

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**

1           THE COURT: I think we were at the cross-examination  
2 point; is that where we were with Mr. Stidham; is that your  
3 understanding?

4           MR. BURT: Yes, Your Honor.

5           THE COURT: Where is Dan?

6           MR. HENDRIX: He's downstairs, Your Honor.

7           MR. DAVIS: Your Honor, I have a couple of things  
8 I need to go over with the Court.

9           THE COURT: All right.

10          MR. DAVIS: Just to apprise the Court of, uh, as  
11 late last week while Mr. Holt was going through some  
12 of the files of Mr. Stidham that were at Jeff's  
13 office, I think that's right, but anyway one of the  
14 requests I had made, because of reference to a tape  
15 that Dan had made in some motion he filed back at the  
16 time of the trial, I asked Kent if he would find that  
17 tape, because he referred to a tape with his client.

18           And I said, you know, we need to get that and see  
19 that. When he checked on it and looked through all of  
20 the boxes, there are no tapes of any statements, and  
21 when he checks on it they find out, well, the file has  
22 been returned from California but the tapes or the  
23 statements that were on the tapes had not, so they  
24 overnight those; they arrived Friday.

25           Last night was my first opportunity to even get

1 to view those or see those, uh, and I didn't get a  
2 chance to view in part a video tape of the defendant  
3 Misskelly being interviewed by, I believe, Dr. Wilkins  
4 and Dan Stidham.

5 I didn't get to finish that one, but at least I  
6 have seen enough of it that I think it's of some use.  
7 There apparently - - I don't know how many audio  
8 statements are on this disc we were provided. We  
9 haven't had a chance to go through that, but  
10 apparently it's audio statements that Mr. Stidham  
11 took.

12 He may tell, and I don't know what he is going to  
13 say on testimony today, but the way he indicated to me  
14 this morning, he reported a lot of things that occur-  
15 red between himself and his client and in fact, he  
16 just remembered last night some of the things he had  
17 done.

18 And then again this morning we were provided with  
19 another audio disc of a statement that Jessie Miss-  
20 kelley gave to somebody - - I guess Dan, or somebody  
21 that's on an audio disc that we just received this  
22 morning.

23 And the reason I'm advising the Court of this,  
24 there are a lot of things I could go through with Mr.  
25 Stidham but we would like to have an opportunity to

1 have an adequate time to review those and maybe it's  
2 denied.

3 I just don't know what the volume of it is.

4 THE COURT: Well, we've got three days scheduled,  
5 so however much of that time you need.

6 MR. DAVIS: Okay.

7 THE COURT: I would like to finish before  
8 December 31<sup>st</sup>. But if we don't, then I guess I'll just  
9 have to work some next year.

10 MR. DAVIS: I just needed to advise the Court of  
11 that.

12 THE COURT: Okay.

13 MR. DAVIS: They did everything to get them to us  
14 when they could.

15 THE COURT: I understand what you're saying. If  
16 you need the time, I guess you'll have to take it.

17 MR. BURT: Judge, could I raise one preliminary  
18 matter? I've been informed by your clerk that there  
19 was a re-numbering on some of the exhibits because  
20 there was a number skipped. And I believe what the  
21 clerk has done, has properly numbered them and we  
22 should make some record of the renumbering so that the  
23 record is clear.

24 THE COURT: Okay. Rosemary?

25 THE REPORTER: I inadvertently overlooked #34 and

1 went to #35. Once I discovered my mistake after court  
2 was concluded for the day, I went back and moved #35  
3 up to #34, in order for the exhibits to be in proper  
4 sequence.

5 THE COURT: Okay. So apparently #34 was omitted  
6 or skipped and starting with #34, she has backed up  
7 #35 to #34, and all of the exhibits are in  
8 chronological order from #34 forward; just backed up  
9 one number, for the record.

10 MR. BURT: Thank you.

11 THE COURT: And we're starting with Petitioner's  
12 #43 today. All right, are we ready to proceed?

13 MR. DAVIS: I think so, Your Honor.

14 THE COURT: Oh, by the way, I have read the brief  
15 that was submitted on the ABA standards; did y'all do  
16 one also?

17 MR. RAUPP: We have not yet. Did you have a  
18 deadline on that?

19 THE COURT: No, I didn't have a deadline. I just  
20 wanted it before I have to read through all of this, I  
21 mean, whenever that is.

22 Did you get a copy of the Petitioner's, it's a  
23 long brief, fifteen or twenty pages long.

24 MR. RAUPP: I received a copy.

25 THE COURT: Okay. Well, I just got it this

1 morning. I don't know when it was filed - - let's  
2 see. It was filed two days ago.

3 You can sit down, Dan. You're still under oath.

4 THE WITNESS: All right, Your Honor. Thank you.

5 THE COURT: All right, you may proceed.

6 CROSS-EXAMINATION

7 BY MR. DAVIS:

8 Q] Good morning, Dan.

9 A] Good morning.

10 MR. DAVIS: Your Honor, may I approach the  
11 witness?

12 THE COURT: Yes, sir.

13 CROSS-EXAMINATION, continuing:

14 Q] Dan, if I could, I was just going to, I believe this is  
15 Plaintiff's Exhibit #34, which was the memo dated September 24,  
16 so you can have that available to look at when I get to  
17 questions about it.

18 A] Okay.

19 Q] And, also Petitioner's Exhibit #29, which are the time  
20 sheets and the time data.

21 A] All right.

22 Q] Dan, if you would, explain to us again how it was that you  
23 were contacted initially and how you became involved in this  
24 case?

25 A] It was approximately June 6<sup>th</sup> or June 7<sup>th</sup>; I believe the

1 arrests were made on June 3<sup>rd</sup>, uh, and I received a phone call at  
2 home from Judge David Goodson on a Monday morning, as I recall.  
3 Uh, and he essentially advised me that he was having a hard time  
4 finding folks willing to represent Mr. Misskelley, uh, there  
5 apparently were volunteers for Mr. Echols and Mr. Baldwin's  
6 cases, but no one wanted to undertake the Misskelly case. And  
7 the public defender had declared a conflict - - the judge didn't  
8 explain the conflict.

9 Q] Okay. Let me ask you about that. I read, uh, you testi-  
10 fied in the Echols Rule 37 case back in 1998; right?

11 A] That's correct.

12 Q] Okay. And you were testifying about the same things that  
13 you are testifying here now, and when you got to the point where  
14 you talked about the conflict of the public defender's office,  
15 you said in there and under oath that you didn't know what the  
16 conflict was, you weren't aware of what the conflict was?

17 A] I do now, but I wasn't at the time.

18 Q] Okay. And the other day when you testified, your  
19 testimony, I believe was, that the conflict was this public de-  
20 fender couldn't represent - - because he was a Christian - -  
21 couldn't represent anyone in a satanic killing; is that what you  
22 testified to?

23 A] That's what I was told.

24 Q] Okay. By the public defender, Tom Montgomery?

25 A] No, honestly, Counselor, I can't recall who told me that.

1 I want to think it was one of our circuit judges, but I can't,  
2 honestly, I can't recall.

3 Q] Okay. So you don't know what the basis of the conflict was  
4 when you testified to that the other day; that was just some-  
5 thing you may have heard and you aren't sure who you heard it  
6 from?

7 A] It's been too many years. I can't - - I, I remember it  
8 because it was quite vivid at the time and I thought it was kind  
9 of silly, but I, I honestly can't remember who told me that. It  
10 may have been, uh, Val Price or one of the other lawyers  
11 involved in the case.

12 Q] And you've never discussed with Mr. Montgomery what his  
13 reasoning was, have you?

14 A] I don't think I've ever met Mr. Montgomery.

15 Q] Okay. And to attribute something of that nature to him,  
16 that he refused to handle it because he's a Christian and it was  
17 a satanic-type killing, did you not feel a little uncomfortable  
18 saying that on the record under oath, when you've never even  
19 discussed that with him?

20 A] Uh, it's been a matter of record for years.

21 Q] What do you mean "a matter of record"?

22 A] Uh, for example, I was interviewed, uh, by *The Arkansas*  
23 *Times* in 1996, and I believe I was quoted as saying that, and  
24 Mr. Montgomery never called and said "hey, that's wrong, or I  
25 didn't say that," and so I've never had any reason to doubt the

1 truth of that statement.

2 Q] Okay. And you would have acquired that knowledge since  
3 1998, sometime between now and between '98 today?

4 A] It was prior to 1996, because the interview that I did with  
5 *The Arkansas Times* was in 1996, June, I believe.

6 Q] I believe you indicated in the testimony under oath in the  
7 Echols Rule 37, uh, that you weren't sure as to why, uh, I can  
8 refer to the page number.

9 A] I'm sorry. I thought you said that I had testified at the  
10 Echols Rule 37 hearing that that's what the conflict was. Maybe  
11 I misunderstood.

12 Q] No, what I was saying was that at the Echols Rule 37 you  
13 indicated you didn't know what the reason might be. And the  
14 other day you testified that was the basis for your reasoning,  
15 uh, but that you understood that was the reason. And I'm just  
16 curious, you know, when you attribute something, a reasoning or  
17 an act of that nature, a fellow public defender, what basis  
18 could you have before you made that statement like that; what  
19 information?

20 A] Probably pure, unadulterated hearsay, I guess, would be the  
21 way to phrase that.

22 Q] Now when Judge Goodson contacted you and told you about  
23 this case, did he tell you the nature of the crime, what Mr.  
24 Misskelly was charged with?

25 A] Oh, it was quite common knowledge because of all the media

1 attention, uh, the confession that was on the front page of *The*  
2 *Commercial Appeal*.

3 Q] Had you read that before Judge Goodson contacted you?

4 A] I don't know that I had read the article word for word, but  
5 I was aware of it. Strangely, it was a copyrighted, uh, story  
6 and some of the other papers were able to reprint it, uh, but it  
7 was widely reported in all of the news stations out of Memphis,  
8 and I think in Jonesboro, as well.

9 Q] So you knew it was a capital murder, three counts capital  
10 murder?

11 A] Yes, sir.

12 Q] Okay. And you knew it involved victims that were eight  
13 years of age?

14 A] That's correct.

15 Q] Okay. And when Judge Goodson mentions this to you, you're  
16 a public defender in Greene County at the time; right?

17 A] That's also correct. Yes, sir.

18 Q] Okay. And I believe you testified that you had never been  
19 involved in a trial involving a homicide case; is that true?

20 A] I had never tried a case, uh, involving homicide. I worked  
21 on a couple of capital murder cases and a conspiracy to commit  
22 capital murder case, uh, while in law school, and as a volunteer  
23 public defender in Greene County. But as far as actually having  
24 conducted any type of jury trial, uh, the Misskelley case was my  
25 first jury trial as first chair.

1 Q] Okay. And explain the cases that involved homicide charges  
2 that you had been involved in, and what your involvement was?

3 A] All right. Uh, back in law school, uh, I was a volunteer  
4 law clerk for the public defender's office, uh, Danny Hyslip,  
5 who I think is still the public defender there in Washington  
6 County, uh, we had a capital case that I did some of the  
7 research on, uh, for the appeal. I can't recall with any degree  
8 of specifics, uh, the name of the defendant or even the facts of  
9 the case. There was also a rape case that I worked on while  
10 there and then I was able to secure a...

11 Q] ...was that a rape case that went to trial?

12 A] Uh, when I got there it was already post-trial and we were  
13 working on the appeal. It was actually reversed on appeal, uh,  
14 and a new trial was granted, as I recall. I can actually  
15 remember the name of the defendant in that one. It was  
16 Cazaglio.

17 Q] Okay. And on the homicide case that you said you worked on,  
18 on appeal, the other day you testified that on the case that you  
19 worked on when you were in law school in Fayetteville, that you  
20 did research and that you also interviewed witnesses?

21 A] That was what I was about to allude to. That was the case  
22 of William Frank Parker, uh, I found a law clerk position in  
23 Springdale that was actually something that paid me, uh, as  
24 opposed to being a volunteer law clerk, which was pretty import-  
25 ant, because I had a small child and I needed to earn some money

1 while I was in school.

2 Q] What was Mr. Parker charged with?

3 A] Capital murder, two counts. He was also charged with  
4 attempted murder, uh, of a police officer.

5 Q] Okay. And did that case go to trial while you were clerk-  
6 ing at the law office that was hired or retained to defend him?

7 A] Yes.

8 Q] Okay. And what was your involvement in that trial?

9 A] My role was limited to researching some of the issues with  
10 regard to motions, uh, and I also interviewed witnesses. I also  
11 helped with, uh, uh, basically being a gopher transporting  
12 documents and papers to different psychologists and psychia-  
13 trists, uh, and things of that nature, but just pretty much  
14 whatever the boss asked me to do.

15 Q] Were you present during the trial?

16 A] A couple of days I sat in the courtroom and observed, but  
17 obviously, I didn't have any role, uh, during the course of the  
18 trial.

19 Q] And who was the lead counsel and defense attorney?

20 A] Uh, there were two, uh, W. H. Taylor, uh, Fayetteville, was  
21 one and there was another lawyer from Fayetteville. It's just  
22 been too many years. I want to say his name was Jim someone,  
23 but they were co-counsel. Uh, I don't know who was lead and who  
24 was second chair, I can't recall, but I worked for Mr. Taylor.

25 Q] And did the case actually go to the jury on the issue of

1 the death penalty?

2 A] It did.

3 Q] Did it result in a death-penalty verdict?

4 A] It did, and then it was reversed on appeal and re-tried and  
5 he was re-convicted and given the death penalty, and he was exe-  
6 cuted on August 8, 1986.

7 Q] Were you involved at all in the appellate work, as far as  
8 the briefings, any of that of the re-trial of the case?

9 A] No, sir. I had already graduated law school and had re-  
10 turned to Paragould to start my practice.

11 Q] And once you returned to Paragould, were you involved in  
12 representing or being involved in any homicide cases while a  
13 public defender or a private attorney in Paragould?

14 A] Uh, two, uh, one involved, uh, I can't remember the name of  
15 the defendant, uh, but to give you some background, uh, David  
16 Goodson, who ironically was the judge who appointed me to repre-  
17 sent Mr. Misskelley in this case, he was our public defender in  
18 Greene County and I went to him, uh, and essentially agreed to  
19 volunteer to assist him, uncompensated, just to try to get some  
20 experience.

21 Q] Was that the crossbow murder where the kid murdered his  
22 grandmother, I believe, at Crowley's Ridge?

23 A] Yes. I think that occurred in Marmaduke, uh, the young man  
24 that shot his grandmother with a crossbow while she was sitting  
25 on the couch, because she wouldn't give him twenty dollars.

1 Q] Was that a capital murder charge, or as first-degree murder  
2 charge, or do you remember?

3 A] I can't remember. I think he was a relatively young de-  
4 fendant, so I think there was a plea and he - - he's out now.  
5 In fact, I've seen him in my courtroom a couple of times.

6 Q] But that case ultimately resulted in a negotiated guilty  
7 plea?

8 A] That's my recollection, uh, otherwise, I don't think he  
9 would be out.

10 Q] What was your role in working on it? That was the case  
11 that you worked on after you were licensed to practice law;  
12 right?

13 A] Yes.

14 Q] Okay. And you were in private practice for yourself?

15 A] I was in private practice with John Williams, I was an  
16 associate for the first six months of my law practice and then I  
17 actually ended up in an office across the street from Judge  
18 Goodson's public defender's office and would just go over and  
19 ask him if I could help out, just to get some experience. And  
20 he was always happy to oblige and was grateful for the assist-  
21 ance.

22 Q] I'm assuming that since you volunteered and did it as an  
23 opportunity to learn, you delved into as many facets of that  
24 case as you possibly could; correct?

25 A] I did what he asked, but in all honesty, I don't remember

1 all of the things that I did and I don't recall the case going  
2 to trial, so again, I think it was a plea.

3 Q] Okay. Do you know; were you involved or familiar with what  
4 the recommendation was on the case?

5 A] It's been a long time ago, but I, uh, it seems like the  
6 negotiation was primarily, because of the defendant's age, uh,  
7 and also, I believe, after thinking about this yesterday, I  
8 think that's how I became acquainted with Dr. Wilkins, uh, is  
9 through David Goodson. I think David Goodson used Dr. Wilkins  
10 in that case, uh, and I think that's how I became familiar with  
11 Dr. Wilkins.

12 Q] And when you say David Goodson used Dr. Wilkins, do you  
13 mean Dr. Wilkins was used by a defense attorney as an expert in  
14 a case where there was a homicide charge?

15 A] That's my recollection. And I'll be happy to explain how I  
16 came about that epiphany yesterday, if you would like.

17 Q] All right. I just wanted, for clarification of the record;  
18 previously you had indicated and as best as you can recall, that  
19 Dr. Wilkins, you obtained him or retained him, as a result of  
20 having become familiar with him or used him in a custody or  
21 child, a domestic relations case?

22 A] That's true.

23 Q] And now after you've thought about it, you've indicated to  
24 us that you believe that that relationship and that familiarity  
25 with Dr. Wilkins resulted from you having previously been

1 familiar with him as an expert witness retained by Judge Goodson  
2 when he was public defender?

3 A] I think, again, I can't state with absolute certainty, but  
4 I think Dr. Wilkins probably consulted on the cross bow murder,  
5 or for the lack of a better, uh, I can't remember the defend-  
6 ant's name. Yesterday, uh, we were in the process of cleaning  
7 out the law library in the Greene County courthouse and there  
8 were some public service workers there removing books and other  
9 items and there was a cardboard box in the corner that contained  
10 Judge Goodson's personal effects, uh, some campaign materials  
11 and other things. And, uh, I picked it up and went to Laura  
12 Hagan's office and asked her if she wanted to set this aside for  
13 Judge Goodson, and she asked me to keep it in my chambers. And I  
14 noticed in the box there was a business card of Dr. Wilkins and  
15 it suddenly kind of jogged my memory that that's how I became  
16 acquainted with him. And again, it may be something that I'm  
17 recalling incorrectly, but that seems to be correct. I don't  
18 have a file to go back to refer to because Judge Goodson, being  
19 public defender Goodson, would have maintained the file. I  
20 didn't have a file of any sort. I was just kind of clerking and  
21 helping out, even though I was licensed.

