shooting his mouth off about  
4 his sexual issues in the case. Do you recall that?

5 A] Yeah.

6 Q] That that was put on the record?

7 A] I do now; yes, sir.

8 Q] And, and did that cause you some grave concerns about this  
9 guy's judgment and how well he was going to be received by a  
10 jury that perhaps would catch wind of the fact that there was  
11 some sexual issue about this guy?

12 A] I wanted to jump out the window, but it was only a one-  
13 story building.

14 Q] Did you think to - - you knew that the inquiry was being  
15 conducted by the licensing board; right?

16 A] I did at that point.

17 Q] And did you make any attempt to use a Freedom of Infor-  
18 mation Act procedure, that there was something else to go to the  
19 licensing board, and get the records that were, that you were  
20 going to need to look at to see what was going on with this guy?

21 A] As I recall, Mr. Davis provided those records to me. I  
22 don't know how he got them or where he got them, but I recall he  
23 gave them to me.

24 Q] He gave them to you the morning that he did the voir dire  
25 and at best, just enough for you to do an investigation and find

1 out how bad it was?

2 A] I can't recall whether it was the day before or the day of,  
3 but it was contemporaneously with, uh, with the testimony.

4 Q] Well, I'll have marked next in order the folder, which is a  
5 Freedom of Information Act request for Dr. Wilkins' file,  
6 Exhibit number 40.

7 THE COURT: Are you wanting to put that in this  
8 record, that file?

9 MR. BURT: Yes, Your Honor, because I think it  
10 will, uh, be relevant to the issue of what was out  
11 there at the time of trial that he could have con-  
12 sulted before he decided to put this guy on the stand.

13 And, uh, I don't think he had available, only if  
14 he might have had some of this information available,  
15 but certainly, uh, this was relevant to his, uh, his  
16 decision making in whether he, he should have  
17 investigated this guy's background a little more, once  
18 he had all of these indications that, uh, there were  
19 problems.

20 And I know for the Court, there was a, uh, in  
21 this file, which is the licensing board file, is a  
22 newspaper article in *The Jonesboro Sun* dated January  
23 28, 1994 which states in part, "*The Jonesboro Sun*  
24 examined Wilkins' file at the board office Wednesday  
25 under a Freedom of Information Act request." So the

1 point here is that he could have investigated this  
2 guy's background when he had indications that there  
3 were problems.

4 And had he done so, he would have seen, uh, the  
5 psychiatric reports on Dr. Wilkins, which indicated  
6 that there was serious evidence of, I'm quoting from  
7 the report in the file, "serious evidence of psycho-  
8 pathology which interfered with his ability to provide  
9 clinical services," as well as documentation of his  
10 incompetency in the areas of forensic psychology and  
11 other areas as well.

12 So my point here is he failed in his duty to  
13 investigate this man's credentials when he had all  
14 sorts of information indicating that he should have  
15 done so, and that had he read this file, no reasonable  
16 attorney would have put this guy on the stand, regard-  
17 less of how you would have ruled on his motion for  
18 continuance. That, that's the bottom line right  
19 there.

20 MR. DAVIS: Judge, I'm generally familiar with  
21 all of Dr. Wilkins' problems. I'm not exactly  
22 familiar with what's in that specific file.

23 THE COURT: It's about two inches thick, for the  
24 record.

25 MR. BURT: Yes, and that's the point, considering

1           how much stuff is on this guy.

2           MR. DAVIS: And that's one of the things that I  
3           don't know, it might be all genuine, it might be all  
4           be properly dated. The newspaper article may refer to  
5           exactly all of those materials where obtained pursuant  
6           to a Freedom of Information, but what I'm somewhat a  
7           little skeptical of is that you could FOI the board  
8           and get all of that information at that time.

9           I'm not sure that some of that information isn't  
10          post, uh, after this incident occurred, and that's all  
11          I'm asking is, exactly what's pertinent in there and  
12          what's not.

13          MR. BURT: I'm not offering any document in there  
14          that post-dates the trial. My only point is if he had  
15          sought this at the time of this issue coming up.

16          THE COURT: I think Mr. Davis's point is, is he's  
17          not sure that at the time of the trial in 1994, that  
18          FOI would have reached that personnel file. Isn't  
19          that your objection?

20          MR. DAVIS: Yes, Your Honor. And I'm not sure  
21          what the, uh, maybe he can tell me, but *The Jonesboro*  
22          *Sun* aspect of it, I'm not sure that that reflects that  
23          all of this information, all of these pages, were  
24          provided to *The Jonesboro Sun*, because there are some  
25          that might be kind of personal in nature.

1           MR. BURT: Well, I'll say this: That the prose-  
2           cutor should have this file, because he used it in  
3           cross-examining Mr., uh, Dr. Wilkins.

4           THE COURT: I remember it real well.

5           MR. BURT: And so at least he had access to it,  
6           or parts of it.

7           MR. DAVIS: I mean, that's the whole deal. I had  
8           two inches worth of file and I...

9           THE COURT: ...okay, I'll let it go in as an  
10          exhibit if that's what you want. It just seems to me  
11          it's cluttering the record with a bunch of miscel-  
12          laneous information that Mr. Stidham basically has  
13          announced that he was incompetent and didn't have  
14          enough knowledge to handle the case.

15          That's what he's been telling us all day long.

16          THE WITNESS: Does that mean you'll give me  
17          another chance next week?

18          THE COURT: No, but I expected you to say that,  
19          anyway.

20          THE WITNESS: I'm ready to go now.

21          MR. DAVIS: Your Honor, and this is what concerns  
22          me is that this newspaper article was referred to says  
23          that among other things when they examined his file,  
24          they were talking about they reviewed orders that told  
25          him what areas he couldn't practice in, uh, what



1 things he couldn't do.

2 THE COURT: I remember that article that came out  
3 during, uh, over the weekend, during the trial.

4 MR. DAVIS: And, but these are, these are psychia-  
5 tric eval - - I mean, these are psychiatric  
6 evaluations that were reports on the doctor, and I  
7 don't think under, I mean, I don't think you can just  
8 FOI down there and they're going to send you copies of  
9 that back in 1994 when we had this trial.

10 THE COURT: Well, he might have gotten it quicker  
11 before HIPPA came out, but I don't know.

12 MR. BURT: He had it because he had the psych for  
13 it.

14 MR. DAVIS: No, I didn't have those reports.

15 THE WITNESS: You gave them to me.

16 MR. BURT: Well, I'll, I'll refer to the record  
17 where he cross-examines Dr. Wilkins on Dr. Hazlewood's  
18 report. And Dr. Hazlewood's report is the psych  
19 report that is in that file.

20 And so obviously Mr. Davis had it in hand,  
21 because it's quoted chapter and verse.

22 MR. DAVIS: I dispute it. I didn't have Dr.  
23 Hazlewood's report.

24 MR. BURT: All right, let me pull it out.

25 THE COURT: All right, I'm just going to - - I

1 mean, if you want to clutter the record with all of  
2 that, go ahead and put it in. I'm going to allow it.

3 I think the record, uh, if you search further,  
4 I believe Mr. Wilkins actually lost his license and  
5 moved from Jonesboro to some other parts.

6 MR. BURT: Yes, his license was revoked. He got  
7 out of Dodge and left the state.

8 THE COURT: I think that's correct.

9 MR. DAVIS: Your Honor, one thing I don't want is  
10 for this to come between, and I realize that it may be  
11 an insignificant item, or whatever, but for the entire  
12 mass of these documents to come in and be under the  
13 theory that these could have been obtained, when we  
14 don't in fact know that they could have been obtained.

15 And there's nothing in here that indicates that,  
16 then to put those into evidence as if there was  
17 something - - and the only purpose would be to show  
18 that they were readily available to Mr. Stidham and he  
19 just didn't obtain them.

20 And that, in fact, hasn't been established.

21 THE COURT: Where did you get all of this?

22 MR. BURT: Well, we got it from the licensing  
23 board and we wrote them a letter. It's right in the  
24 file here, uh, my investigator wrote a letter to them  
25 in November of 2003 and they responded back.

1           This is the Arkansas Psychology Board: "Dear Ms.  
2           Pemberton, enclosed please find the copies of Dr.  
3           William Wilkins' complaint file as you have requested.  
4           Because of the physical size of the file and the fact  
5           that it has been over ten years since the original  
6           complaint was filed, these documents may not be in  
7           chronological order," et cetera.

8           So we just requested them in writing and they  
9           sent them, including the psych reports.

10          MR. HENDRIX: We get them all of the time, now.  
11          I honestly don't know if you could in '93 or '94, but  
12          a simple FOI and you get an entire psychologist file.

13          THE COURT: Isn't that a violation of HIPPA?

14          MR. ROSENZWEIG: No, they waived it by the  
15          license, by pulling the license.

16          MR. DAVIS: But to put them - - the whole signify-  
17          cance and relevance of that, the fact that he got it  
18          in 2003 or 2004 or 2000, doesn't make a flip.

19          The relevance of it is, that he's putting it in  
20          under the pretense that that was available to Mr.  
21          Stidham at that time, that he could have just shot his  
22          letter down there and had it sent right back to him.

23          And that doesn't establish that, that doesn't  
24          prove that, that doesn't even indicate that and is  
25          going to clutter the record with items that pretend to

1 prove one item, when in fact, there's no basis or, in  
2 fact, the relevance for him to do it.

3 THE COURT: All right, just a minute and let me  
4 review it. And Mr. Stidham has indicated that he made  
5 no effort whatsoever to check with the board and that  
6 he's not aware of what's in the file, and indicated  
7 basically that he made no effort to find anything that  
8 was in the file.

9 MR. BURT: Right.

10 THE COURT: I think that's been well established.  
11 Why do we need to now attach the file? It's just  
12 extraneous.

13 MR. BURT: Well, the issue then becomes, uh, what  
14 - - yeah, granted he concedes that, but then the issue  
15 is well, what could he have found out if he had done  
16 that.

17 And so to show that there was this impeachment  
18 material out there - - and, and if there is some issue  
19 I'll put somebody up there from the licensing board to  
20 say "we would have handed it over," but I think the  
21 fact that the newspaper was doing FOIA requests and  
22 getting information on this guy would indicate that he  
23 could have had this information.

24 THE COURT: Well, or read the newspaper. I'm  
25 sure he did.

1           MR. BURT: Correct. And so he, he had an  
2 obligation to seek this out.

3           THE COURT: Okay. I'll let it in with the under-  
4 standing that there's been no demonstration that  
5 what's contained in that two-inch file now was also  
6 available in 1994 at the time of the trial.

7           Certainly part of it was, but we don't know to  
8 what extent the entire file was available.

9           THE WITNESS: I could review it and tell you what  
10 I knew and didn't know.

11          THE COURT: Well, I thought you said you didn't  
12 look at any of it.

13          THE WITNESS: I, I, I...

14          MR. BURT: ...well, I think one, one thing you  
15 said, you did say was that in the course, right before  
16 he took the stand, uh, Mr. Davis gave you certain  
17 documents.

18          THE WITNESS: Correct.

19          MR. BURT: So what I would like you to do is go  
20 through that file and tell me what documents you saw  
21 before you put this guy on the stand, that you  
22 obtained from Mr. Davis; understanding that you did no  
23 investigation yourself; right?

24 DIRECT-EXAMINATION, continuing:

25 A] That's correct.

1 Q] Okay.

2 MR. DAVIS: Can I inquire as to whether those  
3 documents would have been retained in Dan's file?

4 THE COURT: Did you find any documents in his  
5 file?

6 MR. BURT: I looked diligently. I didn't find a  
7 single document that indicated any documentation  
8 received from Mr. Davis, or any independent  
9 investigation.

10 DIRECT-EXAMINATION, continuing:

11 A] As I recall, if I may be permitted to say, uh, as I recall,  
12 Brent handed me the documents. I didn't have time to photocopy  
13 them. I reviewed them, handed them back to him and made my de-  
14 cision to put Wilkins on. And that's the way we proceeded.

15 THE WITNESS: Your Honor, may we recess for about  
16 five minutes to let me look through these?

17 THE COURT: Yes. Court will be in recess for ten  
18 minutes.

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

21 DIRECT-EXAMINATION, continuing:

22 Q] Mr. Stidham, did you have a chance to review the file from  
23 the Psychology Board?

24 A] I did.

25 Q] And can you tell us what, if any, documents you were pro-

1 vided before Dr. Wilkins took the stand?

2 A] I can't say that I actually saw each and every document  
3 contained in this file, but all of the allegations and issues  
4 contained therein, I was made aware of by the documents that Mr.  
5 Davis provided me, on the eve of his testimony.

6 Q] And you will notice in that file is a report, I think an  
7 eleven-page report by Dr. Hazelwood?

8 A] Uh-huh.

9 Q] Were you provided with that report by Mr. Davis before Dr.  
10 Wilkins took the stand?

11 A] I can't say with a hundred percent degree of certainty that  
12 I was provided with the actual report, but the allegations con-  
13 tained therein, I was made aware of.

14 Q] Before you put him on the stand?

15 A] Yes.

16 Q] And you realized that those were pretty serious allegations  
17 did you not?

18 A] Very serious allegations. That's why I made the motion and  
19 asked His Honor to no allow those certain aspects of the report  
20 not to be allowed into evidence, and that Mr. Davis not be  
21 allowed to cross-examine him. And I think Judge Burnett granted  
22 that portion of my motion, as I recall.

23 Q] Well, he granted that portion that just allowed the prose-  
24 cution from getting into the...

25 A] ...sexual allegations...

1 Q] ...the details of the sexual allegations; correct?

2 A] But he was allowed to impeach him on the fact that he was,  
3 his license was not currently under suspension, but he was being  
4 supervised by another psychologist and that he had a hearing,  
5 actually, that was pending during the Misskelley trial that he  
6 used the Misskelley trial as a way to continue that hearing.

7 And I believe that a subsequent hearing is when he actually lost  
8 his license, or it was revoked.

9 Q] And, uh, didn't Mr. Davis also, wasn't he also permitted to  
10 ask, and did he not in fact ask, whether your expert was dis-  
11 allowed to practicing in sexual assault cases?

12 A] I believe that's the case, but I'll have to look at the  
13 records to be certain. It's my recollection that it was.

14 Q] And what impact did you tend to that sort of question added  
15 on the credibility of Dr. Wilkins?

16 A] Well, I described it earlier as a nuclear bomb, and that's  
17 pretty much the way it was.

18 Q] So knowing that you were looking at a nuclear bomb before  
19 you put him on the stand, why did you call him?

20 A] I felt like I had no choice. That's all I had.

21 Q] Well, what credibility did you think he was going to have  
22 after Mr. Davis said that "isn't it true that the licensing  
23 board has forbidden you to work on sexual assault cases"?

24 A] I felt like it was important for the jury to hear Miss-  
25 kelley's limitations, his psychological limitations, and I was



1 hoping that they would overlook, uh, Dr. Wilkins' misgivings,  
2 uh, and then concentrate on Mr. Misskelley. Otherwise, I had no  
3 other way of getting that information reported.

4 Q] And I think you said before we broke that your main con-  
5 cern was getting some evidence of this suggestibility test?

6 A] That's correct.

7 Q] And why was that crucial to your defense?

8 A] Because it was important for Dr. Ofshe's testimony, which  
9 was ultimately proffered, uh, as opposed to his testimony. But,  
10 uh, I felt like it was important for the jury to understand, uh,  
11 Mr. Misskelley's limitations.

12 Q] And you did no preparation to prepare for the State's ob-  
13 jection to the use of the suggestibility test; correct?

14 A] None other than the literature that I was provided by Dr.  
15 Ofshe and Dr. Wilkins, and what was contained in Dr.  
16 Gudjonsson's book.

17 Q] Did Wilkins tell you before he took the stand that he had  
18 never used the test before, that he had no training in its use?

19 A] Yes.

20 Q] And did that information that you had before he took the  
21 stand, lead you to question whether you would even get in the  
22 suggestibility test, given his lack of familiarity with it and  
23 the fact that he hadn't been trained?

24 A] I really thought His Honor would allow it, because  
25 Gudjonsson's textbook, uh, had instructions on how to administer

1 certain tests and how to do it properly, and, uh, there was  
2 indications that it was reliable. And I felt like it met the  
3 criteria for being scientifically reliable.

4 Q] Did Mr. Davis alert you to the fact that he was going to  
5 raise the admissibility objections for the use of that test when  
6 you told him you were going to put him on?

7 A] I don't think so. I don't recall.

8 Q] And did you anticipate that you were going to run into any  
9 problems, admissibility-wise?

10 A] I really didn't think that I would, actually.

11 Q] After the judge ruled it inadmissible, did you consider  
12 going out and trying to hire somebody else who actually had some  
13 experience using this test?