22 Q] Well, let me ask you this. Was the case in which Dr.  
23 Wilkins was involved in, did that involve a juvenile, uh, some-  
24 one under the age of eighteen that was accused of and charged  
25 with murder?

1 A] Yes, I believe the defendant was fourteen or fifteen.

2 Q] And Dr. Wilkins would have been involved in that case as a  
3 witness that would have examined him and for purposes of some  
4 sort of forensic evaluation, to be available to testify to  
5 whether he did or he didn't; that was the reason he was retained  
6 and how you were familiar with him?

7 A] I believe so; yes, sir.

8 Q] So when you make the decision in this case to consult and  
9 retain Dr. Wilkins, it wasn't just because he was the only per-  
10 son that you could think of that would do it the right way, the  
11 other reason was that he was a person you were familiar with and  
12 had been used in a homicide case involving a teenager; correct?

13 A] That's my best recollection. There was a degree of  
14 familiarity there with him because I had worked with him in the  
15 past.

16 Q] Now when Judge Goodson asked you are you interested in this  
17 case, uh, and I can't remember, to be honest with you, I can't  
18 remember if I read it from the transcript in the Echols, I think  
19 it was, but in any event, there was one reference in there where  
20 I believe you said that Judge Goodson said "if you whine enough,  
21 I might make you do it"?

22 A] He made it clear that he would not compel me to do it if I  
23 didn't want to do it, but he was having difficulty finding some-  
24 one willing to undertake the task and, uh, I asked if I could  
25 have fifteen or twenty minutes to try to get to get a hold of my

1 law partner, Mr. Crow, and I didn't want to make the decision on  
2 my own. Uh, Judge Goodson and I specifically discussed the  
3 notion that the case would not go to trial, that most likely  
4 there would be a plea. And the facts of the case, as everybody  
5 understood them at the time...

6 Q] ...let me stop you there. I mean, as a lawyer on any case,  
7 you assess it beginning in what you think the likely scenario  
8 may be, but as a law, uh, as somebody licensed to practice,  
9 along with five or six years of experience, you knew at that  
10 point in time that sometimes, regardless of how you think a case  
11 is going to turn out, it takes a different track and ends up in  
12 different locations; right?

13 A] That's always the possibility; yes, sir.

14 Q] Okay. And you knew on this case, I mean, you knew when you  
15 went into it that capital murder charges were serious charges  
16 and that it was going to require a great deal of effort, time on  
17 your part in order to adequately represent your client; right?

18 A] Yes, sir. That's a fair assessment.

19 Q] Okay. Well, realizing that, did you voice, did you look at  
20 that and say, "Well, gosh, based on my experience and training,  
21 I just - - this is way over my head. I can't do this"?

22 A] No, because at the time I assumed, uh, that it was going to  
23 be a plea. And Judge Goodson and I even discussed that on the  
24 phone that morning.

25 Q] Well, this wasn't, was it money, I mean, was this a

1 lucrative, did you expect this to be a lucrative deal? I  
2 noticed during your transcript, you indicated that based on your  
3 experience, you knew the judge wouldn't reimburse you for this,  
4 they wouldn't allow you to spend this, that your pay would be  
5 low as a public defender. Was it money, was the opportunity to  
6 make a good fee off this case; is that what interested you?

7 A] I never anticipated being able to make any, uh, any money,  
8 money on the case. That was not why I chose to get involved in  
9 it. I chose to get involved because it's the kind of thing,  
10 uh, it's why I went to law school. It's why I volunteered as a  
11 law clerk at the public defender's office in Fayetteville, uh,  
12 it's why I volunteered to help Judge Goodson when he was public  
13 defender. It's why I went to all of the circuit judges in the  
14 Second Judicial District and the Third Judicial District and  
15 offered to take appointments; this being prior to the public  
16 defender system being deployed in the state of Arkansas. I  
17 wanted to try to get as much as experience as I could in  
18 criminal matters because, uh, I wanted to build a criminal  
19 practice. It's what I enjoy; it's what I wanted to do.

20 Q] Was it the high profile nature of this case? I mean, one  
21 thought might be that because this case garnering a lot of  
22 publicity, you're a young attorney, you want to get in the  
23 criminal defense field, uh, were you intrigued by it because you  
24 would get your name in the headlines and in the newspapers and  
25 it might allow you to go to big practice if you jumped on this

1 case?

2 A] I don't, I don't think that that was my way of thinking.  
3 In fact, I remember discussing that very issue with Judge Good-  
4 son. He was trying to coax me into the appointment and the  
5 comment was made, uh, "It's not going to be that big a deal,  
6 he'll testify against the other two, uh, you'll get your name in  
7 the paper a couple of times and it will all be over with in a  
8 couple of months." And, uh, so I had no idea, uh, at that point  
9 that the matter was going to go to trial. Uh, I had no idea,  
10 uh, that there was going to be HBO documentaries, uh, or any of  
11 this other stuff that's happened. So I don't think that was  
12 really a factor in my decision at all.

13 Q] Was it your thought at that point that the effort, investi-  
14 gation and your skills, that whatever happened in this, you  
15 could defend it?

16 A] Uh, I was, I had experience in negotiating pleas and my  
17 assumption was the State would, uh, that, uh, at worst, offer to  
18 waive the death penalty in exchange for Mr. Misskelley's co-  
19 operation and at best, maybe a certain number of years sentence  
20 so that there would have to be any hope that the governor might  
21 commute his sentence to a certain term later on. That, that was  
22 our initial goal was to try to prepare him to testify against  
23 Mr. Baldwin and Mr. Echols. So the trial was really the  
24 furthestest thing from, from my mind at that point.

25 Q] But you knew a trial was -- people charged with murder,

1 with capital murder, trials are options; right?

2 A] Oh, it's always an option; certainly.

3 Q] And you knew that that was possible; right?

4 A] Sure.

5 Q] And when you accepted the case at that point, and the  
6 question I have for you, knowing that that is out there and  
7 there is a possibility that you may find yourself involved in  
8 it, at that point did you consider yourself incompetent to  
9 handle a capital murder case?

10 A] The thought never entered my mind.

11 Q] You're hiring on to represent somebody charged with killing  
12 three eight-year-olds, and you're saying that you didn't even  
13 consider that possibility at that point?

14 A] I did a few months later when it became clear that the  
15 matter was going to go to trial.

16 Q] Okay. Let me ask you this: That would have been somewhere  
17 around September 24<sup>th</sup>; correct?

18 A] That's correct.

19 Q] Okay. And you say that by that time you realize things  
20 have changed and you now see that trial is a likelihood. At  
21 that point in time, did you go to the judge, uh, did you advise  
22 your client, did you advise your client's family that "I'm in  
23 way over my head. I'm not going to going to be able to do this.  
24 I'm not competent to handle this case"?

25 A] No, I didn't think that I was in over my head. I, I did

1 try to seek advice and counsel of more seasoned lawyers, which I  
2 did.

3 Q] Who did you consult with?

4 A] Who did I consult with?

5 Q] Yes, sir.

6 A] Uh, Bobby McDaniel, here in Jonesboro.

7 Q] He was the Jonesboro attorney you referred to in your pre-  
8 vious testimony?

9 A] Yes. Yes.

10 Q] Okay. And did you consult with him on more than one  
11 occasion?

12 A] A couple of times. I remember once discussing with him,  
13 uh, the polygraph issue and *Patrick v. State*, uh, some of those  
14 issues, and he was always very kind throughout my history as a  
15 young lawyer and offered his assistance. And I also talked to a  
16 lawyer in Florida who had handled a case, uh, and I think that's  
17 where I got information about Mr. Holmes.

18 Q] How did you come -- who was the lawyer in Florida?

19 A] I can't recall his name.

20 Q] Do you know how you got hooked up with him?

21 A] I read the case on, on, uh, either a Reporter or, uh, I'm  
22 trying to think of when Al Gore invented the Internet. I can't  
23 remember, uh, when that started happening, but I might have  
24 found it on-line, uh, and, but I contacted the attorney in  
25 Florida, got his name and number and, uh, talked to him about

1 the case and he's the one who asked or advised me that I should  
2 look into the Fraternal Order of Police's efforts at that time  
3 in history to impose super Miranda rights for police officers;  
4 otherwise known as the Police Officer's Bill of Rights. And his  
5 case hinged on that very issue. And so I started doing research  
6 on that, uh, discovered that Arkansas did pass that statute and  
7 incorporated that into my motion to suppress.

8 Q] So you used that strategy during the course of the trial in  
9 an effort to suppress his statement; correct?

10 A] Yes.

11 Q] Okay. It turned out not to work, but it was a strategy  
12 that you acquired through your investigation to the attorney in  
13 Florida, you're looking up information and finding out that as a  
14 possible strategy to use to try to suppress the statement which  
15 was through your defendant's confession; right?

16 A] That was our major task. Yes.

17 Q] And let me ask you. As you, when, when you hire on in this  
18 case and you agree to take it, the state of the case is that  
19 your client has confessed that he was present and that he was  
20 involved as an accomplice in the murder of three eight-year-  
21 olds; right?

22 A] That's, uh, the facts as I understood them at the time I  
23 was appointed. Yes.

24 Q] Okay. And as I understand it, the reasons that the time  
25 period from June 6<sup>th</sup> until September 24<sup>th</sup> or so goes by, that you

1 are still planning to use this strategy of having him plea, is  
2 because he's still telling you that he was involved and that his  
3 confession was accurate, and in fact, that he had been involved  
4 and present when these murders were committed; right?

5 A] That's correct, and I think that's exactly what I testified  
6 to the other day when I was here.

7 Q] Okay. And so your reason for not deviating from the  
8 original strategy you had was because of the information that  
9 your client was supplying; correct?

10 A] That, and the fact that I did not have any experience in  
11 dealing with mentally handicapped, uh, folks. And I failed to  
12 recognize the significance and extent of Mr. Misskelley's  
13 handicap.

14 Q] And would it be fair to say that also he continues to con-  
15 fess up through that time, and in part of September and  
16 consistent with what he had in his statement with the police.  
17 And then again in February, he again gives a statement confess-  
18 ing to the crimes; correct?

19 A] Are you talking about after the trial?

20 Q] Right. The one at Rector?

21 A] Uh-huh.

22 Q] He again gives a statement confessing the crimes; right?

23 A] He did.

24 MR. BURT: We'd object to this reference to the  
25 statement - -if he's referencing the statement that

1 was given, Your Honor, we'd object to the use of that  
2 statement.

3 THE COURT: What's the basis of the objection for  
4 this hearing?

5 MR. BURT: Well...

6 THE COURT: ...I mean, certainly, if it were a  
7 trial or something, it might be relevant, bur for a  
8 Rule 37 petition, wouldn't that be a relevant matter  
9 for the Court to consider?

10 MR. BURT: I think we have some actual cases on  
11 that that Jeff looked up, if the Court would care to  
12 look into that issue.

13 MR. ROSENZWEIG: Your Honor, the case of *Hammers*  
14 v. *State*, uh, that was actually done twice, but the  
15 latter case was 565 S.W.406-263 AR378, cited in 1978,  
16 I think this was around the time that you were prose-  
17 cutor.

18 THE COURT: Yeah, I was the prosecutor. As a  
19 matter of fact, I tried the case. And that's where  
20 Judge Fogleman, not John Fogleman, but his uncle,  
21 ruled that we had exchanged gold for brass, I think...

22 MR. ROSENZWEIG: ...well, Your Honor...

23 THE COURT: ...and that was a homicide case in  
24 Mississippi County. I remember it well.

25 MR. ROSENZWEIG: Your Honor, the *Hammers* case

1 ended up holding that promises of absolute trans-  
2 actional use immunity and that promises made by a  
3 prosecutor are equitably enforceable, and in this case  
4 there was a specific written, or least transcribed,  
5 promise that the statement could not be used in any  
6 capacity whatever.

7 This is a "whatever."

8 THE COURT: Well, yes, I remember *Hammers* case  
9 well. Like I say, I remember that quote real well in  
10 the Appellate opinion, uh, that "the prosecutor ex-  
11 changed gold for brass," and I never forgot that. I  
12 remember that case well.

13 But basically what the holding was, was that if  
14 we made a commitment or a promise then we couldn't  
15 back up on it.

16 And it couldn't be used in the case in chief.  
17 Here, we're not talking about the case in chief  
18 against your client.

19 We're talking about a post-conviction matter.  
20 And I think there is a distinction.

21 MR. ROSENZWEIG: Your Honor, I would respectfully  
22 disagree with the Court. This is part of the criminal  
23 justice process and therefore, you know, it's, uh, you  
24 know, it, it can't be used against him.

25 I mean, if Mr. Misskelley were to testify, uh,

1 you know, he didn't, uh, in this proceeding, it may be  
2 he could be impeached with it, but it certainly cannot  
3 be produced proactively by the State.

4 THE COURT: If you were granted a new trial and  
5 the issue came up whether that statement could be  
6 used, I would grant the motion.

7 MR. DAVIS: Judge, and it's the State's position  
8 that for the focus of this proceeding is the repre-  
9 sentation that Mr. Stidham provided, and particularly  
10 for the purpose of this examination is his representa-  
11 tion and what occurred during the course of that re-  
12 presentation.

13 THE COURT: I think I'm going to allow the in-  
14 quiry for the limited purpose of this hearing; how-  
15 ever, I would clearly state that if it were a trial in  
16 chief where he were in jeopardy anew, then I wouldn't  
17 allow it.

18 But for the purposes of this hearing, I will  
19 allow it.

20 MR. BURT: I do have a second objection, which I  
21 would raise, and that is relevancy. This is a post-  
22 conviction statement, so how can a post-conviction  
23 statement affect his trial strategy?

24 THE COURT: It goes to the mental state of the  
25 attorney representing Mr. Misskelley at the time and

1           it goes to his decision-making process; it goes to  
2           basically everything he did in the case: his attitude,  
3           his state of mind in representing his client, and I'm  
4           going to allow it for those purposes.

5           MR. BURT: This is post-trial.

6           THE COURT: Well, I understand that. I, I think  
7           that on cross-examining him where he's basically said  
8           "I was totally and completely incompetent and ignorant  
9           of the law and ignorant of the facts," uh, it becomes  
10          relevant.

11          And I'm going to allow it for this purpose.

12          THE WITNESS: With all due respect to the Court,  
13          I, I don't think I have ever been incompetent or  
14          stated that I was incompetent. I've never needed a  
15          guardian, to my knowledge.

16          I may have been ineffective pursuant to the  
17          *Strickland* standard, but I don't remember ever, uh,  
18          agreeing that I was incompetent.

19          THE COURT: Well, I mean, that's the way I recall  
20          your testimony. So that's beside the point right now.

21          THE WITNESS: I don't think I need a guardian.

22          MR. PHILLIPSBORN: Your Honor, just for the  
23          record, the Baldwin defense joins in the immunity-  
24          related argument.

25          I realize that for us there is only a slight

1           chance of collateral use of the statement in these  
2           proceedings.

3                     THE COURT:   Go ahead.

4 CROSS-EXAMINATION, continuing:

5 Q]       Let me again hand you - -Mr. Stidham, after that statement  
6       and you indicated that a record, sometime post-conviction a few  
7       weeks after Misskelley was convicted, he gave another statement  
8       when he gave the statement that we were referring to, where he  
9       confessed to this crime; correct?

10 A]       Uh, the short answer to your question is yes.   And the  
11       longer version is that he was coerced into giving that statement  
12       the second time.

13 Q]       Okay.   And when they get up they can ask you the background  
14       of it, but in terms, uh, you were aware that he gave a statement  
15       where he confessed to the crimes, post-conviction, in Rector,  
16       Arkansas some two weeks after the trial?

17 A]       I got a phone call that evening from deputy prosecutor Joe  
18       Calvin...

19                     MR. DAVIS:   ...I object...

20                     THE WITNESS: ... telling me...

21                     MR. DAVIS:   ...I ask the witness to answer yes or  
22       no.

23                     THE COURT:   Yes, answer the question.   And then  
24       if you want to explain your answer, I'm going to allow  
25       you to.

1           THE WITNESS: I have answered the question. I'm  
2 acutely aware of it.

3           THE COURT: Answer yes or no, and then explain.

4 CROSS-EXAMINATION, continuing:

5 Q] And prior, and let me ask you this.

6           THE WITNESS: May I get an opportunity to explain  
7 after I have answered yes?

8           THE COURT: Go ahead.

9 CROSS-EXAMINATION, continuing:

10 A] I received a phone call from deputy prosecutor Joe Calvin.  
11 It said we have your client here in my office in Clay County,  
12 uh, which was a surprise to me because my client was supposed to  
13 be in Pine Bluff in prison. And he said, uh, Mr. Calvin said,  
14 "He's about to give a statement, a confession, and we thought  
15 you might want to be here for that." And so I, uh, after  
16 getting over the initial shock and surprise of that, jumped into  
17 my car and drove to Rector and at which time I tried to contact  
18 Your Honor and that attempt didn't meet with success and I asked  
19 Your Honor to not permit this, and it was at that point I was  
20 advised by Your Honor, uh, that Mr. Misskelley was being granted  
21 use immunity and that he would be allowed to use this statement,  
22 uh, over my objections based on the 6<sup>th</sup> Amendment, uh, I also  
23 asked for a mental evaluation because Mr. Misskelley had  
24 indicated to me previously within days of that event, that he  
25 needed some psychiatric care, and that motion was denied as

1 well.