14 A] Well, actually, I tried to do that before. I didn't want  
15 to put Wilkins on the stand, but His Honor would not give me an  
16 opportunity to retain someone else and have Mr. Misskelley eval-  
17 uated. I knew I couldn't have him evaluated in twelve hours,  
18 uh, on an overnight basis, uh, and so I felt like I was in a  
19 corner. I, I didn't know what else to do.

20 Q] Now besides trying to put on Dr. Wilkins and whatever value  
21 he had to attack the confession, did you also, were you also  
22 aware of the statement that your client had made shortly after  
23 he was questioned by the police in which he had retracted his  
24 confession?

25 A] Yes.

1 Q] And what evidence did you have that he had retracted that?

2 A] He, Mr. Misskelley had advised me that he had spoken to a  
3 female public defender, uh, in West Memphis and that, uh, the  
4 police had told him that if he just told them what they wanted  
5 to hear, they would let him go home. And when they didn't let  
6 him go home and locked him up, uh, he asked to speak to a lawyer  
7 and, uh, the public defender came to the jail cell to talk to  
8 him and he said "hey, I didn't do it; I wasn't there; I just  
9 told them what they wanted to hear," and she basically said it  
10 was kind of too late for that, and that was the end of it. I  
11 tracked her down, talked to her and she said she had no  
12 recollection of having any conversation with Mr. Misskelley.

13 Q] At some point in the case did, was it also brought to your  
14 attention through a newspaper article, dated June 9, 1993 with  
15 the headline "Did Not Kill Three Boys, Teen Writes From Jail"?

16 A] Yes.

17 Q] That your client, in fact, had written a letter to his  
18 parents retracting his confession?

19 A] Yes, I was very acutely aware of that.

20 Q] And did you in fact track down the article; and not only  
21 the article, but the written retraction?

22 A] I got the actual letter.

23 Q] I'll have this marked the next in order, Exhibit 41, the  
24 newspaper article. Do you recognize what I'm showing you as  
25 being part of your trial file in the case?

1 A] (Witness examining same.) Yes, sir, I do. I have a very  
2 large copy of the exhibit that I blew up.

3 Q] I think we've got three copies of it. So what does that  
4 consist of?

5 A] Uh, this is a letter that my client wrote to his father and  
6 his father's girlfriend, uh, Lee, uh, basically stating that,  
7 uh, he didn't do it. And, uh, it's an immediate recantation of  
8 his so called confession, which was two recantations within a  
9 very short period of time. And obviously, uh, it was reported  
10 in the newspaper and so I would assume that the original letter  
11 is in my file somewhere, but I don't know that for certain.  
12 This is a copy of it, and behind counsel table is a very large  
13 copy of it that I had blown up specifically for trial as an  
14 exhibit, that I brought with me today.

15 Q] So you obviously felt that this was an important piece of  
16 evidence?

17 A] Absolutely. Very important.

18 Q] And besides a retraction, did it also indicate Mr.  
19 Misskelley's state of mind at the time this statement was made?

20 A] I'm sure it did. It very, very eloquently did.

21 Q] "I can't stand it in here much longer. I will go crazy,"  
22 et cetera?

23 A] That's correct.

24 Q] Was his state of mind around the time he wrote this letter  
25 of importance to you in terms of attacking the voluntariness of

1 the confession and its reliability?

2 A] It was, and also it, I had also demonstrated, I mean, and  
3 something I wanted to demonstrate to the jury that Mr. Miss-  
4 kelley cannot write in cursive; he prints every thing and even  
5 signed his name, uh, by printing. And it's a very vivid, uh,  
6 demonstration of his, uh, writing ability.

7 Q] Now you said you recognized the importance of this letter;  
8 did you do some legal research into how you were going to get it  
9 into evidence?

10 A] I did, and Mr. Crow and I came to the erroneous conclusion  
11 that it was not admissible into evidence, unless Mr. Misskelley  
12 took the witness stand and testified at trial.

13 Q] And do you remember when this issue came up that you, uh,  
14 in fact, stated to the Court, and this is at page 1597,  
15 "Obviously, Mr. Misskelley would have to testify before we can  
16 lay a foundation for that and we have not made up our minds for  
17 certain whether he will testify, but that is one of our  
18 exhibits," referring to this letter as the exhibit?

19 A] Yes.

20 Q] And do you remember telling the Court on page 1096, "I  
21 believe under the rules, once he's testified, that a contem-  
22 oraneous statement saying that his statement to the police was  
23 not correct is admissible evidence. Obviously, he will have to  
24 testify." Do you remember that?

25 A] Unfortunately, I do.

1 Q] And do you remember Mr. Crow stating at page 1059 - - 1099,  
2 "Obviously, this would not come in unless he gets on the stand."

3 A] That's exactly what we said, and it was an incorrect  
4 interpretation of the law.

5 Q] And did you make any attempt to get admission of this  
6 statement under Rule 806, or any other theory, on the theory  
7 that it comes in as a prior inconsistent statement to a hearsay  
8 statement that the prosecution is using?

9 A] Not only did I fail miserably to interpret Rule 806, uh,  
10 correctly and once the State began to impeach Mr. Misskelley,  
11 uh, through his own statements, uh, it was admissible under Rule  
12 806.

13 Q] Do you recall during the course of the trial when you were  
14 cross-examining, I believe it was, uh, Mr. Gitchell, excuse me,  
15 it was Detective Ridge, do you recall the testimony when you  
16 were cross-examining the detective where the detective said that  
17 in his experience, suspects often understate their involvement  
18 in crimes and confessions?

19 A] I remember it like it was yesterday. In fact, Inspector  
20 Gitchell, on cross-examination said, when I asked him, "Did it  
21 ever occur to you that Mr. Misskelley wasn't there because he  
22 had the ligatures wrong; he had the times wrong; he had the  
23 injuries wrong" and the list goes on and on and on, and his  
24 response was, "Jessie simply got confused."

25 Q] And does he also say at that same time "it's my experience

1 that such suspects often lie, basically”?

2 A] That's right. That's correct. And that should have been a  
3 clue to me that at that point the State was Mr. Misskelley's own  
4 statement that was being introduced against him and then under  
5 Rule 806, it should have been admissible. I went to the trouble  
6 to have it blown up, uh, uh, and marked as an exhibit and  
7 intended to introduce it at trial, but I, Mr. Crow and I had  
8 convinced ourselves that unless Mr. Misskelley actually took the  
9 stand, that, uh, it couldn't be introduced. And I also under-  
10 stand there's a case, *Peoples vs. State*, 331 Ark., 188, a 1998  
11 case, uh, that's directly on point, as I recall.

12 Q] Do, do you recall even before that cross-examination that  
13 when you were arguing at the fitness hearing, that Mr. Fogleman  
14 attacked the credibility of the confession when he said, this is  
15 at page 383, "That's what he says, the defendant says; because  
16 he says it doesn't make it so"?

17 A] They had to attack the credibility of the confession,  
18 because there were so many things that were just not just wrong,  
19 but impossible. Uh, the kids were in school until three o'clock  
20 that day; uh, the victims, the ligatures were wrong; they  
21 weren't choked; there was no sexual assault, uh, there was a  
22 whole laundry list of things that are just impossibilities. And  
23 so the State had to attack the credibility of the confession.  
24 And, uh, as ashamed as I am to sit up here and admit this, I, I  
25 failed to understand the significance of that and introduce this

1 into evidence.

2 Q] Did you consider or argue that the statement would come in  
3 for a nonhearsay purpose; that is, to show Mr. Misskelley's  
4 state of mind at the time the statement was given, and  
5 specifically that he was, uh, "going crazy," etc cetera, as he  
6 indicated in the, uh, the statement?

7 A] Unfortunately, that never occurred to me, either. I think  
8 it would have been admissible under that theory, as well.

9 Q] Now as you went into trial, uh, I notice that throughout  
10 the trial transcript, you objected to, uh, any reference to  
11 evidence which related to Damien Echols or Jason Baldwin. Do  
12 you recall that?

13 A] Yes, I do.

14 Q] And, uh, what was your theory as to why evidence regarding  
15 Baldwin and Echols was not relevant, when Jessie's confession  
16 named them as co-perpetrators?