2           THE COURT: Mr. Stidham, was all of this in an  
3 effort to obtain a concession from the State in the  
4 recommendation for a reduced sentence in exchange for  
5 his testimony against his codefendants?

6           MR. STIDHAM: Apparently the State felt that they  
7 needed him pretty badly.

8           THE COURT: Is that what this was all about?

9           MR. STIDHAM: Judge, I got a phone call that said  
10 my client was in the deputy prosecuting attorney's  
11 office and that I should be there.

12           THE COURT: When you got there and heard the  
13 statement and heard from the prosecutor, is that what  
14 was not - - is that not what was discussed; the  
15 exchange of testimony for a reduction of sentence, or  
16 an offer of it?

17           MR. STIDHAM: I don't recall there being any  
18 negotiation at that point. All I recall is that "this  
19 is what's going to happen," and I tried to discuss the  
20 matter with Mr. Misskelley, uh, Mr. Misskelley didn't  
21 want to talk to me and I voiced my objections to both  
22 Your Honor and on the record, uh, which I listened to  
23 again last night in my preparation for my testimony  
24 today.

25           THE COURT: All right, go ahead.

1 CROSS-EXAMINATION, continuing:

2 Q] While I'm there, Dan, you had indicated this morning that  
3 you found or you became aware again of some taped conversations  
4 between yourself and your client?

5 A] Yes.

6 Q] Okay. Do you know at this stage of the game how many  
7 statements that you took from your client that are on tapes that  
8 hopefully are still available somewhere?

9 A] I haven't had actual physical custody of my file since I  
10 believe October of 2004, maybe 2003.

11 Q] To the best of your recollection, what conversations, times  
12 and the general context that you had with your client that would  
13 have been available?

14 A] Uh, there was a tape recorded conversation that I had with  
15 Mr. Misskelley after the initial offer, uh, it was from the  
16 State made, uh, I believe that was made, I believe that was in  
17 August of '93. Uh, I made some notes; let me see if I can - -  
18 August 19, 1993 would be the first time that I interviewed Mr.  
19 Misskelley through the use of a tape recorder.

20 Q] Okay. And do you remember what that was about?

21 A] Yes, I do. I listened to the tape last night.

22 Q] Okay?

23 A] The *Reader's Digest* condensed version of it is that I had  
24 gotten a phone call from Randy Philhours who relayed an offer,  
25 uh, to Mr. Misskelley which I was duty bound to advise him of,

1 uh, and I made the tape, uh, to memorialize my conversation with  
2 him about the offer itself and whether he understood it and, and  
3 whether he wanted to accept it or not.

4 Q] Okay. Is there any discussion on that tape about the facts  
5 of the case as to what he did, what he didn't do, whether he's  
6 guilty, not guilty?

7 A] I listened to so many tapes last night, I'll be honest with  
8 you; I don't recall. I listened to one tape last night that I  
9 didn't make notes about.

10 Q] Okay. That's the statement made in August, uh, August 19<sup>th</sup>  
11 I believe you said. When would other statements that you  
12 recorded with Mr. Misskelley have been taken?

13 A] Uh, there was another one that was made on February 17<sup>th</sup> and  
14 I believe that that one was post-conviction. I'm sorry. The  
15 next one would have been February 8<sup>th</sup> and I think that would have  
16 been - - you guys will have to correct me - - I haven't seen my  
17 file in years, uh, it may have been during the trial or before  
18 the trial. Let's see. No, February 8<sup>th</sup> was the date that you  
19 and I and John Fogleman and Gitchell went to the penitentiary at  
20 Pine Bluff at the diagnostic Center.

21 Q] Okay. And while we are on that, uh...

22 A] ...and before we change gears, can I, can I answer your  
23 question, your previous question? I had a habit during my term  
24 as a criminal defense lawyer of any time I explained a plea  
25 offer or something important to a client, I memorialized it with

1 a tape recording. And, uh, when I listened to this, uh, August  
2 19, 1993 tape last night, uh, in fact, uh, I picked it up and  
3 listened to it on the way home, uh, last night and it jogged my  
4 memory that I may have another tape in my vault at home and so I  
5 immediately went to my vault at home and found, uh, another tape  
6 that I had done with Mr. Misskelley and it's undated, uh, and it  
7 appears to be post-trial. This is the one that I reported to  
8 all counsel and gave to them this morning and they gave you a  
9 copy, uh, as I understand it. So that's how I remembered that I  
10 had this; uh, getting back to your question about the other  
11 dates, there is also a conversation that I had with Mr. Miss-  
12 kelley that was recorded on February 17<sup>th</sup> and another one, it  
13 appears, on February 23<sup>rd</sup>. And it's got a notation that one was  
14 made in Pine Bluff as well. And what I think occurred is every-  
15 time I made a recording or talked about a plea with a client,  
16 uh, I memorialized that. That's something that David Goodson  
17 taught me to do, uh, as a mentor of mine. And so I keep all of  
18 these in my vault and apparently I thought this one was signif-  
19 cant enough to segregate it from my normal boxes and boxes and  
20 boxes of Misskelly file, and I put it in my safe. And then when  
21 I transferred the file to Mr. Burt, I had forgotten that I had  
22 it in my safe.

23 Q] Are there any other tapes that were made contemporaneously  
24 with your representation of him back in 1993 and 1994 that  
25 either were destroyed or you think have been lost or for some

1 reason aren't in existence and weren't provided to Mr. Burt?

2 A] No. There's just this one, and the other tapes would be an  
3 interview conducted by Mr. Wilkins and also an interview con-  
4 ducted by Dr. Ofshe of Mr. Misskelley.

5 Q] Okay. Now let me back up. Was the only video tape inter-  
6 view done -- one where you and Dr. Wilkins are interviewing  
7 Jessie Misskelley, and it looks like at the Piggott, uh, some-  
8 where in Piggott jail or is in Piggott, there's a calendar of  
9 Piggott in the background?

10 A] Yes.

11 Q] Uh, in December of 1993?

12 A] Prior to yesterday, my recollection was that the Ofshe  
13 interviews were video taped, as well, but, uh, they're not in  
14 the file, so the only video tape that we found was the one of  
15 Wilkins.

16 Q] Okay. But you thought that prior to that that Ofshe's were  
17 videoed, too?

18 A] I thought they were, but they're actually audio tapes.  
19 There's a stack of them about four or five deep on regular cas-  
20 sette tapes.

21 Q] Okay. And would those contain taped statements where he  
22 interviewed Jessie Misskelley in preparation for his testimony  
23 at trial?

24 A] Yes.

25 Q] Okay. Now back to, you mentioned something about the trip

1 to Pine Bluff and you rode down to Pine Bluff with me some week  
2 to two weeks after the Misskelley trial was over; correct?

3 A] That's correct.

4 Q] We went in one vehicle; Mr. Fogleman and Mr. Gitchell went  
5 in another vehicle; right?

6 A] I believe that's correct.

7 Q] Okay. Now the purpose of that trip was to go down there so  
8 that, and, and let me ask you this: The background was we had  
9 information at that point that Jessie had made statements on the  
10 way to the penitentiary that were incriminating or that would  
11 indicate that he was involved; right?

12 A] That's what was reported to me.

13 Q] Okay. In fact, there had been a police report, or an in-  
14 vestigation report with the officers to outline what he had told  
15 them; correct?

16 A] I remember the day Mr. Misskelley was convicted, I  
17 instructed the officers to not have any discussions with him,  
18 uh, at all and of course, naturally, I was stunned when I  
19 received a memo from you about the police report where  
20 apparently, Mr. Misskelley had made some statements, and that  
21 was the purpose for our trip to Pine Bluff.

22 Q] Okay. But be that as it may as to what transferred or  
23 caused it, the reason we traveled to Pine Bluff at that point  
24 was because there is this information provided that he told in-  
25 formation to officers and we asked you can we go down there and

1 just see if he wants to talk and communicate and give a state-  
2 ment; right?

3 A] That's correct. Yes.

4 Q] Okay. And when we arrived there, the plan was that you  
5 would, we would wait outside, they would bring your client up  
6 and you would talk to your client to see if there was a  
7 possibility that we could arrange a meeting where we could dis-  
8 cuss this with him?

9 A] I wanted to talk to him about it first before, uh, we went  
10 with him any further down the road. Yes.

11 Q] Okay. And you go in, and my memory - - it's been too long  
12 - - but you go in by yourself, visit with him for a period of  
13 time and come back out and make a request, don't you? You make  
14 a request for an item to be given to you or provided to you;  
15 right?

16 A] A Bible.

17 Q] Okay. So you, you're in with your client for a period of  
18 time, you come back outside and you say, "I need something, I  
19 need somebody to get me a Bible"; right?

20 A] I believe that's correct. I don't remember whether I made  
21 the request of you or the warden or someone there at the prison,  
22 but I requested one; yes.

23 Q] To use one of your phrases or lines, would you agree that  
24 at the time you came out made that request, you had sort of a  
25 "stunned" look on your face?

1 A] Well, I don't know what kind of look I had on my face.

2 Q] Why, why did you get the Bible?

3 A] Uh, I felt like that, uh, that it would assist me in dis-  
4 cussing with Mr. Misskelley why and how come he was making some  
5 of the statements that he was making, uh, to those officers and  
6 to me.

7 Q] Okay. And in fact, what you related to us was that the  
8 reason you got the Bible was he had told you he was involved in  
9 the crimes and the way you wanted to verify whether he was or  
10 whether he wasn't, was to take a Bible in and have him swear on  
11 it; right?

12 A] I, I think that's a fair assumption.

13 Q] Okay. He told you, "You get a Bible, I'll swear on the  
14 Bible"; right?

15 A] I believe he even says that in the transcript of, uh, the  
16 tape that I made.

17 Q] Okay. Did you record those conversations?

18 A] I did.

19 Q] Okay. So we'll have a recording of your meeting in there  
20 with the request where the Bible takes place, and that sort of  
21 thing?

22 A] Uh, the tape doesn't, uh, reflect that I went out and asked  
23 for the Bible, uh, but Mr. Misskelley makes reference to the  
24 fact a couple of times that his hand in on the Bible and I asked  
25 him a couple of times if his hand was on the Bible, as well.

1 Q] Okay. And so after the Bible is retrieved and you go back  
2 into the room with Mr. Misskelley and this is occurring some  
3 time in February of '94 after his trial?

4 A] February 8<sup>th</sup>.

5 Q] Okay. And after you go back in, you're, you're in there  
6 for another period of time and during that period of time, does  
7 he put his hand on the Bible and tell you that "yes, what I just  
8 told you is the truth, and I swear to it on the Bible"?

9 A] That's a simplistic way of telling it, but yeah. That's  
10 what he said.

11 Q] Okay. And what he just told you was that he was involved  
12 in the crime, like he said in his original statement; right?

13 A] Well, he said he was there, uh, but his story that he  
14 related to me was nothing like his original statement. I mean,  
15 "nothing like" is not a correct way to phrase it, but it, it  
16 varied dramatically.

17 Q] Okay. And when you then leave there and come out, do you  
18 make the statement, hypothetically speaking, "what his defense  
19 attorney knew if his client admits to him that he's involved in  
20 the crime and he has contended he has been innocent all along";  
21 didn't you make that statement?

22 A] You know, I don't remember making that specific statement.  
23 I can't deny that I did.

24 Q] Were you stunned when you came out of there?

25 A] Very much so.

1 Q] Okay?

2 A] In fact, I think at that point you and I, uh, John Fogleman  
3 and Officer Gitchell went out to try to find some physical  
4 evidence to try to corroborate what Mr. Misskelley had told me.

5 Q] And your client at that point and this is before the state-  
6 ment was taken in the record at Joe Calvin's office; right?

7 A] Yes.

8 Q] When he makes this statement to you, there's no police in  
9 the room, there's no prosecuting attorney in the room, it's just  
10 you and him and the Bible; right?

11 A] Just me and him.

12 Q] Okay. And didn't you reflect that you really thought one  
13 of the reasons you went to retrieve the Bible was if he's got to  
14 lie, he isn't going to lie and swear on the Bible?

15 A] I thought it might help.

16 Q] Okay. But he still told you the same thing; he just swore  
17 on the Bible?

18 A] Well, he, he related a story, but it wasn't the same story  
19 that he told the police on June 3<sup>rd</sup>. In fact, it varied rather  
20 dramatically.

21 Q] And you got all of that on tape; right?

22 A] Uh-huh.

23 Q] Okay?

24 A] I went through it last night. I was up until about 3:30  
25 this morning going through it.

1 Q] Okay. And did you go back - - what were the circumstances  
2 that you next, after that, had contact with Jessie Misskelly?

3 A] Uh, after we - - of course, I know you and I differ as to  
4 our opinions as to whether or not we were able to corroborate  
5 anything that he told me, uh, I think the next contact I had  
6 with Jessie was when I got the phone call from Joe Calvin that  
7 he was in Clay County. Uh, that's the last, uh, I'm sure that I  
8 may have talked to him on the phone a couple of times, but as  
9 far as there being any record in my file that I, that I was able  
10 to ascertain in looking at my file real quickly, I hadn't seen  
11 it in years, uh, the next recorded statement is the statement in  
12 Joe Calvin's office, and then there's the statement that I found  
13 last night that appears to be made subsequent to, uh, both  
14 trials.

15 Q] Okay. Let me see if I can refresh your memory about some-  
16 thing, but there's one in there I think there ought to be a tape  
17 of, and I'll let you look over that?

18 A] Okay.

19 Q] Okay. When we leave there and the Bible situation and he's  
20 made the statement to you and we're driving back, the discussion  
21 at that point is there is at least strong discussions that based  
22 on what he's told you, we may work out something where he  
23 testifies, that's at least a possibility; right?

24 A] I believe that you and I probably discussed that on the way  
25 back to West Memphis.

1 Q] Okay. And between then and the time we end up kind of  
2 crossways at Joe Calvin's office that that statement takes  
3 place, don't you contact him and have discussions with him as to  
4 whether that's something he's interested in or don't you discuss  
5 it in order to relay to us that it ain't gonna happen?

6 A] Yeah, but I don't think I recorded those.

7 Q] Okay. Do you remember in one of your petitions for a new  
8 trial you put in there that you came by my office and this is  
9 where you're basically stating that this is how you informed me  
10 not to talk to Misskelley or have him at Rector, but that you  
11 came by my office and played for my secretary a segment of a  
12 tape where you said something to the effect, and I wasn't there  
13 but as I understand it, but that he didn't want to talk to  
14 anybody or he wasn't going to testify. And you played that for  
15 her and said, "You heard it, now you need to relay this to your  
16 boss"?

17 A] I remember going to your office and you weren't there and I  
18 remember leaving the message with your secretary, but I honestly  
19 don't recall playing a tape. You had mentioned previously to me  
20 that, uh, the fact that I did play her a tape is mentioned in  
21 the pleading. I simply don't recall that and in my file, there  
22 is no tape, uh, but it's possible that I might have tape-record-  
23 ed him saying "I don't want to talk to the prosecutor or the  
24 police or have anymore contact with the police and the prosecu-  
25 tor," I might have recorded just that little snippet and played

1 that to your secretary and then discarded the tape, but I, it  
2 doesn't appear to be in my file. And it wasn't in my vault last  
3 night when I checked again.

4 Q] Okay. You don't have any personal recollection of that?

5 A] I remember going to your office and talking to your secre-  
6 tary, but I don't remember playing her the tape.

7 Q] Okay?

8 A] I'm not saying that that's not the way it happened, because  
9 I, it's very possible that it could be, but I just don't recall.

10 Q] And was that, and now let me back up to the pre-trial time  
11 period. When you testified here a few weeks ago, you were asked  
12 the question "Do you remember going to Mr. Davis' office and  
13 meeting with Mr. Davis and Mr. Fogleman on a Saturday afternoon"  
14 and you said, "no, I just have absolutely no recollection of  
15 that." Okay. Now I'm going to...

16 A] ...I still don't.

17 Q] Okay. Now let me ask you some questions and see if I can  
18 jog your memory?

19 A] Okay.

20 Q] Do you remember a dinner at the Holiday Inn on a Saturday  
21 afternoon, August 28, and I believe your records reflect that  
22 you had a meeting on that day at 7.5 hours with Fogleman and  
23 Davis on August 28<sup>th</sup>, if you want to check your time sheets?

24 A] Yeah, I remember that being brought out in my time sheets,  
25 but I still don't remember, remember doing it.

1 Q] Okay. And do you remember the - - and I believe it was the  
2 *Arkansas Press Association*, but in some sort of press agency or  
3 a group actually sponsored this dinner at the Holiday Inn in one  
4 of their banquet rooms on a Saturday afternoon where all of the  
5 defense attorneys, the judge, uh, the various reporters from the  
6 newspapers, from the TVs were all gathered there as an effort so  
7 everyone could get to know each other and possibly start to work  
8 toward setting ground rules that would make the process of the  
9 trial go a little easier. Do you recall that?

10 A] I honestly don't. I, I, my billing records reflect that I  
11 did, but I honestly, uh, don't remember that, uh, I remember the  
12 meeting that Your Honor, uh, and you and I and the sheriff of  
13 Clay County had about security, uh, in Piggott before the trial  
14 started.

15 Q] Well, that's memorialized in the film; right?

16 A] Yeah, that's right. Uh, but I don't recall - - the only  
17 thing I remember us talking to the press about was post-trial at  
18 the mid-year Bar Meeting in Memphis, uh, we did a seminar, uh,  
19 about the media.