17 A] Because the fiber evidence and the hair evidence was ex-  
18 clusionary evidence, not conclusionary evidence and therefore, I  
19 felt like it was irrelevant and prejudicial, and therefore,  
20 shouldn't be admitted. Because my hair is microscopically  
21 similar to yours, uh, so that doesn't mean that hair found on  
22 the body or hair found on a, uh, garment, uh, in Mr. Baldwin's  
23 trailer or Mr. Misskelley's trailer is probative of, of, uh,  
24 corroborates the confession. So I felt like that, uh, I had to  
25 object to that. Hindsight being 20/20, uh, the correct way to



1 do it and, uh, which I, uh, after spending a third of my life on  
2 this case, uh, the correct way to do it would have been to  
3 retain an expert on fibers and an expert on hairs and come in  
4 and vividly demonstrate to the jury just how unimportant and  
5 ridiculous that evidence was. It, it really didn't show  
6 anything.

7 Q] In, in approaching the case, did you think it was important  
8 in terms of your strategy to rebut any suggestion that Baldwin  
9 or Echols was going to be involved in these offenses, or did you  
10 not feel that was important?

11 A] At that time it was conceivable to Mr. Crow and I that  
12 there was a possibility that the co-defendants could have been  
13 guilty and Mr. Misskelley was simply giving a false confession  
14 implicating them, because that's what the police had asked him  
15 to do. So we were less concerned about the evidence against  
16 them and more concerned about the confession and because of  
17 that, I think we focused too tightly on that. Now, uh, after  
18 fifteen years of researching this case and investigating this  
19 case, I now know that unequivocally that none of these three  
20 defendants have anything whatsoever to do with these crimes.

21 Q] Well, I'm not trying to focus on now. I'm trying to focus  
22 on back when you were trying this case. For instance, you knew  
23 before you questioned the fingerprint expert that there was a  
24 fingerprint found at the scene; correct?

25 A] That's correct.

1 Q] And you also knew that that fingerprint had been compared  
2 not only to your client, but also to Echols and Baldwin, and  
3 that the results of that comparison were negative; they weren't  
4 either one of those guys fingerprints; right?

5 A] That's correct.

6 Q] And I notice in your cross-examination of the, the expert,  
7 you only said, uh, Misskelley's fingerprints, "you didn't find  
8 Mr. Misskelley's fingerprints?" Why didn't you think it was im-  
9 portant to exculpate the other defendants with the fingerprint  
10 expert if you could do so?

11 A] Mr. Echols, at that time, was acting so strangely and  
12 bizarrely, uh, I didn't want to be associated at all or I wanted  
13 to try to stay away from him in every aspect that I could.

14 Q] Now you knew that your client, through his confession, had  
15 associated himself with Damien Echols; correct?

16 A] I did.

17 Q] And you knew that part of the confession, and outlined in  
18 his statement was that there was some sort of cult activity in-  
19 volved that involved Echols and your client; right?

20 A] That's correct.

21 Q] And do you remember when you were questioning the police  
22 officer on cross-examination about what your client had said  
23 about Damien Echols. Do you recall that?

24 A] I'm not, I'm not sure I know exactly what you're asking.

25 Q] Well, in 868 of the transcript, uh, and this is, had not

1 been elicited by the State, you asked, "Did he tell you that he  
2 was friends with Damien, or did he tell you that he knew  
3 Damien?"

4 Answer: "He said he knew Damien."

5 Question: "What else did he tell you about Damien?"

6 Answer: "He told me that he knew that he had been around Damien  
7 and Jason at one point. He said that Jason had got into a fight  
8 and Damien had taken his finger and wiped blood off of his nose  
9 and then licked the blood; things of that nature. I have high-  
10 lighted some notes, some of the things we talked about." What  
11 was the purpose of eliciting that, which obviously was pretty  
12 prejudicial as to Mr. Echols and Mr. Baldwin, was it not?

13 A] It was, and I again, simply failed to appreciate the sig-  
14 nificance of, of, uh, trying to contradict that testimony,  
15 because obviously, the State used it to corroborate Mr. Miss-  
16 kelley's confession.

17 Q] They needed to corroborate it, and here you appeared to be  
18 corroborating it by showing that Damien Echols has engaged in  
19 some sort of cult, uh, not cult-like activities, but some pretty  
20 bizarre activity; right?

21 A] I, uh, I didn't do a very good job of refuting that.

22 Q] Now when you were cross-examining the same police, uh,  
23 officer, you say - - this is at page 897: Question: "Didn't  
24 the police department receive some anonymous tips through  
25 America's Most Wanted, or other tips anonymously that this was a

1 cult killing?"

2 Answer: "Yes, sir, we have received information to that effect."

3 Question: "So y'all were looking into that angle?" "Yes, sir."

4 What was the purpose in eliciting from a police officer hearsay  
5 information, which otherwise would appear obviously to be inad-  
6 missible, to the effect that people were informing the police  
7 that this was a cult killing?

8 A] The purpose of me eliciting that testimony was to show that  
9 everybody in West Memphis knew, uh, that that was the theory,  
10 and that it wasn't any huge surprise that Mr. Misskelley knew  
11 that and was able to recite that as part of what the police  
12 wanted him to say in his confession.

13 Q] All right. And then you ask the following question: "Did  
14 you find any confirmation whatsoever that there was a cult or  
15 that Jessie was involved in a cult?"

16 And his answer: "Yes, sir."

17 Question: "What is that?"

18 Answer: "A young man by the name of Ricky Climer in another  
19 state, that is separated from the group." Do you recall that  
20 answer?

21 A] Yes, I do.

22 Q] What, what strategic purpose, if any, was served by  
23 eliciting that information?

24 A] None whatsoever. And I should have never asked that  
25 question. I expected Officer Ridge to state that he had talked

1 to all of the people that Jessie had listed as members of the  
2 cult, and it turned out to be people that Jessie hated in  
3 school, at the Marion High School, uh, and when they interview-  
4 ed them, they realized that there was no cult. And Ridge's  
5 response caught me off guard.

6 Q] Uh, do you remember shortly after, you yourself elicited  
7 that testimony, that when Vicky Hutcheson took the stand, you  
8 stood up and said, "There should be no evidence regarding cult  
9 activity, because it was highly prejudicial."

10 A] Yes.

11 Q] And do you remember Mr. Davis's response that you were the  
12 one that stuck cult issues, uh, in the case. Do you remember  
13 that?

14 A] Before, I did.

15 Q] And do you remember the Court then in response to that  
16 argument allowed Vicky Hutcheson to testify that your client and  
17 Damien Echols had been at some sort of a cult meeting?

18 A] I remember it very well. Yes, sir.

19 Q] Did you feel that that evidence was extremely prejudicial  
20 to Mr. Misskelley?

21 A] Yes, it was.

22 Q] Do, do you think that your cross-examination of the officer  
23 opened the door to that evidence, because you yourself had put  
24 in evidence that your client was involved in cult activity?

25 A] That was not my intent when I asked the question, but it

1 certainly was the result, and it was a horrible miscalculation  
2 on my part.

3 Q] Had you, before you asked that question, had information  
4 that the police had interviewed this guy, Ricky Climer, and had  
5 been informed that your client was involved in cult activity?

6 A] Yes, but his interview was so bizarre and ridiculous and  
7 off the wall, that I never expected Officer Ridge to bring it  
8 up.

9 Q] Well, when he did bring it up unexpectedly, did you either  
10 through cross, or independently attempt to establish that  
11 Climer's information was ridiculous and off the wall in order to  
12 rebut the prejudice that you yourself had caused by putting into  
13 evidence that your client was associated with cult activity?

14 A] No, sir, I didn't.

15 Q] Was there any strategic reason for not doing that, once you  
16 had done that damage?

17 A] Nope. I, I just didn't know how to undo the damage.

18 Q] Now when Vicky Hutcheson took the stand you asked her a  
19 question of whether she had ever told anyone that she was in  
20 this for the reward money. Do you recall that?

21 A] I do.

22 Q] And she said she had never told anybody that; correct?

23 A] That's correct.

24 Q] And in fact, you had evidence in your files specifically  
25 investigations of Mr. Lax, indicating that that testimony was

1 false, did you not?

2 A] A witness by the name of Jennifer Roberts was prepared to  
3 testify that Ms. Hutcheson had told her that she was after the  
4 reward money.

5 Q] And in fact, you put on Ms. Roberts for other issues, but  
6 you never asked her the question about whether Hutcheson had  
7 told her that she was testifying because of the reward?

8 A] That's correct.

9 Q] And why did you not elicit that information, since you, on  
10 cross-examination, set that issue up by asking her whether she  
11 ever before made statements to anybody about the reward?