20 Q] Well, then let me ask you this: If Mr. Crow recalled it,  
21 do you, I mean, do you dispute that on August 28<sup>th</sup> a meeting  
22 occurred at my office where you and Mr. Crow were present?

23 A] No, my billing records reflect obviously that I was there.  
24 So I was there. I just, just don't recall it.

25 Q] Okay. It reflects the meeting was not only with myself,

1 but also with then deputy prosecutor Fogleman, now circuit court  
2 Judge Fogleman?

3 A] That's what it says. Yes, sir.

4 Q] Okay. Do you recall that that meeting was requested by you  
5 and Mr. Crow that we meet at a site where we could be away from  
6 the media so that you could make your pitch for a plea agreement  
7 in the case with your client?

8 A] What was the date again?

9 Q] August 28<sup>th</sup>, Saturday afternoon around three o'clock, after  
10 lunch was over?

11 A] August 23<sup>rd</sup>?

12 Q] No, August 28<sup>th</sup>?

13 A] 28<sup>th</sup>. I'm sorry. Well, according to my tape with Mr. Miss-  
14 kelley, I relayed an offer to him on August 19<sup>th</sup>. So maybe after  
15 my discussion with him we met with you to discuss the offer  
16 after talking with our client. I, I just, I just don't have any  
17 recollection of the meeting.

18 Q] By that day on August 28<sup>th</sup>, had you been to the scene where  
19 the murders occurred?

20 A] Not other than to just drive by it and say that's where it,  
21 you know, the bodies were recovered. I didn't actually get out  
22 and walk around at the scene until the first frost. I'm  
23 horribly allergic to poison ivy. I didn't want to get in there  
24 until, uh, until it was safe.

25 Q] Well, then do you recall describing for Mr. Fogleman and

1 myself that afternoon how your client had told you the murders  
2 occurred there at the crime scene?

3 A] He had - - I don't remember telling you and Mr. Fogleman,  
4 because I don't remember the meeting, but I certainly remember  
5 my client telling, making attempts to try to tell me the same  
6 story that he had told the police on several occasions in be-  
7 tween the time that I was appointed to represent him up until  
8 September, when we decided that our strategy changed. I'm not  
9 trying to be coy; I just honestly don't remember the meeting.

10 Q] Well, what I'm trying to find out and what kind of stuns me  
11 is, that that would seem to me to be a very, very significant  
12 point in representing somebody on a capital murder case, when  
13 you go and meet with the two prosecutors that are handling the  
14 case and lay your cards on the table and say "this is what my  
15 guy can say; this is what he is telling me happened; what's the  
16 deal going to be; what can we do if we testify. Here's what  
17 he's saying." And to me, particularly for somebody that's going  
18 to, as you say a 30-or-life, working on this case, that remem-  
19 bering that particular day and that particular incident when you  
20 were doing those things, I mean, would be, uh, something that  
21 would stand out like a beacon. And you say you don't even  
22 recall the meeting or even ever sitting down and telling the  
23 facts of what your client would testify to and discussing a plea  
24 agreement?

25 A] I remember it...

1                   MR. BURT: ...that question is slightly argumen-  
2                   tative.

3                   THE COURT: Well, go ahead.

4                   THE WITNESS: So should I answer the question,  
5                   Your Honor?

6                   THE COURT: Yes.

7                   THE WITNESS: Or try?

8                   THE COURT: Yes.

9                   CROSS-EXAMINATION, continuing:

10                  A] Uh, I remember having conversations with Judge Fogleman,  
11                  then prosecutor Fogleman, uh, about what would be expected and  
12                  what, you know, what offers might be there and what offers might  
13                  not be there, but I honestly don't remember having that  
14                  conversation with you and he at the same time. And I certainly  
15                  am not denying that I did; I just don't remember, uh, the exact  
16                  sequence of the events. It's been fifteen years, uh, I wish I  
17                  could remember, uh, I'm sorry that it's frustrating for you that  
18                  I don't remember. It's frustrating to me, but my billing  
19                  records reflect that I was there, so I was there. But I don't  
20                  remember, uh, exactly what was discussed. I don't remember what  
21                  room we were in, where we were exactly, uh, I just don't. I'm  
22                  sorry.

23                  Q] Okay. Do you remember sometime very, very shortly after  
24                  that August 28<sup>th</sup> entry, uh, a situation where your client's  
25                  father appeared on the Channel 5 news on a weekend newscast?

1 A] Yes, I do.

2 Q] Do you remember him sitting in his recliner?

3 A] Uh, I was thinking he was on the front porch of the  
4 trailer, but it may have been the recliner.

5 Q] He had a can of Budweiser with him?

6 A] That sounds familiar.

7 Q] Ball cap on, Budweiser can, sitting in the recliner, and  
8 that he's basically being very, very, very critical of the  
9 people who were representing his son?

10 A] I remember him holding press conferences at his home, uh,  
11 and getting phone calls from either John Fogleman or Randy Phil-  
12 hours stating that those types of press conferences are not  
13 really conducive to negotiations and we needed to try to get  
14 them stopped. I remember that.

15 Q] Okay. And it's put you in a horrible position, because  
16 your client's telling you that he did it and he's guilty, and  
17 his dad's bashing you on TV; right?

18 A] Uh, his dad was not happy with the fact that we hadn't gone  
19 out and interviewed alibi witnesses, uh, and I tried to explain  
20 to Mr. Misskelley, Sr. that, uh, it really seemed to kind of a  
21 waste of time to interview alibi witnesses when Mr. Misskelley,  
22 Jr. was telling us that he was there and trying to repeat the  
23 story that he had told the police.

24 Q] And in fact, Mr. Misskelley ultimately became, Jessie, Sr.,  
25 became one of your alibi witnesses at trial; right?

1 A] Only in the sense that, uh, that he had a DWI class that he  
2 attended that very night, uh, that the boys came up missing.

3 Q] Okay. Do you remember some of the problems that his testi-  
4 mony posed when he was cross-examined as an alibi witness?

5 A] I remember he had a receipt where he paid for his class and  
6 there had been the sign-in sheet showing that he had been there  
7 at the time, but I don't particularly remember.

8 Q] Where he acknowledged in his testimony that he had granted  
9 an interview, uh, saying that his son, uh, may have been there,  
10 he just didn't think he was involved in it, and this is what he  
11 testified to and said under oath, after he had said that he saw  
12 his son at this particular time on the day of the murders?

13 A] I think I do remember that one. Yes. I was never pleased  
14 with Mr. Misskelley's press conferences. Uh, we had asked him  
15 to stop and cease and desist on many occasions, and he chose not  
16 to abide by advice of counsel in that regard.

17 Q] And so as early September rolls around, your client's  
18 father is providing - - or he's not only directly to you, but  
19 through the media, and your client is still telling you that he  
20 was there and he did it and he killed them, or he was involved?

21 A] I'm not sure exactly about the exact timeframe, but that  
22 sounds correct.

23 Q] Okay. And at some point your client's father goes and has  
24 a long discussion with him and that's when things kind of turn  
25 around; is that not right?

1 A] Because of that friction, uh, Mr. Misskelley, Sr. and I and  
2 I believe Mr. Crow was there, met with Mr. Misskelley, Jr. at  
3 the Clay County Detention Center, uh, at which point, uh, Mr.  
4 Misskelley, Jr. told Mr. Misskelley, Sr. "I wasn't there," uh,  
5 "those cops made me say that," uh, "you've gotta get me out of  
6 here," uh, and it was at that point that I realized that Mr.  
7 Misskelley thought I was a police officer.

8 Q] Well, wasn't the scenario that before y'all actually go and  
9 meet Mr. Misskelley, you and Jessie, that Mr. Misskelley says  
10 "we've gotta have a meeting out there. I've been out there  
11 talking to Jessie and you need to come out here with me and meet  
12 with him 'cause this ain't how this- - you aren't really  
13 portraying it really how it is." Isn't that what happened?

14 A] Again, I don't know of the exact timeframe, but Mr. Miss-  
15 kelley, Sr. was not happy about our negotiating with the State,  
16 uh, while he thought that we should be interviewing alibi wit-  
17 nesses; there was a conflict. Yes, sir.

18 Q] And he related to you that he had spoken with his son and  
19 that y'all need to go out there and speak with him and he was  
20 going to be there too, because what he was hearing from his son  
21 wasn't what his son was telling y'all?

22 A] I think that's a fair ascertain.

23 Q] Okay?

24 A] He was telling his dad one thing and us another.

25 Q] Okay. And it was after Jessie, Sr. talks with Jessie, Jr.

1 and then gets y'all to come meet with him, it's that point that  
2 you make this September 24<sup>th</sup> memo; right?

3 A] Yes, sir. I believe that's when the epiphany occurred.

4 Q] Okay. And would it be fair to say and the Court can review  
5 your testimony previously, but if I understood your testimony up  
6 until September 24<sup>th</sup> one of you, what you said your problem was,  
7 is your client didn't make any sense, you couldn't talk to him,  
8 you couldn't discuss what happened to him on the day of his  
9 arrest; he couldn't give you any details of anything?

10 A] All he could do was answer "uh-huh," "uh-huh," "yes,"  
11 "yeah," "no." Uh, there was very little, if any, narrative that  
12 he could ever provide me about any of the events that he  
13 allegedly saw and, uh, that was very troubling and frustrating  
14 to me and, uh, it was also about this same time that we had the  
15 hearing in Marion, excuse me, in West Memphis, uh, and prose-  
16 cutor Fogleman had advised me that, uh, a DNA match that he  
17 thought that he had on this T-shirt that was found in Mr.  
18 Misskelley's trailer was, was not the victim's blood, but Miss-  
19 kelley's own blood and, uh, Mr. Misskelley had told me  
20 previously that that was his own blood on the T-shirt. And so  
21 that's when Mr. Crow and I said "rutro, this is not what we  
22 thought it was, and we need to start going out and taking a look  
23 at these alibi witnesses and confront Mr. Misskelley." And this  
24 memo is basically memorialization of my confrontation with my  
25 client about "why did you tell us this when, when, uh, it wasn't

1 the case?"

2 Q] And in your testimony the other day, I thought I understood  
3 you to say that in regard to the 2.3 issue, the deal about the  
4 officer advising him he didn't have to come down there, that you  
5 couldn't even be aware of that prior to hearing Mike Allen  
6 testify, because your client just, he could never describe any  
7 of the events surrounding the day of the arrest; is that pretty  
8 accurate?

9 A] That's pretty accurate.

10 Q] Okay. This September 24<sup>th</sup> memo, does he ask in that  
11 September 24<sup>th</sup> memo, does he ask to be evaluated?

12 THE COURT: Is this a good time for a recess?

13 THE WITNESS: It would be for me, Your Honor.

14 THE COURT: All right, ladies and gentlemen,  
15 court will be in recess for ten to fifteen minutes.

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

18 THE COURT: Court's back in session. You may  
19 proceed.

20 MR. DAVIS: Judge, may I approach the witness?

21 THE COURT: Yes, sir.

22 CROSS-EXAMINATION, continuing:

23 Q] Dan, this is something totally different what I've been  
24 asking you, but in going through your boxes of materials that  
25 was provided to us, we found this empty file marked, labeled

1 "Trial Strategy"?

2 A] Empty?

3 Q] Yes?

4 A] Maybe I do need a guardian.

5 Q] And since the other side didn't introduce it and make it an  
6 exhibit, I'm assuming there was something in it at one time?

7 A] My suspicion would be that it, uh, probably made its way  
8 into the trial notes or trial exhibits, uh, folder.

9 Q] Okay?

10 A] Uh, and I can explain if you care to allow me.

11 Q] I guess the big concern would be if there is an empty file  
12 that's labeled "Trial Strategy" and it's empty and it's in your  
13 box in this file, that's not because you had no trial strategy,  
14 it was because you changed it and moved it to somewhere else?

15 A] Yes, yes. Uh, keep in mind, if I may elaborate, that prior  
16 to this pivotal moment in September, uh, as this exhibit points  
17 out, we were working towards negotiating a plea and preparing  
18 Mr. Misskelley to testify. And while we were fervently reading  
19 the discovery information as it was being provided to us by, uh,  
20 the police and the prosecution, we were not cataloguing it in a  
21 very meaningful way; in other words, we would read it and it  
22 would be put in a box and marked "Discovery," uh, because all we  
23 were focused on was getting Mr. Misskelley prepared to testify.  
24 In September, suddenly when things shifted and we realized that  
25 there was a significant chance that we were going to go to trial

1 on this matter, we had to go back through all of that discovery,  
2 uh, and start categorizing it and filing it in the proper  
3 places. So, uh, even though, uh, Mr. Burt has been very kind in  
4 his characterization of, of the organization of my file, I would  
5 describe it as chaotic, uh, at best.

6 Q] One question I forgot to ask you earlier is you describe  
7 your legal experience up to the point of this trial. After this  
8 trial did you, did you have any other homicide cases after this  
9 trial that you defended anyone on?

10 A] No.

11 Q] Okay. Uh, any other major felony cases after this trial?

12 A] I tried a, uh, arson case, uh, in Greene County that I won  
13 an acquittal on. And, uh, I also tried a, uh, drug case, uh,  
14 that I thought I was going to get an acquittal on, but the jury  
15 didn't agree with my, uh, arguments and my client was convicted.  
16 Those are the only two that I can recall.

17 Q] Okay?

18 A] And then shortly thereafter that, I was elected judge and  
19 could not practice criminal law anymore, so my jury trial  
20 experience has been shifted to the civil matters exclusively.

21 Q] Okay. Were there any cases prior to this trial where you  
22 had represented criminal defendants and requested mental  
23 evaluations?

24 A] There were times when I was public defender in Greene  
25 County and times when I was representing retained clients that

1 we would raise that issue, uh, uh, but, uh, I don't recall ever,  
2 in fact, I'm certain that we never tried a single case during my  
3 entire tenure as public defender in Greene County. We  
4 negotiated everything out, uh, so while there were mental eval-  
5 uations that were conducted, uh, they never became relevant in  
6 the sense that I had to prepare an expert to testify about them  
7 at trial.

8 Q] Did you have cases where you had mental evaluations per-  
9 formed and if so, what cases were they, or do you recall what  
10 type of cases, because, and the reason I ask that is most of  
11 your forgery-type checks, thefts, it's usually your more serious  
12 offenses where you have mental evaluations performed. Do you  
13 recall if you had any?

14 A] No, I can't put my finger on any specifics, uh, that con-  
15 spiracy to commit capital murder case involving the death of  
16 Dr. Jones and his wife in Paragould was another one of those  
17 cases that, that, uh, I wasn't the public defender but I was  
18 appointed, uh, because David Goodson was appointed to represent  
19 one of the defendants and there were co-defendants and the Court  
20 appointed Roger Colbert to represent Sharon Edwards, I believe  
21 is her name, and I went to Roger and again offered my assistance  
22 to help him, uh, with the case, which he was more than happy to  
23 accept. And so, uh, I believe that we had a mental evaluation  
24 done in that case and that would have been in 1989 or '90, I  
25 believe. But again, that case pled out. She turned State's

1 evidence and testified against the other two and did a plea.  
2 Q] One of the reasons I asked that question, is there was  
3 testimony you provided the last time about, uh, you know, the  
4 Court's offer to have, you know, your client evaluated by the  
5 State and requesting that you wanted your client evaluated by  
6 the State, that you wanted him checked out, and you, I think,  
7 testified on more than one occasion that based on your  
8 experience, uh, you know, "the state hospital was an arm of the  
9 prosecution" and that you had had experience that clients that  
10 howled at the moon, uh, whatever, that it would still come back  
11 that they would be okay. And I guess my question is, when you  
12 told us how inexperienced you were in these cases, but then you  
13 referred to your experience as to why you didn't go that route,  
14 what's the, where did you come up that?

15 A] Well, I can easily explain that. Uh, the, the few times  
16 that I did, uh, request mental evaluations, I quickly was able  
17 to ascertain that, uh, the state hospital, uh, I don't think  
18 Mid-South Health System was doing those at that time, but who-  
19 ever had the contract for those, uh, uh, I've never seen a  
20 single one come back that as being not competent to stand trial,  
21 uh, or, uh, or unable to appreciate the, uh, uh, nature and  
22 criminal aspects of their conduct. And, and the thing that  
23 struck me, uh, in my limited, uh, exposure to those areas was  
24 that, uh, my client's mental evaluation was sent to the prose-  
25 cutor immediately. And so there was no, uh, uh, I couldn't

1 shield my client, so to speak, from the prosecution, knowing  
2 exactly what was going on. And my fear in the Misskelley case  
3 was, and Judge Burnett kept pushing me, uh, you know, "if you're  
4 going to raise the insanity defense, you've got to do it by a  
5 certain date, and if you're going to do it, you need to get him  
6 to the state hospital," and so I was afraid to do that. I did  
7 not want the state hospital to conduct the forensic, uh,  
8 evaluation, because I did not want to lay my cards on the table.  
9 And as Mr. Burt, uh, asked me in my direct-examination here a  
10 few months ago or a couple of months ago, I didn't want to lay  
11 my cards on the table. So I felt like I needed to consult with  
12 an expert, uh, that way, uh, if I wasn't happy with the results,  
13 I didn't have to disclose that information to the prosecutor.

14 Q] Okay. That brings me to - - and while I'm thinking about  
15 it, let me ask you this. I think you've answered it. Do you  
16 feel like you need to say anything else?

17 A] No, I think that covered, covers that.

18 Q] Okay. There was a question asked of you, uh, by Mr. Burt  
19 something to the effect, well, the suppression hearing occurs in  
20 January shortly before the trial and you heard earlier, I think  
21 it was the transfer to juvenile motion, uh, and Dr. Wilkins had  
22 testified and he mentions something kind of off-hand about Mr.  
23 Misskelley's ability to understand Miranda; do you remember  
24 that?

25 A] My recollection is, is that he testified that he did not,

1 he was not able to comprehend Miranda. Does that, does that,  
2 did I misunderstand your question?

3 Q] Your probably answered; I probably didn't make sense, but  
4 the question by Mr. Burt the other day was why didn't you bring  
5 Dr. Wilkins back and testify at the suppression hearing in  
6 January and put him back on the stand to go into more detail in  
7 an effort to try to get the statement suppressed?

8 A] I thought that asking His Honor to take judicial notice of  
9 that previous testimony at the previous hearing in Osceola was  
10 sufficient to, to do that. And, uh, looking back, I don't think  
11 that was the best way to have handled that.

12 Q] Okay. Let me ask you a question, because I think there was  
13 a strategy involved there and if you think back on it, you will  
14 recall. I don't think I just imagined it. The video tape where  
15 you and Dr. Wilkins are videoing Jessie occurs on December 10<sup>th</sup>,  
16 which would have been between the time that the juvenile hearing  
17 takes place and the time that the suppression hearing takes  
18 place later; okay?

19 A] What was the date of the juvenile, uh, transfer hearing; do  
20 you recall?

21 Q] October 27<sup>th</sup> in Osceola?

22 A] That sounds correct.

23 Q] You can correct me if I'm wrong?

24 A] I think that's correct. I think it was late October; yes.

25 Q] Okay. And in December when you and Dr. Wilkins interview

1 Jessie, video tape this interview, a lot of that is in preparing  
2 the testimony about the suggestibility of kind of laying the  
3 ground work for what you hope will clear the path for Dr. Ofshe  
4 to come in and really, really make a big case for a false  
5 confession; right?

6 A] That's a correct assessment; yes, sir.

7 Q] Okay. And would it be fair to say that while you had pro-  
8 vided Dr. Wilkins' initial evaluation about the forensic eval-  
9 uation about his competency, his IQ and all of that, the stuff  
10 that occurs as far as his examination for suggestibility and  
11 that scope, that was stuff that occurs after that hearing and  
12 you hadn't tipped your hand as far as the kind of testimony he  
13 was going, or anticipated to be providing in that case; right?

14 A] I'm not sure that I understand your question completely,  
15 but I think...

16 Q] ...let me rephrase it.

17 A] Okay.

18 Q] What I, reading the testimony and now having seen the video  
19 tape, what I think is that you didn't want to put Wilkins on in  
20 January because by doing that, he could be subject to cross-  
21 examination and we could discover what all he has done in  
22 preparing your client for using his false confession suggest-  
23 ibility scale and it was a calculated strategy to keep him off  
24 the stand so that the State wouldn't become aware that this much  
25 had been done along those lines to prepare him to try to put up

1 forward that defense?

2 A] I don't think that's a fair assertion, uh, in having looked  
3 at, uh, at, at the December 10<sup>th</sup> interview with, with Mr., uh,  
4 Wilkins, uh, uh, I think my misjudgment was that, that I should  
5 have put Wilkins on the stand at the suppression hearing to  
6 demonstrate to Judge Burnett that Mr. Misskelley was unable to  
7 understand Miranda, uh, based on, on, uh, the December 10<sup>th</sup>  
8 interview. And I think that would have been a very, very  
9 important issue for the Court to determine with regard to  
10 voluntariness of the, of the confession and whether or not he  
11 had the ability to even understand or waive his Miranda rights.  
12 And, and I think that's where I dropped the ball.

13 Q] Do you think that the December 10<sup>th</sup> interview shows that he  
14 doesn't understand his Miranda rights?

15 A] Uh, based on what I looked at last night, I, again it was  
16 about 3:30 in the morning, but, but, uh, I recall, uh, Dr.  
17 Wilkins asking Jessie on December 10<sup>th</sup>, you know, uh, about the  
18 Miranda waiver form and, uh, you know, did he understand what,  
19 what, uh, waiving your rights means; do you understand what a  
20 lawyer is, do you understand, uh, and it was clear after the  
21 interview that he didn't understand and, uh, also at that point,  
22 uh, it had been relayed to me by Dr. Wilkins that you have to  
23 have a 6<sup>th</sup> grade reading level to understand, uh, uh, Miranda and  
24 in the video, uh, Mr. Misskelley reads the Miranda form and he  
25 can barely read it. And why I didn't attempt to elicit that

1 testimony, uh, at the suppression hearing in January, uh, I  
2 don't know. I, uh, it just, in looking back, it seems real  
3 important now. At the time, uh, it seemed sufficient to just  
4 ask His Honor to, to take into consideration Wilkins' previous  
5 testimony at the juvenile transfer hearing, uh, which was  
6 denied. And I think it was also not only a transfer to juvenile  
7 court motion, it was also a motion to prohibit the State from  
8 using the death penalty, based on mental retardation. I think  
9 it was kind of a - - I think we did both of those issues that  
10 day, and I may be not be entirely correct, but I think both of  
11 those issues were explored and, uh, uh, but I think it would  
12 have been - - hindsight is always 20/20, but I think it would  
13 have been much more effective for Judge Burnett to have heard  
14 issues with regard to Miranda, because as you will recall at the  
15 suppression hearing, uh, Mr. Fogleman, uh, Judge Fogleman, uh, I  
16 can't help but call him Judge Fogleman, he was prosecutor  
17 Fogleman then, uh, introduced several previous Miranda state-  
18 ments or waivers that Mr. Misskelley had signed as a juvenile  
19 and in other matters, to demonstrate to the Court that he  
20 understood that. And, and, uh, I didn't do anything; I didn't  
21 make any attempt to combat that.

22 Q] Well, wouldn't you agree that to a certain extent, you were  
23 able to kind of sandbag as far as what Dr. Wilkins had done in  
24 preparing, uh, the testimony about the suggestibility; if you  
25 had been able to keep that from going into a report to be

1 provided to the prosecutor prior to the time that the  
2 suppression hearing was held?

3 A] Well, I wouldn't have gone into the suggestibility issues,  
4 uh, with Dr. Wilkins at the suppression hearing, uh, I don't  
5 think that that would have been, uh, something that would have  
6 been important to determine, uh, uh, the suppression issue, at  
7 least not from my judgment. My judgment may not have been the  
8 best judgment.

9 Q] But if you put him on and he's up there testifying on  
10 cross, he's then exposed basically to discovery deposition of  
11 what it was he did, what he asked, what information he gave,  
12 what tests he performed, what his opinions are, based on that.  
13 I mean, it opens the door wide open, and by keeping him off the  
14 stand, you were able to at least use your strategy to rely on  
15 his pervious testimony and yet also ask the Court to consider  
16 that, and yet also protect him from cross-examination on the new  
17 material he had discovered in the December 10<sup>th</sup> interview,  
18 because the State didn't have that interview, did it?

19 A] I don't believe so.

20 Q] Okay. We didn't even know it occurred until last night;  
21 right?

22 A] That's my understanding. Uh, I don't recall it being a  
23 strategy decision. I recall it being, uh, it was late in the  
24 day, uh, uh, in fact, it was so late I remember, uh, the media  
25 had gotten up out of the jury box and left so they could lodge

1 their ten o'clock reports. And much to my dismay, because when  
2 Mr. Holmes testified at the suppression hearing, none of that  
3 was even in the newspapers the next day because they never heard  
4 it, uh, which I think is some of the most compelling testimony  
5 at the suppression hearing. So it was late in the day and, uh,  
6 perhaps the best way to characterize it was laziness on my part  
7 and the fact that I just thought it would be easier since His  
8 Honor had already heard it just a couple of weeks earlier in  
9 Osceola, I didn't see any need to regurgitate it again. But  
10 again, looking back, uh, it, it would have been very important  
11 for His Honor to have heard, uh, some of these issues, uh, that,  
12 uh, Dr. Wilkins had, uh, brought out in the December 10<sup>th</sup> inter-  
13 view with Mr. Misskelley.

14 Q] Now let me jump back to the Exhibit #35, the memo...

15 A] ...the September 24<sup>th</sup> memo?

16 Q] Right?

17 A] Okay.

18 Q] Have I got the right exhibit number?

19 A] 34.

20 Q] 34. Now in your testimony on page 20, it's on page 26 of  
21 the transcript of your testimony from the last hearing...

22 A] ...is there a copy of that available for me to look at?

23 MR. DAVIS: I've only got one copy.

24 CROSS-EXAMINATION, continuing:

25 A] It has been fifteen years, but I've slept a couple of times

1 since then. You better check me. Did you say 26?

2 Q] Page 26.

3 A] All right.

4 Q] Do you see down there, uh, on line 15 and the question was:  
5 "When did that situation change in terms of the converse," and  
6 the talk then turns to September 24<sup>th</sup>; okay? Page 26?

7 A] My 26 talks about Rule 2.3.

8 MR. BURT: I'm sorry. Do you have any copies  
9 over there?

10 MR. DAVIS: I don't have an extra copy.

11 THE COURT: I think he's got the wrong  
12 deposition.

13 THE WITNESS: It looks awfully small. This looks  
14 like maybe it's Mr. Crow's.

15 MR. HOLT: That's Crow's.

16 MR. DAVIS: That's an old prosecutor's trick.  
17 That will confuse you.

18 THE WITNESS: (Laughing.) It did. It did. It  
19 worked. All right, I'm on page 26.

20 CROSS-EXAMINATION, continuing:

21 Q] Okay?

22 A] And on line 17 there is a reference to the September 24<sup>th</sup>  
23 memo.

24 Q] Okay. And the very line, and this is your testimony at the  
25 hearing on the 30<sup>th</sup> day of September, and the last line that says

1 "and, uh, of course, my client's father at that time was telling  
2 me that he had all of these alibi witnesses lined up." Okay.

3 And that would have been as of September 24<sup>th</sup>?

4 A] That was about all at the time that the strategy changed  
5 and Mr. Misskelley started telling both he and his father, or me  
6 and his father, the same story.

7 Q] And you say on page 27, uh, on lines 3, 4, and 5, "I  
8 essentially ignored Mr. Misskelley, Sr., kept telling Mr.  
9 Misskelley, Sr. that your son is telling me that he was there."  
10 Is that pretty much what you testified to here today?

11 A] Yes, sir.

12 Q] And the Mr. Misskelley that was lining up the alibi  
13 witnesses was the same guy that when he testified at trial, ad-  
14 mitted that he had made the statement that his son may have very  
15 well have been there, just not involved in the crime; correct?

16 A] I, I seem to have some recollection in making that state-  
17 ment, but I think that it was within days of the arrest back in  
18 June.

19 Q] Now if you will turn - - once you made this change in  
20 strategy, which you said started to formulate to change on the  
21 24<sup>th</sup> by the hearing of the 27<sup>th</sup>, the change is complete?

22 A] That's when the light bulb went off in my head when, when  
23 John Fogleman advised me that, that, uh, the DNA match was not a  
24 DNA match. And suddenly everything kind of - - that was the  
25 pivotal moment in, in, uh, the case for us, because everything

1 started making sense for a change, instead of, uh, not making  
2 any sense.

3 Q] At that point did you ever, did you just throw up your  
4 hands and go to the judge and say "you know, I hate to tell you  
5 this, Judge, but now that it's going to trial, you're going to  
6 have to get a different man. I'm not capable of doing that"?

7 A] Frankly, the thought never occurred to me.

8 Q] Okay. And in fact, what you did was you absolutely devoted  
9 the balance of your time from the first of October all the way  
10 through the end of the trial, and you spent your entire time  
11 devoted to this case, doubling your efforts to get it prepared  
12 for trial?

13 A] I did.

14 Q] And now referring to, if you want to follow me, to page 41  
15 and it was on September 27<sup>th</sup>, the day of the hearing I'm refer-  
16 ring to your answer on lines seven through eleven?

17 A] That's, that's what I was alluding to earlier about, uh,  
18 prosecutor Fogleman advising me about the mistake on the DNA  
19 analysis.

20 Q] Well, it wasn't really a mistake; it's just that it came  
21 back consistent with both the victim and Jessie Misskelley;  
22 right?

23 A] It was inconclusive; right.

24 Q] Yeah. I mean, it wasn't like there was an error in the  
25 test results. There were additional results that came in that

1 showed that his, that, that, uh, it was as likely it was his as  
2 it was the victim's. So it was a wash as far as its benefit in  
3 terms of evidence?

4 A] I referred to it as a mistake. And the epiphany in the  
5 case and the pivotal moment in the case, because John had refer-  
6 red to it previously in a phone conversation I had with him, as  
7 a dead-on DNA match.

8 Q] Okay?

9 A] And that's why I kept insisting to Mr. Misskelley, Sr.  
10 that, that we don't need to be interviewing alibi witnesses  
11 because they have a DNA match. And that's why, uh, I didn't  
12 move in that direction until the September 27<sup>th</sup> hearing when,  
13 when John Fogleman told me that, uh, he, he said "it wasn't a  
14 match and we're not going to use it at trial." And so that's  
15 when, again, the light bulb went off in my mind and I realized  
16 that, uh, uh, I had an innocent client.

17 Q] Okay. And, but, and that's also about the time that you  
18 said you would agree with your previous motion for DNA testing?

19 A] Yes, because there was no other DNA available, uh, that,  
20 that, uh, posed us any problem.

21 Q] Okay. And we may get into it further, but, but you had,  
22 apparently you weren't just rocking along doing nothing. You  
23 had apparently filed a motion for DNA testing earlier; right?

24 A] I was concerned when, when John Fogleman told me that there  
25 was a DNA match. So I filed a motion with, uh, Judge Burnett

1 asking for funds to hire our own expert to, to basically  
2 challenge, uh, uh, the State's analysis on that issue. But once  
3 I was told that that wasn't an issue anymore, I withdrew the  
4 motion.

5 Q] Okay. And on September 27<sup>th</sup>, that was the day you met with  
6 Mr. Lax and got the name of Dr. Ofshe to start exploring that;  
7 correct?

8 A] That's correct.

9 Q] Okay. So, I mean, that's nearly simultaneously with your  
10 decision or change in strategy, to contact Lax and get the name  
11 of Ofshe and you start working that angle; right?

12 A] Actually, Mr. Lax approached me at the conclusion of the  
13 hearing; introduced himself to me and apologized to me because  
14 some of his investigators had been advising witnesses in the  
15 case that he was working on my behalf. And I took issue with  
16 that and had phoned him weeks earlier, uh, advising him that he  
17 didn't work for me and he shouldn't be telling people that. And  
18 so he approached me at the end of the hearing and, uh,  
19 apologized and asked if he could make it up by taking me and Mr.  
20 Crow to lunch, which we did.

21 Q] And one of the other things that you did within a very  
22 short period of time after that was to make the strategic  
23 decision to not go with the state hospital evaluation, but to  
24 hire Dr. Wilkins; right?

25 A] Yes. I, I can't remember the exact timeframe that Dr.

1 Wilkins was brought in without being able to peruse my file,  
2 but, but, uh, uh, we, we realized we had to move in that  
3 direction pretty quickly and we were running out of time.

4 Q] Okay. And you're strategic thought was to have your own  
5 private examination and examiner to assist you in competency  
6 issues and any other thing was a better proposal than asking the  
7 State to do the mental evaluation?

8 A] Yes. Absolutely.

9 Q] Okay. And that's the route you took?

10 A] That's the route that we proceeded on; yes, sir.

11 Q] Now there was some questions asked of you the last time  
12 about, talk about what you could have done differently as far as  
13 cross-examining Dr. Peretti about his testimony regarding  
14 evidence of sexual abuse of the children. Do you recall that?

15 A] Are you referring to the issues he had with his license?

16 Q] No. Dr. Peretti?

17 A] Oh. Dr. Peretti. I'm sorry. I thought you were talking  
18 about Wilkins. Uh, I remember Mr. Burt, uh, asking me, uh,  
19 about my cross-examination of Dr. Peretti in light of the, the  
20 information that I had received from Mr. Ford.

21 Q] And I believe Mr. Burt was, "critical" may be a poor word,  
22 but at least questioned why you didn't specifically use the  
23 statements that had been provided to you from the recorded  
24 telephone conversation with Robin Wadley versus just using that  
25 information in getting Dr. Peretti to basically agree to what

1 that information was?

2 A] I, I did as I recall, and it should be reflected in the  
3 transcript, ask him on, on cross-examination and again on re-  
4 cross, about whether or not those injuries to the boys' anuses,  
5 uh, uh, showed any signs of trauma, or were the result of sex-  
6 ual assault. And, uh, he was kind of wishy-washy with regard to  
7 that. And, uh, uh, you know, it's, it's, it's hard for me to  
8 sit up here today fifteen years later and look at this case  
9 through the prism of what I had experience-wise and knowledge-  
10 wise in 1993 and 1994 compared to everything I have done in the  
11 last fifteen years post-trial. But when I put, uh, someone  
12 provided me with, with, uh, a copy of, uh, the trial footage and  
13 I put the DVD in and watched it, I was just stunned at how, how  
14 poor my cross-examination, uh, not only of Dr. Peretti, but of  
15 Inspector Gitchell, Victoria Hutcheson and others, uh, it, uh,  
16 it made me physically ill to watch it.

17 Q] I mean, you've got Dr. Peretti, and on pages 59 and 60, Mr.  
18 Burt went over with you the questions that were asked. You got  
19 Dr. Peretti to acknowledge that he found no evidence of semen in  
20 the oral cavities; is that right?

21 A] Yes, sir.

22 Q] And you got Dr. Peretti to admit, the question was at the  
23 bottom of page 59: "Isn't it true that the dilatation of the  
24 orifices, anal orifices, could be caused by the fact that the  
25 bodies were in the water?" And he said, "That's correct." You

1 asked was there any evidence whatsoever to indicate the victims  
2 were sodomized or raped?"