12 A] Again, with some measure of shame, I must candidly admit  
13 that I misunderstood the Rules of Evidence and thought I was  
14 bound by Ms. Hutcheson's answer and could not introduce any  
15 collateral testimony to contradict her.

16 Q] Did, were you aware that you could, once she testified she  
17 never made that statement, that you could put in her prior in-  
18 consistent statement, uh, into evidence to impeach her?

19 A] I misinterpreted the Rules of Evidence and, uh, became  
20 aware of it after the trial was over that it was admissible and  
21 I should have elicited the testimony from Ms. Roberts.

22 Q] And the interview that I believe Mr. Lax has identified as  
23 one of our exhibits - - I'm showing you Exhibit 20. Do you  
24 recognize this document?

25 A] (Witness examining same.) Yes, sir, this is the interview

1 with Jennifer Roberts and was conducted by Ron Lax at my  
2 request.

3 Q] Now do you remember, and, and is this the interview you had  
4 in your possession when you were cross-examining Ms. Hutcheson?

5 A] Yes, it was.

6 Q] And did you read in the interview, uh, this is page 10, the  
7 question Mr. Lax asked her and got a tape recorded statement of  
8 Ms. Roberts. Question: "Before the time that Jessie was  
9 arrested, did Vicky ever talk to you about the reward money?"

10 Answer: "Yes, sir."

11 Question: "What did she say?"

12 Answer: "At one time she told me that they were going to split  
13 the reward money between Aaron and another little boy."

14 Question: "Did you ask her why they were going to give Aaron  
15 part of the money?"

16 Answer: "She said it was just information that he had given  
17 her."

18 Question: "Did she go into more detail?"

19 Answer: "That's about it."

20 Question: "Was there any other time that she mentioned this  
21 reward money?"

22 Answer: "At another time she told me they were going to give  
23 Aaron all of the reward money."

24 Do you recall reading that before you went into trial?

25 A] Yes, sir.



1 Q] And in fact, is that the reason you asked Hutchinson that  
2 question and whether she had told anybody else whether she was  
3 doing this for the reward money?

4 A] That's exactly the reason why I asked it.

5 Q] And are you telling me that after she gave you the answer  
6 "no," that thought you were precluded by law from introducing  
7 testimony of a prior inconsistent statement through Ms. Roberts?

8 A] That's absolutely correct.

9 Q] So there was no tactical or strategic reason for not using  
10 that evidence; you simply made a mistake as to the law?

11 A] I dropped the ball.

12 Q] I just have one more exhibit to be marked. I'm showing you  
13 Exhibit 42. Do you recognize this interview? It's a tape  
14 recorded, a transcript of a tape recorded statement of Rhonda  
15 Dedman.

16 A] (Witness examining same.) Yes, sir, I do recognize this.

17 Q] And I think what I was reading from that I just quoted to  
18 you was actually from this transcript. Did you have this one in  
19 your file, as well; right?

20 A] I did.

21 Q] And was there any tactical reason why you didn't put Ms.  
22 Dedman on to impeach Vicky Hutcheson?

23 A] The same reason.

24 Q] Uh, the Jennifer Roberts interview, she told Mr. Lax, did  
25 she not, uh, the question that is on page 13 of that earlier

1 exhibit: "Did Vicky ever talk to you about the reward?"

2 "Yes, sir."

3 "What did she say?"

4 "She had told me that Aaron was receiving it and then she told  
5 me how she was going to spend the money; buy different things  
6 with it."

7 Do you recall that you were in possession of that statement?

8 A] With a degree of shame, but I do remember it.

9 Q] And again, no tactical reason for not using that and simply  
10 making a mistake as to the law?

11 A] I made a mistake.

12 Q] Okay. Did you at one time consult with an expert by the  
13 name of, or at least talk to an expert by the name of Park Deeds  
14 about whether in fact this case, this killing, these killings  
15 were cult related?

16 A] Yes, I did.

17 Q] And what information did you learn from Dr. Deeds?

18 A] He would not talk to me unless I paid him fifteen thousand  
19 dollars.

20 Q] And did you discuss with him whether or not that there was  
21 any evidence that this was a cult killing?

22 A] I begged him to look at my file and he refused to do so  
23 unless I paid him a retainer.

24 Q] Did you talk to anybody else in an attempt to get some  
25 expert assistance on whether there was anything about this

1 killing being a cult?

2 A] I made a phone call to a - - I tried to call Quantico; they  
3 wouldn't talk to me. I tried a behavioral science unit; and  
4 then I also tried to contact a group of retired FBI profilers,  
5 and I could not afford their retainers.

6 Q] I want to direct your attention now to the jury delibera-  
7 tions in the case. Was there an incident that happened during  
8 jury deliberations?

9 A] Yes.

10 Q] And what was that?

11 A] Uh, the jury got the case late in the afternoon, I believe  
12 it was on Thursday, I may be wrong about that, it may have been  
13 on Friday, and around midnight Judge Burnett excused the jury.  
14 It was my understanding that he admonished them they were not to  
15 read any media reports and were to report back to the courthouse  
16 the next morning at 9:30. And, uh, at 9:30 we all came back and  
17 the jury resumed their deliberations. And as I came into the  
18 courtroom, the sheriff of Clay County, a fellow by the name of  
19 Darwin Stow, uh, approached me and told me that, uh, that I was  
20 going to win the case. And he said that, uh, he had talked to  
21 someone who had talked to a juror, or the foreman of the jury,  
22 and that, uh, the initial vote in the jury room was eight to  
23 four for acquittal. And, uh, obviously, I was rather excited,  
24 uh, I thought that maybe we had managed to poke enough reason-  
25 able doubt into the State's case, uh, I did share this

1 information with Mr. Crow and, uh, uh, a couple of more hours  
2 went by and, uh, we were all standing around in the hall. The  
3 courtroom in Clay County is very small, uh, the courthouse is  
4 very small, and there is a hallway that makes a complete circle  
5 around the courtroom. And the jury room is located directly  
6 behind the bench. And Judge Burnett, uh, we were either in the  
7 hall talking or outside the hall in one of the east or west  
8 quarters, and as I recall, I know that Judge Burnett and I were  
9 there, but I think Mr. Davis was there as well, and it was  
10 getting close to lunch time. And Judge Burnett said "I'm going  
11 to order some food for the jurors." And he opened the door to  
12 the jury room and, uh, the jurors were deliberating and he,  
13 Judge Burnett said, "Either I can order some food for you, or do  
14 you want me to order some food for you?" And the foreman of the  
15 jury, Mr. Williams, indicated that "that won't be necessary  
16 because we're done. We're almost finished." At that point, uh,  
17 Judge Burnett stated, "Well, you're going to have to come back  
18 for sentencing anyway, so I'm going to go ahead and order the  
19 food." And, uh, at that point the foreman of the jury, Mr.  
20 Williams, said, "Well, what if we're going to vote not guilty?"  
21 And, uh, it kind of stunned all of us and Judge Burnett closed  
22 the door and then we went back into the courtroom and I reported  
23 to Mr. Crow. And this, coupled with the information that the  
24 sheriff had given me earlier in the day, gave me, uh, a lot of  
25 confidence that we, uh, we might be leaning with acquittal. And

1 I don't recall, in talking with Mr. Crow about making a motion  
2 for a mistrial, uh, we never discussed, uh, asking that the  
3 conference be put on the record. The court reporter was not  
4 there and, uh, uh, later on, as we got ready to prepare the  
5 direct appeal, we realized that, uh, we should have made a  
6 record of that at the very least, and probably made a motion for  
7 a mistrial.

8 Q] Uh, let me see if I understand this: The - - did you con-  
9 sider that there was some legal issue there in terms of what  
10 took place?

11 A] Well, I was concerned that the judge had commented on his  
12 theory, or, or the evidence in the case, and I felt like the  
13 jury...

14 Q] ...how, how had he done that; what was the comment?

15 A] Well, when he said "you're going to have to come back for  
16 the sentencing," that was telling the jury that the proper way  
17 for them to proceed was for them to find, make a finding of  
18 guilt.

19 Q] That in your mind that was what was going on?

20 A] Yes.

21 Q] Okay. And are you then saying that you think you had a  
22 shot at winning, and so therefore, you didn't do anything about  
23 this?

24 A] No, I went back, I was astounded, uh, and I, frankly, I, I  
25 don't, I was more astounded that, uh, that it appeared that we

1 were about to win the case, uh, and I was excited about that  
2 possibility, but, but, uh, uh, Mr. Crow and I were, were  
3 optimistic that, uh, things were going to go well. And, uh, I  
4 felt like Dr. Ofshe, in spite of the fact that he wasn't allowed  
5 to testify to everything that we wanted him to, and Mr. Holmes  
6 did an incredible job testifying, uh, and even with the nuclear  
7 blast of, of Dr. Wilkins, and we felt like that, uh, uh, that we  
8 had a real shot at it.