3 And his answer was: "No semen was detected in the anal  
4 orifices."

5 Question after question regarding this, which were all designed  
6 to get the impression across to the jury that there was no  
7 physical evidence specific that he could point to that, that  
8 related to sexual assault; correct?

9 A] I, I did touch upon those issues in my cross-examination.  
10 Yes, yes, I did.

11 Q] And he left the door somewhat open in some areas in terms  
12 of because there was a lack of evidence didn't mean that such  
13 and such necessarily didn't happen, but you did cross-examine  
14 him specifically on those issues and know which issues that you  
15 wanted to make a point with the doctor on; correct?

16 A] Yeah, but the part that troubles me in looking back is when  
17 you rehabilitated him on re-direct, uh, I really felt like my  
18 re-cross was not very adequate, uh, again, hindsight is 20/20  
19 and I'm a lot more experienced in these matters now than I, than  
20 I was then, uh, but, uh, I guess it's fair to say that Dr.  
21 Peretti was the first expert that I had ever cross-examined,  
22 ever, in a trial.

23 Q] Well, the manner, as a defense attorney defending his case,  
24 was there concern on your part that the manner in which the  
25 bodies were found completely nude, and obviously, an animal

1 didn't strip their clothes off; tied ankle to wrist, and  
2 obviously an animal didn't do that to the kids; and submerged in  
3 water, did any of that, as a defense attorney, were you  
4 concerned that whether there was testimony about sexual assault  
5 or not, that the very nature of the way the bodies were  
6 unclothed and tied and bound and injured, that that would - -  
7 whether sexual assault was involved, it would still be extremely  
8 irritating to the jury?

9 A] Sure. I mean, that certainly was a consideration that I  
10 was cognizant of and, and worried about.

11 Q] And regardless of whether there was any semen or whether  
12 there was any signs of anal injury or injuries that could  
13 specifically be pointed to as being solely the result of sexual  
14 assault, that just because of the nature and the way they were  
15 clothed and the way they were tied, indicated to some degree  
16 that there might be something of a sexual nature involved in  
17 this attack; correct- - from a common-sense standpoint?

18 A] That is what the officers wanted Mr. Misskelley to say in  
19 his confession, and so that's why it was important for Dr.  
20 Peretti to, to leave that door open and I don't believe that I  
21 did a good enough job of, of, uh, capitalizing on the memo that  
22 I had gotten from Ford and Wadley and perhaps my worst, uh, uh,  
23 inadequacy was not retaining, uh, my own, uh, medical examiner  
24 to, to look at, uh, uh, these injuries. I did finally do that  
25 later, uh, at a forensic conference, uh, in San Francisco and,

1 uh, the experts told me immediately, is that they took one look  
2 at the photographs and said "that's animal predation" and, uh,  
3 but I, that's something that I should have done in 1993 and 1994  
4 and not wait until 1996 or 1997.

5 Q] You're familiar with the medical expert who testified at  
6 the Echols Rule 37; right, a Dr. Cohen, I believe?

7 A] I, I remember someone testifying, but I don't think I was  
8 in the courtroom. I think I was under the Rule.

9 Q] And while he alluded to the possibility that some of these  
10 injuries might be animal related, he certainly didn't render an  
11 opinion within a degree of medical certainty that those injuries  
12 were caused by any animal predation; are you familiar with that?

13 A] I'm, in all honesty, Counselor, I'm not familiar with his  
14 testimony. I wasn't in the courtroom when he testified and I  
15 don't recall ever reviewing an affidavit or anything. It's  
16 possible that I may have. As Mr. Burt pointed out, uh,  
17 contained in my file was a portion of Dr. Spitz's book regarding  
18 animal predation that, that, uh, I had available to me, but I, I  
19 just didn't, didn't follow up on. I didn't ask Peretti that  
20 question.

21 Q] And in the portion of the book that you had were photo-  
22 graphs, uh, I believe there are two photographs I was speaking  
23 of, uh, one was of somebody who had received post-mortem ant  
24 predation?

25 A] That, and I think maybe a house cat. I, I would have to

1 look at the exhibit again to be certain. I don't know if they  
2 are attached in this transcript or not.

3 Q] Now you indicated in your testimony the other day, uh, I  
4 believe I asked you about it earlier, that Jessie just wasn't  
5 able to provide you with any information to allow you to  
6 evaluate the possible Rule 2.3 violation; right?

7 A] The best way I can characterize it, uh, it's, it's the only  
8 case that I've had ever had where it was almost like not even  
9 having a client. I mean, I, I, it was just so little  
10 information that I could get from him every client interview,  
11 and I didn't immediately recognize his mental handicap. I  
12 wasn't familiar, uh, with how to deal with those issues and,  
13 and, uh, you know, every time I talked to him, you know, there  
14 would be a, for example, you know, he kept insisting on the fact  
15 that that the blonde-haired child was the one who was sexually  
16 mutilated. And, of course, I knew that wasn't the case, and,  
17 you know, and I would ask him about that and he would be  
18 insistent. And then, of course, when he realized, uh, that I  
19 was being insistent, he would change his story to please me.

20 Q] Let me ask you this: Did his ability to relate facts to  
21 your or to explain what went on, did it change or evolve, during  
22 the course of your representation or did it remain pretty  
23 static?

24 A] It remained pretty static and even the tapes and the inter-  
25 views that I did with him post-trial, you could still see the,

1 you know, in this interview that, that I did where you and I and  
2 Mr. Fogleman went to Pine Bluff, you know, I kept telling him in  
3 the interview, "don't, don't..."

4 Q] ...I don't know, and we didn't get to go back in the room  
5 with you?

6 A] (Laughing.) Okay. Fair enough. I reviewed the tape last  
7 night and made some notes with regard to it and there were  
8 several times when I kept saying, you know, "don't answer my  
9 questions 'yes' or 'no,' tell me what happened. Explain to me,  
10 if you were there, tell me what happened," and he was incapable  
11 of doing that. Uh, the only way that he could describe it is if  
12 you, uh, for example, uh, if you would ask him, you know, what  
13 color were the bicycles? And if I gave him the information or  
14 suggested the right color, then he would agree with it. And  
15 during this interview I would try to give him the wrong infor-  
16 mation, uh, to see if he would agree with it and he did. And  
17 so, uh, that's how I knew that he was not telling the truth and  
18 was not at the crime scene, because, uh, unlike the police  
19 officers and on June 3<sup>rd</sup>, 1993, who were happy to give him the  
20 information and ask him leading questions that he replied "uh-  
21 huh," "yeah," "uh-huh," "uh-huh," "yeah," I would try to  
22 intentionally mess him up and he would just follow right along  
23 with whatever I suggested.

24 Q] Did you ever feel in the December 10<sup>th</sup> interview what you  
25 and Dr. Wilkins did with Jessie that y'all did the same thing

1 that you accused the police of in terms of trying to lead him to  
2 the conclusions that were consistent with your defense and with  
3 his statement not being true?

4 A] I haven't seen all of this; I watched it until about 3:30  
5 last night and I finally went to sleep, but I think the part of  
6 the interview that I did not see was the experiment that, that  
7 we did, uh, whereby Mr. Misskelley, we got him to confess to an  
8 armed robbery that had never occurred, and it took about fifteen  
9 minutes to do so.

10 Q] Okay. Was that a Flash Market armed robbery?

11 A] Uh-huh.

12 Q] Okay. Well, was the entire session video taped?

13 A] I think it's in there, but again, I haven't reviewed all of  
14 it either; I'm kind of in the same position as you are. But,  
15 but, uh, Mr. Misskelley, uh, he gets angry and when he gets an-  
16 gry he will tell you whatever you want to hear.

17 Q] Is it your opinion also that that interview and the Court  
18 being able to observe both visually and audibly, uh, to hear and  
19 see him on the tape that the Court can evaluate, that this will  
20 provide some information and insight into his ability to  
21 communicate, to comprehend, to understand issues; would you  
22 agree?

23 A] I think it, uh, demonstrates just how, uh, unable he was  
24 to, uh, assist us in trying to, to defend him essentially as I  
25 said earlier, it was like, sometimes it was like not even having

1 a client.

2           MR. DAVIS: Your Honor, the next thing the State  
3 would do is to go ahead and offer and introduce this  
4 video, and it's pretty lengthy.

5           THE COURT: I'm going to take the noon recess.  
6 All right, ladies and gentlemen, with the admonition  
7 not to discuss the case with anyone, you may all stand  
8 in recess until one o'clock.

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

11           THE COURT: Court's back in session.

12           MR. DAVIS: Judge, I would move for introduction  
13 of State's Exhibit #3. Dan testified that there was a  
14 video tape taken on that day, uh, it's been changed  
15 into a different format, so I don't think he can  
16 identify it until he sees it.

17           THE COURT: What day are you talking about?

18           MR. DAVIS: December, it was the, the tape is  
19 from December 10<sup>th</sup>, '93.

20           THE COURT: All right, it will be received into  
21 evidence.

22 (WHEREUPON, State's Exhibit #3 was admitted and received into  
23 evidence and is appended on page .)

24           THE COURT: All right, you may play it. Are you  
25 going to leave it there - - you may want to move it.

1 No, just leave it there; I may need to move.

2 THE WITNESS: Your Honor, may I move from the  
3 witness stand?

4 THE COURT: Yes, everybody can move around,  
5 except the audience.

6 (WHEREUPON, the video of 12/10/93 was played in open court as  
7 follows, to-wit:)

8 WILKINS: What does that mean, "the right," Jessie?

9 MISSKELLEY: I don't know. I guess not to talk.

10 WILKINS: If I told you you have the right not to - - chew your  
11 nails. What does that mean?

12 MISSKELLEY: Don't cut them.

13 WILKINS: If they tell you that "anything you say to me can be  
14 used against you," what does that mean?

15 MISSKELLEY: (inaudible.) They been bad to me before.

16 WILKINS: What?

17 MISSKELLEY: I said they been bad to me before, but it didn't  
18 have (inaudible), I talked anyway.

19 WILKINS: Why'd you do that?

20 MISSKELLEY: 'Cause, I didn't know what it meant. I just kept  
21 on talking. It's like when I had a warrant for my arrest.

22 WILKINS: What does that mean?

23 MISSKELLEY: What, a warrant?

24 WILKINS: Yes.

25 MISSKELLEY: I don't know. That's the first time I've ever had

1 one.

2 WILKINS: Never had one?

3 MISSKELLEY: They just said they had one for my arrest. And  
4 they said everything you said.

5 WILKINS: Read that right there. Read that for me.

6 MISSKELLEY: Where?

7 WILKINS: Right here.

8 MISSKELLEY: All of it?

9 WILKINS: Uh-huh.

10 MISSKELLEY: "All, right, we are police officers of the West  
11 Memphis Police Department. We are convicting" - - no, I don't  
12 know that word - - "for the offense of capital felony murder  
13 (inaudible) committed on or about 5/5/93. Before we ask you any  
14 questions, you must know and understand your legal rights.  
15 Therefore, we want to advise you that you have a right to remain  
16 silent. Do you understand that?"

17 WILKINS: What does all that mean, that you just read?

18 MISSKELLEY: I guess it means that I can talk to them or I  
19 can't.

20 WILKINS: Okay. What does this first part of what you read  
21 mean?

22 MISSKELLEY: (No answer.)

23 (Very long pause.)

24 WILKINS: Start right there, (inaudible) read that.

25 MISSKELLEY: "He'd been watching them. You mentioned earlier

- 1 that one of the (inaudible) with this cult meeting, they had  
2 some pictures. Describe those pictures.”
- 3 WILKINS: What cult meeting are they talking about?
- 4 MISSKELLEY: I don't know. I hadn't never went to one.
- 5 WILKINS: What is a cult meeting?
- 6 MISSKELLEY: I don't know what a cult is.
- 7 WILKINS: You don't know what a cult is?
- 8 MISSKELLEY: Huh-uh, but I read in a, a *National Inquirer*.
- 9 WILKINS: What'd they say in there?
- 10 MISSKELLEY: Well, this boy's name is Richard and he's a ring  
11 leader of a cult.
- 12 WILKINS: What's a cult from?
- 13 MISSKELLEY: I guess it's - - it's devil worship.
- 14 WILKINS: Devil worship?
- 15 MISSKELLEY: Uh-huh. (Affirmatively indicating).
- 16 WILKINS: What does that mean?
- 17 MISSKELLEY: Satan.
- 18 WILKINS: Yeah. Well, what does tie man to be a devil worshiper?
- 19 MISSKELLEY: I don't know.
- 20 WILKINS: Are you one of those?
- 21 MISSKELLEY: Huh-uh. (Negatively indicating.)
- 22 WILKINS: How do you know, if you don't know what it is?
- 23 MISSKELLEY: 'Cause I ain't done nothing like that - - or what-  
24 ever they do.
- 25 WILKINS: How do you know you haven't done that they've done if

1 you don't know what they do? What do they do? Do you know?

2 MISSKELLEY: Well, I heard they draw stuff on buildings and  
3 stuff.

4 WILKINS: Uh-huh?

5 MISSKELLEY: And I can't draw.

6 WILKINS: What else do they do?

7 MISSKELLEY: I never been to one.

8 WILKINS: Why did you say you had?

9 MISSKELLEY: 'Cause they said I was, and I told them I wasn't.

10 WILKINS: How come they didn't write that down? How come they  
11 didn't write that down that you told them you hadn't been to  
12 one?

13 MISSKELLEY: They just want to write what they want to write.

14 WILKINS: You mean to say that they said you'd been to a cult  
15 meeting, you said no?

16 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

17 WILKINS: And they said the cult meeting you were at, just, just  
18 didn't put it down?

19 MISSKELLEY: Huh-uh. (Negatively indicating) That's not an  
20 answer. They didn't put it down.

21 WILKINS: How would they do that, Jessie?

22 MISSKELLEY: 'Cause they want to lie.

23 WILKINS: Why?

24 MISSKELLEY: I guess to make their self look good. 'Cause they  
25 said that, uh, Ridge said, uh, said he seen me in, uh, Turrell

1 in a cult meeting with Damien. And I told them I hadn't ever  
2 been to Turrell, and I haven't.

3 WILKINS: Why would Riggs - - Ridge say that?

4 MISSKELLEY: He's a liar.

5 WILKINS: But he's a policeman; how could he be a liar?

6 MISSKELLEY: 'Cause all policemen do lie.

7 WILKINS: They do?

8 MISSKELLEY: Yes, they do.

9 WILKINS: Oh. How do you know that?

10 MISSKELLEY: Well, they sent my daddy off with a lie, and now  
11 they're trying to send me off with a lie. Marion police, uh,  
12 lie, saying they, uh, they saw me steal something from Heck's,  
13 wearing camouflage, and I don't own camouflage. They lie.  
14 Then, uh, somebody said they seen me steal something off the  
15 railroad tracks, some lasers or something, some laser disks.  
16 They lie. I was out of town the day it happened. Now they're  
17 trying to say this.

18 WILKINS: You think they're kind of against you.

19 MISSKELLEY: I know they lie.

20 WILKINS: Why?

21 MISSKELLEY: I don't know. They just - - I guess they don't  
22 like the Misskelley's; that's all I'm wondering.

23 WILKINS: You think part of this is because of the problems that  
24 your dad had, too. You think that's what it is?

25 MISSKELLEY: My dad?

1 WILKINS: Yes.

2 MISSKELLEY: He's been in trouble? Yeah.

3 WILKINS: You think that's why they came after you, too? It's  
4 all part of that because of his problems, too?

5 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

6 WILKINS: When did you decide that?

7 MISSKELLEY: Huh?

8 WILKINS: When did you decide that?

9 MISSKELLEY: What?

10 WILKINS: That was part of you - - your dad's problems why they  
11 came after you, too?

12 MISSKELLEY: 'Cause he's been in trouble with the law. And they  
13 lie, just to send him up the river.

14 WILKINS: You say here, Jessie, "I was there until they tied  
15 them up, and that's when I left. After they tied them up, I  
16 left." Why did you say that?

17 MISSKELLEY: 'Cause I, where I could go. Where I could go home.

18 WILKINS: But you saw them cutting the boys. Did you see them  
19 cutting the boys?

20 MISSKELLEY: Huh-uh. (Negatively indicating.) I wasn't there.

21 WILKINS: Well, why did you say all that shit?

22 MISSKELLEY: They put me up to say that.

23 WILKINS: Yeah, but why did you do it?

24 MISSKELLEY: I just said what they wanted me to say.

25 WILKINS: Why?

1 MISSKELLEY: You know, if they want to catch somebody in a lie,  
2 I can catch them in a lie, too.

3 WILKINS: And then what?

4 MISSKELLEY: You know, police. They say policemen ain't never  
5 bad, or they're never wrong and stuff. That's why they believe  
6 policemen, not other people. That's why most people right now  
7 are in jail or in prison, because policemen lies and they don't  
8 lose their job all the time.

9 WILKINS: You ever see a male screw another male?

10 MISSKELLEY: No.

11 WILKINS: Why did you say that?

12 MISSKELLEY: They told me that. They said, uh, Ridge told me he  
13 seen Damien and Jason have sex before. I didn't know nothing  
14 about that.