9 Q] So did, did you consider that since you did in your mind  
10 have a real shot at it, that you ought to at least see if the  
11 Court would admonish the jury to disregard what you considered  
12 to be a comment on the evidence?

13 A] In all honesty, the thought never really occurred to me  
14 until later when we were starting to formulate the appeal issues  
15 and then we realized by not making a record of it, that we had  
16 waived it.

17 Q] I want to ask you some general questions about your - -  
18 and, and you didn't have any strategic reason for waiving that?

19 A] No, I, it just didn't occur to me.

20 Q] All right. I want to ask you some general questions about  
21 your investigative strategy. Did you hire an investigator to  
22 help you investigate this case?

23 A] No, I didn't have any funds to do so.

24 Q] Would you have had one, if you had had the funds to do so?

25 A] Absolutely.

1 Q] And why would you have done that, since you could have done  
2 the investigation yourself?

3 A] I did as much of the investigation as I could myself, but I  
4 was so far away from Crittenden County that it took a lot of  
5 time to travel back and forth. The witnesses were there; it's  
6 about an hour and half drive and, uh, in December, uh, uh, act-  
7 ually it was probably closer to October, uh, Val Price, Echols  
8 trial counsel, and Mr. Davidson, his co-counsel, Mr. Crow and  
9 myself, uh, met with Mr. Lax and we agreed on an informal basis  
10 to, uh, assist each other. And part of that agreement was that  
11 Mr. Lax would help us track down some of these last witnesses  
12 that we were having trouble locating.

13 Q] When did you get together with Mr. Lax for the purpose of  
14 having him help you on the investigative aspects of the case?

15 A] Uh, according to my file, it was December 28<sup>th</sup>.

16 Q] So right on the verge of trial?

17 A] Yes.

18 Q] Up to that time, who was conducting the investigation on  
19 your behalf?

20 A] Myself.

21 Q] And when Lax got involved, is it true that he couldn't find  
22 two specific witnesses and namely a list of eight people who you  
23 wanted him to locate?

24 A] I gave him a wish list of people that I would like for him  
25 to track down and, uh, because I hadn't been able to locate them

1 myself.

2 Q] In other words, this was not a situation where you were  
3 giving him free reign to go out and investigate on your behalf?

4 A] No, no, just, uh, I asked for his assistance. Mr. Price  
5 and Mr. Davidson and I and Mr. Crow, had come to the conclusion  
6 that what was good for Mr. Misskelley, was good for Mr. Echols.  
7 And for some reason that's still to this day defies logic and  
8 reason; Mr. Ford and Mr. Wadley did not subscribe to that point  
9 of view.

10 Q] Did, was there some reason why you didn't just give, uh,  
11 Lax instruction to go out and investigate the case for you,  
12 including all aspects of the alibi, and maybe even the back-  
13 ground on your expert witness?

14 A] I, I was still a little bit concerned about conflicts and  
15 interests, and, and confidentiality, waiving the attorney/client  
16 privilege, so I, I was a little bit leery of that. We've never  
17 entered into the formal agreement, uh, joint defense agreement,  
18 but we, uh, addressed those issues and essentially, he just kind  
19 of agreed to help, because it helped Echols in his defense as  
20 well.

21 Q] And what made you think that in a capital case where you  
22 didn't begin your investigation until September, late September,  
23 that the Court would not authorize funds for your investigator.  
24 What had Judge Burnett done, if anything, that led you to think  
25 it would be futile to ask for funds to get an investigator, your



1 own investigation?

2 A] His remarks to all of us were "file a motion, tell me  
3 exactly what you want, why you want it, how you want it, and  
4 then I'll approve it." And if I did that, then I would be  
5 telling the prosecutor what I was doing, and I didn't want to  
6 lay my cards on the table.

7 Q] Well, what cards were you laying on the table by letting  
8 them know you were using an investigator. Would that have  
9 necessitated you laying the results of the investigation on the  
10 table?

11 A] I felt that it would. Yes.

12 Q] How so? In other words, you knew you could make applica-  
13 tion for funds because you, in fact, made application for a DNA  
14 expert; right?

15 A] Yes.

16 Q] Why couldn't have you have gone to the Court, filed the  
17 motion with a declaration saying "it's late in the day; I just  
18 have discovered I need to investigate this case and we've only  
19 got a couple of months to go to trial; I have identified  
20 numerous witnesses who need to be investigated; I don't have the  
21 time or the resources to do it myself; this is a capital case;  
22 *Ake vs. Oklahoma*, I need these funds; please grant them." What  
23 would have prevented you from doing that?

24 A] I wanted to do it myself.

25 Q] Now you, on the verge of trial, filed a response to the

1 prosecutor's discovery request in which you listed about three  
2 hundred witnesses; right?

3 A] Yes, sir.

4 Q] And, uh, did you intend to put on three hundred witnesses  
5 on behalf of Mr. Misskelley?

6 A] No, sir.

7 Q] Had you interviewed all of the people on your witness list  
8 that you served on them in January?

9 A] No, sir.

10 Q] Had you made any tactical decisions based on investigation  
11 as to whether the people on that list would help you or hurt  
12 you?

13 A] I basically listed everyone whose name came up in the file,  
14 in the discovery, so that I would not close any doors and have  
15 any surprises. Suddenly I realized that if so-and-so was  
16 important, I didn't want to be precluded from not being able to  
17 call them if I didn't have them on my list.

18 Q] Well, would it be true that if those names were not just  
19 made up, that that list of names came from the discovery in your  
20 own, whatever investigation you were doing?

21 A] Yes.

22 Q] And so those were people who had facts relevant to this  
23 case; correct?

24 A] Sure.

25 Q] But they were not that people you had interviewed yourself

1 or had an investigator?

2 A] No, sir.

3 Q] And so what would have prevented you, when you filed that  
4 list on January 7, 1994, of filing a motion with Judge Burnett  
5 which said "these names have been identified to me as potential  
6 witnesses under the ABA guidelines, I have an obligation to  
7 interview them; there are two hundred and twenty-five names  
8 listed and this is your filing of January 7, 1994; I need an  
9 investigator here to help me interview these people"?

10 A] With all candor, my experience had been that, uh, motions  
11 of that nature would be futile.

12 Q] And, uh, again, I asked you this before in another area,  
13 but did you think there was any strategic or legal reason in a  
14 capital case, even if you thought it was futile, to make the  
15 best factual record you could, for purposes of an appeal in the  
16 event that Judge Burnett denied you funds for an investigator in  
17 a capital case?

18 A] Again, in all candor, the thought never occurred to me.

19 Q] Now did you ever have the benefit of an investigator in  
20 court with you, sitting there assisting you to remind you of  
21 things that you needed to impeach witnesses?

22 A] I had a paralegal.

23 Q] Okay. And who was that?

24 A] Uh, her name was Vicky Cross.

25 Q] And was she in court with you on top of the discovery,

1 reminding you of things that you needed to do?

2 A] She and Mr. Crow both.

3 Q] Okay. Mr. Lax did not perform that function; right?

4 A] No, he did not sit at counsel table with us. I never  
5 considered him to be my investigator. He did share some infor-  
6 mation. Most of the information, uh, that we shared came post-  
7 conviction, uh, the other attorneys sort of walked away from the  
8 cases. I was the only one who stayed on and on all of this time  
9 and so Mr. Lax and I worked together closely after the  
10 convictions, moreso than we did prior to the trials.

11 Q] I've identified a few interviews that you had of Lax's.  
12 How, how much material did he provide you with in terms of  
13 defense investigation?

14 A] Only that which was in my file. Now there are some things  
15 in my file, binders that are indexed with all of the witness  
16 names and chronological memos with regard to his interpretation  
17 of discovery being provided by the State. He did not share  
18 those with us until after the trials were over.

19 Q] And in terms of this in-court assistance, do you recall  
20 that at one point in the trial he apparently was attempting to  
21 sit with you at counsel table, and Mr. Davis vehemently objected  
22 to his, uh, being present with you?

23 A] There was a general sense of animosity, uh, that I felt not  
24 only from the Court, but also Mr. Davis, that they were upset,  
25 uh, that Mr. Lax was involved at all.