15 WILKINS: How'd he know that?

16 MISSKELLEY: Who? Ridge?

17 WILKINS: Yeah.

18 MISSKELLEY: I don't know. I guess he's been joining them. I  
19 don't know.

20 WILKINS: You had sex with a boy?

21 MISSKELLEY: No.

22 WILKINS: Sure?

23 MISSKELLEY: Positive.

24 WILKINS: You ever thought about it?

25 MISSKELLEY: No.

- 1 WILKINS: Have they ever tried to have sex with you?
- 2 MISSKELLEY: Huh-uh. (Negatively indicating.)
- 3 WILKINS: Huh?
- 4 MISSKELLEY: Huh-uh. (Negatively indicating.) Some of them want  
5 to play around, though.
- 6 WILKINS: Why?
- 7 MISSKELLEY: Act like it. Act like we're like that.
- 8 WILKINS: What are you saying, Jessie?
- 9 MISSKELLEY: Act like you are, you know. Act like you're funny,  
10 or something. Act like you're gay.
- 11 WILKINS: Oh, okay.
- 12 MISSKELLEY: But you're not.
- 13 WILKINS: Do you do that sometimes when you have other - - when  
14 you- - mess around?
- 15 MISSKELLEY: No. No. I did that- - I did that when I'm around  
16 my - - my uncle.
- 17 WILKINS: Okay. Okay.
- 18 MISSKELLEY: You know he, he, he, he plays with us like that.  
19 He'll come up to us, he'll hug us and kiss us, and all that.  
20 And then, me and my cousin, we, you know, since he does that to  
21 us, me and him does it back. People say, you gay, or stuff, I  
22 say, "Yeah, we are." We'll grab each other and we'll kiss each  
23 other.
- 24 WILKINS: You ever had sex with him?
- 25 MISSKELLEY: No.

1 WILKINS: Sure?

2 MISSKELLEY: Positive.

3 WILKINS: You say here, "when they have a cult meeting, every-

4 body has an orgy and stuff like that." What's an orgy?

5 MISSKELLEY: When a whole bunch of gays do it - - some boys and

6 only one girl.

7 WILKINS: When you killed the dog, what do you do with it?

8 MISSKELLEY: What would I do with a dog if I killed a dog?

9 WILKINS: Uh-huh. (Affirmatively indicating.)

10 MISSKELLEY: Throw 'em away.

11 WILKINS: Well, it says here, you said that when you killed a

12 dog you got to skin it and make a - - make a bonfire and eat it

13 and stuff like that?

14 MISSKELLEY: I don't do that stuff.

15 WILKINS: Why did you lie about that, Jessie?

16 MISSKELLEY: It, it's funny.

17 WILKINS: What's funny about it?

18 MISSKELLEY: Playing a - - about skinning dogs and eating it,

19 and stuff. I guess a dog's just like chicken; I don't eat

20 chicken.

21 STIDHAM: Why would you tell the police that you did that if you

22 didn't?

23 MISSKELLEY: I told 'em I wasn't even there in the first place,

24 but they wouldn't listen. They kept on hollering at me.

25 STIDHAM: Well, how could you make up a story about skinning a

1 dog and eating him?

2 MISSKELLEY: I guess to see one of them cult things. I don't  
3 know.

4 WILKINS: One of what cult things, Jessie?

5 MISSKELLEY: Eating and stuff. Eating animals and stuff.

6 STIDHAM: Did you make that up by yourself, or did someone else  
7 tell you about that?

8 MISSKELLEY: What?

9 STIDHAM: About skinning dogs and eating them?

10 MISSKELLEY: I made that up by myself. 'Cause I don't know what  
11 they do in those cult meetings.

12 WILKINS: Well, where did you get the idea about skinning a dog?

13 MISSKELLEY: Just popped in my head.

14 WILKINS: Have you ever done that?

15 MISSKELLEY: What, skin a dog?

16 WILKINS: Uh-huh. (Affirmatively indicating.)

17 MISSKELLEY: Huh-uh. (Negatively indicating.)

18 WILKINS: You ever skin a deer or a rabbit?

19 MISSKELLEY: I - - a rabbit and a squirrel. That's it.

20 WILKINS: How do you do that?

21 MISSKELLEY: I don't do it; my dad does it. I just help him,  
22 you know, hold it.

23 WILKINS: How do you do it? How does your dad do it?

24 MISSKELLEY: I hold down the side, on the back take the knife  
25 and cut him up there in the back and then pull the hair off of

PROPERTY OF ARKANSAS SUPREME COURT/COURT OF APPEALS

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**Appellant(s)**

Charles Jason Baldwin  
Jessie Lloyd Misskelley, Jr.

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

**Appellee(s)**

State Of Arkansas

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

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Supplemental Record Filed  
June 11, 2010  
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By Renee Herndon

Volume 5

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IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS  
CRIMINAL DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CR-93-~~450~~4506

*JASON CARLOS BALDWIN*  
~~JESSIE R. MITCHELL, JR.~~

DEFENDANT

**FILED**  
**APR 21 2010**  
Ann Hudson  
Circuit Court Clerk

**VOLUME IV of X**

1 him. Then cut it from the bottom and take their guts out.

2 STIDHAM: Hey, Jessie, how did you make up that stuff about the,  
3 uh, briefcase and pictures of kids and stuff like that?

4 MISSKELLEY: Made it up. It popped up in my head.

5 STIDHAM: Had anybody ever told you about a briefcase?

6 MISSKELLEY: Uh-huh. (Affirmatively indicating.) They've told  
7 me about a briefcase.

8 STIDHAM: Who is "they"?

9 MISSKELLEY: Ridge and Gitchell.

10 MR. DAVIS: Let me interrupt there and ask Mr.  
11 Stidham some questions.

12 CROSS-EXAMINATION, continuing:

13 Q] Dan, when you're asking the questions of how, who told you  
14 to make that up, why did you ask that question?

15 A] The reason I asked that question, because he previously  
16 told me that that's what had happened. And, uh, I was trying  
17 to, uh, get him to be spontaneous in front of Dr. Wilkins.

18 Q] So that's why you had asked him a leading question like  
19 that and re-directed his attention back to what he had previous-  
20 ly had told you before?

21 A] Usually, every time I asked a leading question, I'd get a  
22 different answer. So it was hard to follow along with any kind  
23 of scenario.

24 Q] And if you could, if you will pay particular attention,  
25 because after this is over, I may ask you about something that I

1 think might fit in the same category?

2 A] Okay.

3 VIDEO, continuing:

4 STIDHAM: Well, why do you think the police would want to make  
5 something up like that?

6 MISSKELLEY: It's like I say, they - - 'cause they - - they just  
7 want to frame me like they did my dad.

8 STIDHAM: Would you agree with the statement that most people  
9 want to say what the police tell them to say, that they'll just  
10 tell them what they weren't there, they didn't have anything to  
11 do with it?

12 MISSKELLEY: Hum?

13 STIDHAM: Wouldn't most people just say, "No, I didn't have  
14 anything to do with it," if they didn't have anything to do with  
15 it?

16 MISSKELLEY: That's what I told them in the first place. I  
17 didn't have nothing to do with it. I was with Rickey Deese.  
18 They said, "No you wasn't."

19 WILKINS: Why don't you believe them? Why didn't they believe  
20 you?

21 MISSKELLEY: I don't know. I guess, 'cause I'm, I'm another  
22 Jessie. That's why they don't want to believe nothing.

23 STIDHAM: Has there been anything happen that would make them  
24 not believe you?

25 MISSKELLEY: I don't know.

1 STIDHAM: They give you any kind of a test or anything, to see  
2 if you were telling the truth?

3 MISSKELLEY: They gave me one of them lie detector's test.

4 STIDHAM: And what is a lie detector's test?

5 MISSKELLEY: What I seen it's on a desk. It's got paper and - -  
6 some kind of needles and stuff.

7 STIDHAM: Tell us what happened when they gave you that test?

8 MISSKELLEY: Well, they asked me some questions and they put a  
9 thing on my arm, but a thing on my finger. And he asked me them  
10 three questions over and over and over.

11 STIDHAM: How many questions?

12 MISSKELLEY: I don't know. One of they, uh, "have you ever done  
13 drugs?" Another was "have I been at that Robin, Robin Hood  
14 field" and whatever, and uh, another one they asked me, uh, "did  
15 I know who killed them three boys?" I told them, "no."

16 STIDHAM: How many times did they ask you those three questions?

17 MISSKELLEY: Three times.

18 STIDHAM: Three times?

19 MISSKELLEY: (Inaudible.) times.

20 WILKINS: Well, did they ask you more than once when they asked  
21 you?

22 MISSKELLEY: He asked me, he asked me that one time. Then he'll  
23 wait a little bit, and then he'll ask me again over, and then  
24 he'll wait, and he would ask me again.

25 WILKINS: Did he ask you any other questions along the way?

1 What's your name or address, that kind of stuff?

2 MISSKELLEY: Nope.

3 WILKINS: About where you went to school or go to school, or  
4 anything, any other kind of questions at all?

5 MISSKELLEY: Nope. He just asked me them three questions.

6 WILKINS: Just those three, that's all he asked you?

7 MISSKELLEY: No, there was some more questions on there. I  
8 don't - - don't I don't remember them other ones.

9 STIDHAM: Well, what happened immediately after they got done  
10 with the test?

11 MISSKELLEY: Then that one guy said, "You're lying." I said,  
12 "Okay, I did drugs."

13 He said, "No, I ain't talking about that." And he, he said,  
14 "You know who done it."

15 And I said, "No, I don't know who done it."

16 He said, "Yes, you do, 'cause your brain is telling us."

17 STIDHAM: Said your what?

18 MISSKELLEY: My brain was telling them.

19 STIDHAM: Who told you that?

20 MISSKELLEY: That guy that gave me the test.

21 STIDHAM: So he told you your brain was lying?

22 MISSKELLEY: My brain was telling him.

23 STIDHAM: Well, is that why you decided to go ahead and tell  
24 them this story, then?

25 MISSKELLEY: No, I wasn't going to say nothing to them. Then

1 when they asked me them questions, I told them I didn't know who  
2 done it. After he done, after I done took that test, they asked  
3 me did I know who done it. I told them no, I didn't know who  
4 done it.

5 STIDHAM: How long was it between the time that they gave you the  
6 lie detector test 'till they showed you the picture of the  
7 little boy? Just a couple of minutes? Or an hour? Or?

8 MISSKELLEY: About, I'd say about an hour, 30 minutes, somewhere  
9 in there.

10 STIDHAM: What did you think when you seen the picture of the  
11 little boy?

12 MISSKELLEY: Wasn't nice.

13 STIDHAM: What do you mean?

14 MISSKELLEY: Seein' somebody laying on the floor dead, and they  
15 cold.

16 STIDHAM: Did that upset you?

17 MISSKELLEY: Yeah.

18 STIDHAM: Then what happened?

19 MISSKELLEY: Then I started crying.

20 STIDHAM: How come you started crying?

21 MISSKELLEY: 'Cause I can't, can't stand to see nobody dead.

22 STIDHAM: Did you know what happened to the little boy?

23 MISSKELLEY: No. Not from what I've heard.

24 STIDHAM: What do you mean from what you heard?

25 MISSKELLEY: I heard that they - - they was cut up.

1 STIDHAM: Who told you that?

2 MISSKELLEY: Kevin, that same day the, uh, they paged him - -  
3 they thing was cut - - thing was cut.

4 WILKINS: Who's Kevin?

5 MISSKELLEY: Johnson.

6 WILKINS: Who's he?

7 MISSKELLEY: He's a search and rescue.

8 WILKINS: Oh, and he lives behind you?

9 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

10 STIDHAM: Then what happened after you started crying?

11 MISSKELLEY: They started asking me some questions, and they're  
12 tell - - and then I - - you know, then I told them I didn't  
13 know, then they said we're going back to the - - we're going  
14 back to, uh, ground one again. They when they'd say something,  
15 then I said it, then they said "now we're getting somewhere."  
16 Then when they say something again and I don't know what they're  
17 talking about, I told them I don't know, then they're saying,  
18 "well, we're going back to ground one again," then when they  
19 tell me something else, then I say it. They they're saying...

20 STIDHAM: ...now when you're saying - - you mean you were saying  
21 what they said earlier?

22 MISSKELLEY: Well, uh, if I don't know what they were talking  
23 about, I'd tell them that I didn't know. Then they're saying we  
24 ain't getting nowhere, we're just going back to ground one  
25 again. And when they said something about where the boys was

1 laying at, then I'd say it. Then they're saying, "we're getting  
2 somewhere now."

3 STIDHAM: Why would you say something about where they were  
4 laying if you didn't know it - - where they were laying?

5 MISSKELLEY: I did know - - cops - - they told me. When they  
6 said it, I said it.

7 WILKINS: Why did you do that?

8 STIDHAM: Didn't you know that was going to get you in trouble?

9 MISSKELLEY: I didn't know.

10 STIDHAM: Well, then what happened?

11 MISSKELLEY: UH, that's mainly it.

12 STIDHAM: They tell you anything about, uh, helping them, or,  
13 uh...?

14 MISSKELLEY: They said they'd get me out of that, out of that  
15 circle.

16 STIDHAM: What circle?

17 MISSKELLEY: That, that, they're, the cops are around us and  
18 where the circle is and we can get out, then you can be with  
19 others.

20 STIDHAM: Who said that?

21 MISSKELLEY: Ridge.

22 STIDHAM: Who?

23 MISSKELLEY: Ridge.

24 STIDHAM: Are you sure it was him?

25 MISSKELLEY: Ridge.

- 1 STIDHAM: Did he draw a circle or did Gitchell draw a circle?
- 2 MISSKELLEY: Gitchell.
- 3 STIDHAM: Ridge is, is, is kind of short and stocky and  
4 Gitchell's kind of tall, with a bald head. Which one was it?
- 5 MISSKELLEY: Gitchell.
- 6 STIDHAM: He drew a circle on a piece of paper?
- 7 MISSKELLEY: Then he put Xs around the, around the circle and  
8 then put three dots in the middle.
- 9 STIDHAM: And what did he tell you about the circle?
- 10 MISSKELLEY: He said, "This is you, Damien and Jason, and we can  
11 get you out."
- 12 STIDHAM: What did he mean by "we can get you out"?
- 13 MISSKELLEY: I don't know what he meant. That's all he said.
- 14 STIDHAM: What did you tell him when he said that?
- 15 MISSKELLEY: I told him I want- - I wanted to get out. If I'm  
16 in that circle, I want to get out.
- 17 STIDHAM: Then what'd he say?
- 18 MISSKELLEY: Then he started asking me some questions. And then  
19 when I got something wrong he'd say, "well, you're (inaudible)  
20 getting closer, and closer, and closer."
- 21 WILKINS: You ever robbed a store, Jessie?
- 22 MISSKELLEY: Robbed a store?
- 23 WILKINS: Yeah.
- 24 MISSKELLEY: I ain't never robbed nobody.
- 25 WILKINS: Strange. Because there's a report that said you did.

- 1 MISSKELLEY: A report?
- 2 WILKINS: Yeah.
- 3 MISSKELLEY: I ain't never robbed no store.
- 4 WILKINS: Sure?
- 5 MISSKELLEY: I'm positive.
- 6 STIDHAM: There's a Flash Market by your house?
- 7 MISSKELLEY: Huh?
- 8 STIDHAM: There's a Flash Market by your house?
- 9 MISSKELLEY: Flash Market? That's down the road, by the court-
- 10 house.
- 11 STIDHAM: Yeah, is that the one?
- 12 MISSKELLEY: Saying I robbed it?
- 13 STIDHAM: Yeah.
- 14 MISSKELLEY: They're lying. I ain't never robbed nobody.
- 15 WILKINS: Have you ever been in there?
- 16 MISSKELLEY: Have I been in the Flash Market?
- 17 WILKINS: Uh-huh. (Affirmatively indicating.)
- 18 MISSKELLEY: Yeah, I've been in the Flash Market a bunch of
- 19 times.
- 20 WILKINS: Why?
- 21 MISSKELLEY: Been in to get cigarettes, put gas in the car.
- 22 WILKINS: Ever been in there with somebody else?
- 23 MISSKELLEY: Huh?
- 24 WILKINS: Ever been in there with somebody else?
- 25 MISSKELLEY: Yeah, with my dad.

1 WILKINS: Your dad? Anybody else?  
2 MISSKELLEY: My cousin.  
3 WILKINS: Cousin?  
4 STIDHAM: What's his name?  
5 MISSKELLEY: Bubba.  
6 WILKINS: Bubba?  
7 MISSKELLEY: His name is Charles Ashley.  
8 WILKINS: Bubba is - - yeah, yeah, he's the other one I was  
9 talking about.  
10 STIDHAM: He's the one that told the police that you did it.  
11 MISSKELLEY: Huh? Huh-uh. (Negatively indicating.)  
12 STIDHAM: He's the one that told the police you went in there  
13 with a gun.  
14 MISSKELLEY: I ain't got no gun. I don't even own one.  
15 STIDHAM: Why would he say that?  
16 MISSKELLEY: I don't know. Ridge and Gitchell told 'em that he  
17 was in on it, too.  
18 WILKINS: He's "in on" what?  
19 MISSKELLEY: Huh? This stuff, killing and stuff.  
20 WILKINS: He said that Bubba was in on it, too?  
21 MISSKELLEY: They asked me was he on it, in on it, and I don't  
22 know.  
23 WILKINS: They said he was?  
24 MISSKELLEY: Uh-huh. (Affirmatively indicating.) They asked me,  
25 "Are you sure?" I said, "I'm positive." I only been to one

1 store, and we was down the street when somebody was stealing  
2 something.

3 WILKINS: Who was that?

4 MISSKELLEY: It was me, Richard Lovelace, William Jones and, uh,  
5 Scott something.

6 WILKINS: What'd you steal?

7 MISSKELLEY: I didn't steal nothing. We was down the street  
8 waiting for them. It was William and Scott is the ones that  
9 stole.

10 STIDHAM: What day was this?

11 MISSKELLEY: It's been a while back.

12 STIDHAM: Did they have a gun?

13 MISSKELLEY: Huh-uh. (Negatively indicating.) All they did was  
14 went in the store, grabbed some - - grabbed a beer.