1 Q] Do you recall this at page 1380, Mr. Davis stating "Your  
2 Honor, we previously objected to the other defense team being  
3 allowed to be inside the rail up here during the course of the  
4 testimony, but we certainly object to Mr. Lax and Ms., the lady  
5 in black being there with him sitting up there. They have ab-  
6 solutely no business being inside the rail." And the Court  
7 says, "All right, well, have Val tell them to sit out in the  
8 audience." Do you remember that?

9 A] Yeah, and I never understood the logic or the rationale  
10 behind that, and I never understood why, uh, that when the  
11 Byers' knife became relevant, uh, and we had to stop the trial  
12 while we were waiting for DNA tests to come back on the knife,  
13 uh, there was one point where I literally begged, uh, the judge  
14 to allow anybody but a West Memphis officer to conduct the  
15 investigation or the interrogation of Mr. Byers. There were two  
16 or three state police officers who were there who were CID  
17 officers, and uh, Judge Burnett, uh, stated that it was the West  
18 Memphis police department's case and that they would be allowed  
19 to conduct the interview, and uh, I don't mean this to sound  
20 ugly, but, but, uh, the interview was done about like they - -  
21 somebody at junior high could have done it; it was horrible and  
22 it wasn't done properly.

23 Q] And in terms of your strategy at the sentencing phase, I  
24 think you've touched upon this, but I just want to make sure I  
25 understand your position. Is it your position that in your own

1 opinion you provided ineffective assistance of counsel to Mr.  
2 Misskelley during the sentencing phase of this case?

3 A] Mr. Crow and I did next to nothing to prepare for the  
4 sentencing phase.

5 Q] And do you think that there was information that had been  
6 provided to you through either Dr. Wilkins' reports or else-  
7 where that could have made a difference in convincing the jury  
8 not to give him a life sentence?

9 A] At the time, I failed to recognize it, but looking back  
10 now, obviously, there was a wealth of information through his  
11 previous mental health reports, uh, with Wilkins' own report.  
12 Of course, I was, I, I would have been very, very reluctant to  
13 put Wilkins back on the stand for any reason after what happened  
14 but, uh, there's a lot we could have done and we simply just  
15 were totally, totally unprepared to deal with that issue.

16 Q] And looking at the guilt phase overall, in light of all of  
17 the issues we have talked about today, uh, do you think you've  
18 lived up to those ABA standards and do you think you've provided  
19 effective assistance of counsel to Mr. Misskelley in the areas  
20 that we've discussed here today?

21 A] I obviously did not fulfill those ABA standards in any form  
22 or fashion. I was not qualified, I didn't have the proper ex-  
23 perience, uh, I didn't have, uh, uh, I didn't abide by the  
24 standards. I, I can sit here and say honestly, uh, that I gave  
25 it my all. I took this case very, very serious, I spent, uh,

1 almost two thousand hours preparing the case, uh, I was able to  
2 beg, uh, two of the world's leading experts to fly in from both  
3 coasts to come in and testify, and I, I, and I gave it the best  
4 shot I could, and I made a promise to Mr. Misskelley, uh, that  
5 if he was convicted that I would never ever, ever give up on  
6 him. And, uh, that's why I'm, uh, up until January first of  
7 this year when I became a full-time judge, uh, I, I've spent  
8 every waking moment, uh, working on his case. Uh, I wish that I  
9 would have known then what I know now and I wish that His Honor  
10 would give me another shot at it.

11 Q] When you say you spent two thousand hours on it, do you  
12 recall at the beginning of the case that Judge Burnett instruct-  
13 ed you and the other guys, uh, I think twice, that you were to  
14 keep very detailed time records on any time spent on this case?

15 A] And I did keep meticulous records.

16 Q] And did the billing records that you submitted to Judge  
17 Burnett at the end of the case, accurately reflect your  
18 activities?

19 A] Absolutely.

20 Q] Uh, are there things that you did that are not reflected in  
21 your billing?

22 A] None whatsoever.

23 Q] So if it's not reflected in your billing, it didn't happen  
24 in terms of involvement in things that you did?

25 A] There's nothing that I didn't, uh, record or log in my

1 billing records.

2 Q] Is Exhibit 29 a copy of the billing records that you sub-  
3 mitted to Judge Burnett at the end of the case?

4 A] Yes, sir, it is.

5 Q] Now this is a billing record submitted by both you and Mr.  
6 Crow; correct, so it's a joint effort?

7 A] That's correct.

8 Q] Uh, not broken down by attorney; otherwise, this is a total  
9 billing for the two of you?

10 A] That's right. We just, uh, did it all on the computer and,  
11 uh, uh, totaled it up and Judge Burnett did observe it on at  
12 least two occasions; even as late as while the jury was  
13 deliberating, that we would be compensated for our time at sixty  
14 dollars for in-court and forty dollars for out-of-court and, uh,  
15 at the end of, uh, the case when we had the hearing, we received  
16 nineteen dollars an hour for each of the eighteen hundred hours  
17 that we had in the case and, uh, our experts received the least  
18 amount of any of the experts that were awarded. That didn't  
19 even come close to reimbursing them for their travel expenses;  
20 essentially, my gold card, uh, my Visa card, uh, financed, uh,  
21 the defense when he took away some of the travel expenses for  
22 the experts to fly.

23 Q] What I wanted to focus on was the hours that you spent on  
24 the case, not the money part of it, but the hours according to  
25 your bill at page 43 that you and Mr. Crow combined spent on the



1 case, which was one thousand eight hundred and thirty-six,  
2 thirty-seven hours; correct?

3 A] That's correct. That doesn't include the direct appeal.

4 Q] Right. Uh, did the entries in the billing accurately re-  
5 flect witness interviews in terms of how many times you inter-  
6 viewed witnesses?

7 A] Every one of them, without fail.

8 MR. BURT: I believe that's all I have.

9 THE COURT: Have you got any cross-examination?

10 MR. DAVIS: I do, but we would ask not to start  
11 it at five until five this afternoon.

12 THE COURT: All right.

13 MR. BURT: Could I put something on the record in  
14 that regard, Your Honor, which is we have, uh, had the  
15 files shipped from California back to Little Rock so  
16 that the State would have access to the trial files.  
17 We have those available for a certain period of time.  
18 They unfortunately were not able to get to them and  
19 start reviewing Mr. Stidham's trial file.

20 We are now going to ship them back to Little Rock  
21 and further instructions so they have access to the  
22 originals.

23 And I think they're going to want to review those  
24 before they enter into cross-examination, so that  
25 would be an additional reason why I think that would

1 be the time to grant that.

2 THE COURT: There's no way we can continue the  
3 case tomorrow?

4 MR. BURT: I know Mr. Phillipsborn can't be here,  
5 and I unfortunately can't be here either. And I  
6 apologize for that.

7 THE COURT: All right. We'll have to continue  
8 the hearing until sometime in the future. I'm not  
9 sure exactly when it will be. I don't know.

10 MR. BURT: And as we said yesterday, Your Honor,  
11 we'll remain flexible if the Court gets some free time  
12 in its schedule and we can get some indication, and  
13 certainly since Mr. Stidham is on the stand, we can  
14 get him back here in short order and we can finish him  
15 up and arrange other witnesses behind him.

16 THE COURT: How many other witnesses do you have?

17 MR. BURT: Well, we're going to need to put on  
18 the, uh, Dr. Dering and at least two, possibly three  
19 of the forensic pathologists. That would be on behalf  
20 of Misskelly and Baldwin, and those would be joint  
21 witnesses.

22 THE COURT: Well, what would be the purpose of  
23 their testimony?

24 MR. BURT: Again, it would be on the issue of  
25 prejudice, in other words, what information could he

1 have discovered, uh, had he consulted with these  
2 experts, so that the Court is in position to weigh  
3 whether it would have made any difference.

4 THE WITNESS: Your Honor, before you recess, can  
5 I take a short recess to visit with Mr. Burt, uh, and  
6 Mr. Phillipsborn, uh, about scheduling and uh, uh, and  
7 before we recess, and I think there may be a question  
8 or two that, that they may want to ask before we break  
9 entirely, if we could just take five.

10 THE COURT: Yeah, that's fine with me.

11 MR. PHILLIPSBORN: Your Honor, maybe as Mr. Stid-  
12 ham is getting off the witness stand, just for the, to  
13 answer the Court's questions from our view point,  
14 again we, the Court was kind enough, uh, over the  
15 State's objection to allow us to enlarge the petition,  
16 the amended petition, as the Court knows in our case,  
17 uh, it's as Mr. Burt said not only joining him on the  
18 medical evidence, the forensic pathology evidence, but  
19 we have, uh, we have, uh, alibi witnesses that we'll  
20 need to present.

21 So the Court can gauge again, based on what  
22 evidence was available, uh, because there are  
23 witnesses beyond those that were discussed with Mr.  
24 Ford on the witness stand.

25 THE COURT: Well, I don't want to re-try the

1 case. That's not the purpose of this hearing.

2 MR. PHILLIPSBORN: I, I understand and again, I,  
3 I know that there are courts and I've inferred here  
4 the Court knows the procedure much better than I do,  
5 and the State has been consulted at least two or  
6 three, I mean, we agree on this. I mean, our, part of  
7 the reason that we were offering our, uh, exhibit, the  
8 enlarged petition was in the hope that we would avoid  
9 having to duplicate some of the evidence that was  
10 reduced through affidavit.

11 But I, I mean, the State has the right, of  
12 course, to object to that procedure. So I understand  
13 the Court's point, but we're in a difficult position  
14 if we don't put on witnesses, uh, we don't want our  
15 client to be in the position in which he is precluded,  
16 uh, or where he's found with waive issues.

17 THE COURT: I think it's probably sufficient for  
18 you to just to demonstrate that there were other  
19 potential alibi witnesses that they either knew of or  
20 didn't know of, or if they did know of them and didn't  
21 call them, that should be sufficient for this hearing.

22 MR. PHILLIPSBORN: Well, again, maybe, Your  
23 Honor, during the, uh, the recess, and I don't mean  
24 today, but during the time we have off, I will consult  
25 with Mr. Davis with whom I've had a good communication

1 and relation - - or a good communicating relationship  
2 with on that issue to see where the State stands.

3 And, uh, also with Mr. Raupp and Mr. Holt, and  
4 we'll see.

5 THE COURT: The other thing is that calling all  
6 of these forensic experts, the State's then going to  
7 want to call their forensic experts, and this is not a  
8 trial. This is a hearing.

9 MR. PHILLIPSBORN: I understand.

10 THE COURT: And I mean, I just don't see the  
11 purpose of it or the need to do that. Like I pointed  
12 out, if somebody is going to be testifying about what  
13 kind of bugs and insects and fish and varmints were in  
14 that ditch, I've got to know who checked it, whether  
15 or not they were really there or not; whether there  
16 was any water in the ditch, other than a foot or two.  
17 I mean, you, we're making this into a gigantic pro-  
18 duction that the record is going to be so voluminous  
19 it will take them ten years to read it.

20 I mean, if that's what y'all want to do, I guess  
21 I'm prepared to do it, at least if we get it done  
22 before December 31.

23 MR. PHILLIPSBORN: There is some evidence, I know  
24 the Court is concerned about that issue and has  
25 focused on it a couple of times. It is an issue that

1 we feel we are in a position to address.

2 THE COURT: Well, you see, in the last Rule 37  
3 petition, it was the odontologist who testified as to  
4 whether or not it was human bite marks, or not. And  
5 I've got a whole record that it either was or wasn't  
6 human bite marks.

7 And now it's going to be animal predation. I  
8 mean, the whole theory has changed. I guess I can  
9 hear it.

10 MR. PHILLIPSBORN: Although, Your Honor, I  
11 respectfully point out, uh, and in fact, Your Honor  
12 was one of the questioners of this, uh, of this doctor  
13 and I don't know if you remember there was a forensic  
14 pathologist from the New York Medical Examiner's  
15 office who testified, and he brought out, I think  
16 somewhat unexpectedly, that as far as he was  
17 concerned, based on his experience, uh, that he felt  
18 there were signs of animal predation and that wasn't  
19 an issue then.

20 And then you, you sought to clarify, uh, one of  
21 the answers that he had given in that respect. So I'm  
22 only respectfully saying that in that record it  
23 happens I think by accident, as far as the parties  
24 there were concerned, but that issue was in fact, that  
25 issue was discussed.

1           And so this, this isn't from the scientific view  
2 point, I don't think that this is a complete change of  
3 direction in terms of, uh, where certain pathologists  
4 feels the evidence...

5           MR. BURT: ...you know, the only thing I wanted  
6 to add, Your Honor, is that recognizing that the  
7 Court's concerns, we're going to work hard and try to  
8 streamline this as much as possible.

9           We have been doing that up to this point and I  
10 think we can do it in the future and hopefully make it  
11 as short as possible.

12           THE COURT: Brent?

13           MR. DAVIS: Judge, uh, I mean, my concern here is  
14 that originally when we started these proceedings, uh,  
15 the Court had indicated that these proceedings would  
16 be limited in nature, limited in scope, what the Court  
17 wanted to hear regarding specifics, primarily the  
18 ineffectiveness of the attorneys and that it would be  
19 that the far-reaching scientific evidence stuff would  
20 not be something that would be addressed here.

21           And from my past experience in the Rule 37 that  
22 didn't involve these attorneys, but Mr. Mallett, on  
23 the hearing, is in the same category or class, I would  
24 say maybe way above...

25           THE COURT: ...I think better.

1           MR. DAVIS: Well, but what occurred there would  
2 be the claims into the Rule 37 kind of grew  
3 exponentially the longer we were in court, and the  
4 longer we were in court, the more there was need for  
5 evidence, until it kind of blossomed out.

6           And I think what we're kind of saying is that  
7 we'll accept the Court's instructions if we're only  
8 going to be limited to certain evidence, but then we  
9 will try to figure out a way to expand things out  
10 until it gets longer and longer and longer in court  
11 and more expansive areas.

12           THE COURT: Well, I imagine you're going to take  
13 a half a day on Mr. Stidham, so I'm trying to figure  
14 out how much time I need to block out.

15           If you call all of those experts and you call  
16 counter experts, the only thing I'm concerned about is  
17 if the field of knowledge was available and for some  
18 reason the lawyers didn't use it, and that's  
19 sufficient, at least for these purposes, and it should  
20 be sufficient for an appellate court if they know that  
21 there was a field of knowledge that was available and  
22 wasn't sought after, wasn't utilized, or wasn't  
23 reasonably sought after, that ought to be enough for  
24 the purposes of this hearing.

25           Y'all try to work it out and I'll try to block



1 out two days just as soon as I can, but you're going  
2 to have short notice.

3 MR. HENDRIX: And one of the problems is, of  
4 course, our view is you've got all of that evidence in  
5 front of you by way of affidavit.

6 THE COURT: Sure. I've already seen it and read  
7 most of it.

8 MR. ROSENZWEIG: The problem is with the  
9 *Strickland* standard, we have to prove to you that  
10 there is a reasonable probability the result would  
11 have been different in order, in order for us to  
12 prevail.

13 And we presented the affidavits, but according to  
14 case law, the State has the right to cross-examine  
15 them. If the State is willing to stipulate to that, I  
16 don't know if they will or not, but if the State is  
17 willing to stipulate that these people are incredible,  
18 uh, then their testimony they represent would have  
19 been credible, then we're fine.

20 But assuming that they don't want to stipulate to  
21 that, we have to be able to present it so you can make  
22 that determination on prejudice.

23 THE COURT: Well, all right. Y'all try to work  
24 it out and shorten the witnesses down if you can. If  
25 you can't, we'll just hash through it.

1           MR. PHILLIPSBORN: Your Honor, while the Court is  
2 on the bench, will the Court give us just a few  
3 moments to talk to Mr. Stidham, because I'm not really  
4 sure of what he has in mind.

5           MR. BURT: Uh, perhaps we could do this, Your  
6 Honor. If we could reserve the right to ask whatever  
7 small areas are left when you return, rather than keep  
8 everybody sitting here.

9           THE COURT: That's fine.

10          MR. BURT: Thank you.

11          MR. DAVIS: Judge, one other thing is that Mr.  
12 Stidham be requested to be under the Rule regarding  
13 his testimony here at this hearing, and that he remain  
14 recognizing that he is under the Rule for purposes of  
15 this hearing.

16          THE COURT: Yeah, that means you can't discuss  
17 your testimony with anyone until you're finally  
18 released.

19          THE WITNESS: Yes, sir.

20          THE COURT: All right, I guess that's it. Court  
21 will be in recess.

22 (WHEREUPON, at 4:55 p.m., September 30, 2008, the proceedings in  
23 the above-styled cause were concluded and court was continued  
24 until November 19, 2008.

25                                   **NOVEMBER 19, 2008**