15 STIDHAM: Was it the Flash Market?

16 MISSKELLEY: It was in West Memphis.

17 STIDHAM: Was it the Flash Market, though?

18 MISSKELLEY: Huh-uh. (Negatively indicating.)

19 STIDHAM: Bubba says that you and him went in with a gun and  
20 stole some stuff and got some money out of the cash register.

21 MISSKELLEY: No, I don't even know about it.

22 STIDHAM: Why would he say something like that?

23 MISSKELLEY: I don't know.

24 WILKINS: Ever held a gun?

25 MISSKELLEY: Yeah, I held a gun.

1 WILKINS: What?  
2 MISSKELLEY: I held a gun before.  
3 WILKINS: Whose?  
4 MISSKELLEY: My dad's.  
5 WILKINS: What is it?  
6 MISSKELLEY: Well, it was my grandfather's gun. Somebody sold  
7 it for some drugs. And my dad had a .25 when I was little, and  
8 I held it. I had a .22 and then I carried it back where I  
9 bought it from.  
10 WILKINS: Why did you do that?  
11 MISSKELLEY: It tore up. It wouldn't eject the shells.  
12 WILKINS: But you didn't rob anybody?  
13 MISSKELLEY: I would never pull a gun on nobody.  
14 WILKINS: You've pulled a knife on people, don't you?  
15 MISSKELLEY: Huh?  
16 WILKINS: And you've pulled a knife on people?  
17 MISSKELLEY: Pulled a knife on people?  
18 WILKINS: Yeah.  
19 MISSKELLEY: (Not answering.)  
20 WILKINS: And a ball bat (inaudible)?  
21 MISSKELLEY: Yeah. If they make me mad enough, I would. Just  
22 like Dino, he got me mad one night 'cause he was drinking. He  
23 got me mad. And I pulled a gun on him.  
24 WILKINS: You pulled a gun on him? You don't have a gun, you  
25 said.

1 MISSKELLEY: I know I don't, but I pulled one on him.

2 WILKINS: Where'd you get it?

3 MISSKELLEY: I took it from my dad.

4 WILKINS: Is that the same one you robbed the store with?

5 MISSKELLEY: Hmm. I didn't rob no store.

6 WILKINS: Look, Jess, I just, I mean, you said you'd never  
7 pulled a gun on anybody, you wouldn't do that...

8 MISSKELLEY: ...not unless they got me mad enough.

9 WILKINS: Got you mad. People try to get you mad, it's all  
10 right to pull a gun on them?

11 MISSKELLEY: Yeah.

12 WILKINS: Who first started? What got you mad?

13 MISSKELLEY: Dino's got me mad before; I pulled a gun on him.

14 WILKINS: But, but, but people started it, too, then?

15 MISSKELLEY: Yeah, they start it.

16 WILKINS: What?

17 MISSKELLEY: Yeah, they start stuff. That's why people's lying  
18 now, saying I robbed the store. I hadn't got a gun to rob a  
19 store. See, people lie 'cause they don't like me, that's what  
20 it is.

21 WILKINS: Better than that, let's step back Jessie. Now you  
22 said, okay, you've never pulled a gun on anybody; right?

23 MISSKELLEY: No.

24 WILKINS: Then you said, "I pulled one on Dino one night because  
25 he got - - he pissed me off"?

1 MISSKELLEY: 'Cause I won't - - peop - - people make me mad.  
2 I'll pull a ball bat and I'll pull a knife on them if they make  
3 me mad.  
4 WILKINS: And then you said, "I don't own a gun"?  
5 MISSKELLEY: I don't.  
6 WILKINS: Then you said, "I got a gun and pulled it on Dino."  
7 Now you know, this ain't making sense, Jessie; okay?  
8 MISSKELLEY: You asked me did I pull a gun, uh, pull a knife and  
9 a baseball bat on people?  
10 WILKINS: Uh-huh. (Affirmatively indicating.)  
11 MISSKELLEY: Yes, if they make me mad enough. So I, I pulled a  
12 gun on Dino, when me made me mad.  
13 STIDHAM: Well, Jessie, did it make you mad when that lady that  
14 you robbed at the store, and she called you a little faggot, did  
15 that make you mad?  
16 MISSKELLEY: Little lady?  
17 STIDHAM: While you was working at the store at the Flash  
18 Market?  
19 MISSKELLEY: I don't know nobody...  
20 STIDHAM: ...she said she called you a little faggot, and you  
21 got mad and pulled a gun and you took the money.  
22 MISSKELLEY: No. I don't know no woman at the Flash Market  
23 that's short; my dad does, but I don't. I don't know her. He  
24 knows everybody works at the Flash Market. I don't.  
25 WILKINS: Well, you've been in there, haven't you?

1 MISSKELLEY: Yeah, I've been in there with him.

2 WILKINS: And so, and so essentially, they know what you look  
3 like now, don't they, in there?

4 MISSKELLEY: Yeah.

5 WILKINS: And they know who you are?

6 MISSKELLEY: Yeah.

7 WILKINS: Okay. She says...

8 STIDHAM: ...I'm going to get a drink of water.

9 WILKINS: She says you came in there and was shoplifting shit.  
10 And she caught you and called you a little faggot and you got  
11 mad at her and pulled out a gun.

12 MISSKELLEY: People lie.

13 WILKINS: I'll be back in a second.

14 STIDHAM: Well, I'm going to go down the hall and make that  
15 phone call again and see if they've got that tape.

16 [Stidham leaves the room; tape still running. Phone rings and  
17 Wilkins answers: "Yes. Okay, so it'll be here when? Okay.  
18 Good. Thanks."]

19 WILKINS: That tape's on its way, Jessie. So here we are.  
20 Let's talk about the robbery, Jessie.

21 MISSKELLEY: Who are you talking to?

22 WILKINS: You.

23 MISSKELLEY: You ain't talking to me.

24 WILKINS: Yes, I'm talking to you.

25 MISSKELLEY: No, you ain't, either.

1 WILKINS: Why not?

2 MISSKELLEY: Talk to yourself. I'm not talking.

3 WILKINS: You're not talking?

4 MISSKELLEY: Huh-uh. (Negatively indicating.)

5 WILKINS: You damn well are now.

6 MISSKELLEY: (Silent.)

7 WILKINS: Look, Jess, okay? Let's quit this shit. You lied to  
8 the police; Jess?

9 [Door opens, closes. Telephone rings. Very long pause.  
10 Footsteps into the room.]

11 WILKINS: Are you on, Dan?

12 STIDHAM: We're on.

13 WILKINS: Jess, okay. Let's go back to the couch, okay. You're  
14 on Vickie's couch, okay, and your dad wakes you up; all right?  
15 Can you start through this? Tell me what happens after that?

16 MISSKELLEY: Uh, I was, I was on the, uh, sleeping on the couch  
17 in my boxers, and dad came and got me, told me Mike Allen wanted  
18 to talk to me.

19 STIDHAM: About what?

20 WILKINS: Did he say? Say what he wanted to talk to you about?

21 MISSKELLEY: About that guy that (phone rings) so, said okay, so  
22 let me go down to the house, get some...

23 STIDHAM: ...what guy got picked up?

24 MISSKELLEY: Tracy. The one that was turned in.

25 STIDHAM: That's what your dad said?

1 MISSKELLEY: Yeah. He said Mike Allen wanted to talk to me  
2 about that.

3 STIDHAM: Tracy Laxton?

4 MISSKELLEY: Yeah. So okay, so I said I go to go back down to  
5 the house and get me some clothes on. So I went to the house,  
6 put on a shirt and shorts, and some tennis shoes. And went to  
7 the shop and Mike Allen was there. I got in the car with Mike  
8 Allen.

9 STIDHAM: Okay. Let's stop right there. When you got to the  
10 shop, you got out of your dad's truck?

11 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

12 STIDHAM: Where was Mike at?

13 MR. DAVIS: Judge, at this point I want to  
14 interrupt so I can ask a question.

15 THE COURT: Go ahead.

16 CROSS-EXAMINATION, continuing:

17 Q] Dan, at this point you're asking questions and going  
18 through the sequence of events that occurred when he was picked  
19 up by Mike Allen on the day that he was questioned; right?

20 A] It appears so; yes, sir.

21 Q] Okay.

22 A] I haven't seen this part of the video in many, many years.

23 VIDEO, continuing:

24 MISSKELLEY: Well, my dad got the second spot, like - - Mike  
25 Allen was there. When dad - - daddy pulled up to the door and

1 Mike Allen's car was in the, by the next door, you know - -  
2 there's two big old doors, and...

3 STIDHAM: ...was he out of the car, or sitting there and waiting  
4 for you, or what?

5 MISSKELLEY: He was sitting in the car.

6 WILKINS: (Inaudible.) Okay.

7 STIDHAM: What did he say when you got out?

8 MISSKELLEY: He just said, "We need to ask you some questions."

9 STIDHAM: About what? Did he say?

10 MISSKELLEY: No. He, no, he, no, he said, "Do you care to ride  
11 with me to West Memphis?"

12 I said, "No," and got in the car.

13 STIDHAM: Did your dad say anything to you, or did Jim McNease  
14 say anything?

15 MISSKELLEY: I don't - - I didn't see Jim that day, I don't  
16 think.

17 STIDHAM: He wasn't there, or do you just not remember?

18 MISSKELLEY: His truck wasn't there. So I don't know if he was  
19 there or not.

20 STIDHIM: Okay. So...

21 WILKINS: ...did your dad say anything to you about what you had  
22 to go with him, or not go with him, or needed to do, or anything  
23 down there?

24 MISSKELLEY: He asked my dad could I, uh, was it all right if I  
25 go with him. Dad said sure. So I got in the car with him.

1 STIDHAM: What'd you talk about on the way to the police  
2 station?

3 MISSKELLEY: Nothing. We didn't talk.

4 WILKINS: Didn't say anything till you got to the police  
5 station?

6 STIDHAM: Where'd you go when you got to the police station?

7 What part of the building? Down a set of stairs? Basement?

8 MISSKELLEY: It was upstairs.

9 STIDHAM: Whose office? Do you remember?

10 MISSKELLEY: Huh-uh. (Negatively indicating.)

11 STIDHAM: Was it a man, or a woman?

12 MISSKELLEY: It was by the, close to the, where they, where they  
13 had a couch and stuff at. Where the - - I guess it's a lounge.

14 STIDHAM: Was it across the hall from where the couch was?

15 MISSKELLEY: Kinda. You go...

16 STIDHAM: ...you walk down a long hall?

17 MISSKELLEY: Yeah, you go past the bathroom, then there's the  
18 lounge, then there's a window and cut across, and there's a  
19 little room, another room.

20 STIDHAM: So you were in the room where the lie detector machine  
21 is?

22 MISSKELLEY: No, I didn't go to that place. I went to the...

23 STIDHAM: ...place where the couch is?

24 MISSKELLEY: No.

25 WILKINS: Here, Jess, okay. Here's the hall and here's the

1 couch...

2 MISSKELLEY: ...the couch was on this side, and I was on this  
3 side.

4 WILKINS: Okay. And so there's the couch, and then what  
5 happens?

6 MISSKELLEY: And then there's downstairs. I didn't go down-  
7 stairs, and I went to a room they had, uh...

8 WILKINS: ...y'all probably go out to the couch right here.  
9 Just about right across from the south side?

10 MISSKELLEY: Yeah. Then I, there was a room, then it's like in  
11 the same room, but different doors.

12 WILKINS: Okay.

13 MISSKELLEY: Just say like this one and that one put together.  
14 And then...

15 WILKINS: ...okay. You came in here and you went in another  
16 room over there?

17 MISSKELLEY: Right.

18 WILKINS: Okay. Now, is this where you did the lie detector  
19 test here, or was that somewhere else?

20 MISSKELLEY: Huh-uh. (Negatively indicating.) Right next door.

21 WILKINS: Back this way?

22 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

23 WILKINS: Okay.

24 STIDHAM: So this is the hallway here and there's a bathroom  
25 over there; right?

1 MISSKELLEY: Bathroom about right up in here.

2 STIDHAM: Okay.

3 MISSKELLEY: And a couch, the window...

4 STIDHAM: ...this couch is in the room over here; right?

5 MISSKELLEY: Yeah.

6 WILKINS: And then so it's...

7 STIDHAM: ...it's the end of the building...

8 WILKINS: ...with a window. Okay.

9 STIDHAM: There's stairs going down here?

10 MISSKELLEY: Uh-huh. (Affirmatively indicating.) Then, uh, I

11 was right in here.

12 WILKINS: And these windows go over to here?

13 MISSKELLEY: And as soon as you walked in the door, there's a

14 desk, then there's a door right there, and I was in, right in

15 there.

16 WILKINS: What's right here?

17 MISSKELLEY: Huh?

18 STIDHAM: This is where the...

19 MISSKELLEY: ...a desk?

20 STIDHAM: Is this the desk that has the lie detector in behind

21 that door there?

22 MISSKELLEY: No.

23 WILKINS: You had to cut back out here to go through here?

24 MISSKELLEY: Like - - like - - like I just walked in from the

25 door. There's a desk sitting right here. There's a desk sit-

1 ting right here. There's a desk sitting right there and there's  
2 the door.

3 WILKINS: Okay. Now, where is the lie detector room? Do you  
4 get to go back out that door to get there?

5 MISSKELLEY: Hmm. (Inaudible.)

6 WILKINS: Is it back out there, back of the hall?

7 MISSKELLEY: There's a door going...

8 WILKINS: ...in the hallway and back out again?

9 MISSKELLEY: Around the corner.

10 STIDHAM: Just around the corner, not back in the hall?

11 MISSKELLEY: No, just around the corner.

12 STIDHAM: Okay. Now I know where you were, then. Uh, who did  
13 you talk to when you first went in and sat down? More than one,  
14 or just one?

15 MISSKELLEY: More than one.

16 STIDHAM: Who was that?

17 MISSKELLEY: Gitchell and Ridge.

18 STIDHAM: Gitchell and Ridge? What about Mike Allen?

19 MISSKELLEY: Huh-uh. (Negatively indicating.) He, he, he didn't  
20 come in 'till after I took that lie detector test.

21 STIDHAM: He just kinda disappeared then, after he dropped you  
22 off there; he just kind of went somewhere else, then?

23 MISSKELLEY: Yeah, he didn't come in until after, after I got  
24 into it with that guy.

25 WILKINS: Did he bring you in here to meet Ridge and Gitchell?

1 He just brought you in and left you and then he left?

2 MISSKELLEY: (silent.)

3 WILKINS: Okay.

4 STIDHAM: So you go in and sit down in a chair by the desk?

5 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

6 STIDHAM: And what happened?

7 WIKLINS: Kinda like you are now?

8 MISSKELLEY: Yeah.

9 STIDHAM: Then what happened?

10 MISSKELLEY: After I sit down, I figured that they was going to  
11 ask me about, about that guy.

12 STIDHAM: Tracy Laxton?

13 MISSKELLEY: Right; and they didn't.

14 STIDHAM: What'd they start asking you about?

15 MISSKELLEY: They ask - - they asked me where I just come from,  
16 the day we come in, yeah, it was that day? Then, then this guy  
17 asked me where'd I come from and I told him, I told him I came  
18 from Vickie's house. He said, "Who's Vickie?" And I said a  
19 woman I stayed the night with her because there was a guy  
20 prowling around. And he asked me, he said, "You sure you  
21 weren't sleeping with her?"

22 I said, "I'm positive." I said, "She slept in one room, and I  
23 slept on the couch and the parents slept in the other room."

24 He asked me what she looked like and I told him. He said, "She  
25 was up here just the other day talking about you." And then,

1 uh, then they started - - then they - - I said...

2 WILKINS: ...what did they say she said about you, or did they  
3 say what she...?

4 MISSKELLEY: He didn't say.

5 WILKINS: She was just talking about you? Okay.

6 MISSKELLEY: And then, uh, they went out and I was sitting there  
7 in that room by myself.

8 WILKINS: How long were they gone? Any idea, Jess?

9 MISSKELLEY: Huh-uh. (Negatively indicating.)

10 WILKINS: Just a little while - - just a minute or two - - just a  
11 little bit?

12 MISSKELLEY: Uh-huh. (Affirmatively indicating.) They said we  
13 need you to go with us because we got to get your test, and I  
14 didn't know what for. And then me and Mike Allen, we left.

15 STIDHAM: Let me stop you just a second. So all they asked you  
16 before they started talking about getting your dad's permission,  
17 was where you had been?

18 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

19 STIDHAM: They didn't ask you anything about Damien or Jason up  
20 to that point?

21 MISSKELLEY: Huh-uh. (Negatively indicating.)

22 STIDHAM: They wanted to do a lie detector test on you after  
23 they asked you where you'd been?

24 MISSKELLEY: Right. So me and Mike Allen left. We was going to  
25 get my dad's signature and we passed my dad. We had to turn

1 around and we met my dad at, uh, Chief's Auto Parts and there he  
2 was, getting out of the wrecker.

3 STIDHAM: What did you and Mike Allen talk about on the way  
4 there?

5 MISSKELLEY: Nothing. He, he didn't say anything, 'till I said,  
6 "There's my dad right there." And he turned around at Chief's  
7 Auto Parts and I seen dad pull up in the driveway and get out.  
8 And Mike Allen said, "We need you to sign this," and dad just,  
9 uh, signed the, uh, he uh, "it'd be nice if Jessie would tell  
10 him that," uh, "who done it or something, 'cause, you know, he'd  
11 have some money."

12 And dad said, "Yeah, he could buy him a new truck."

13 STIDHAM: What kind, what money are you talking about?

14 MISSKELLEY: He, they just said some money; that's all Mike  
15 Allen said.

16 STIDHAM: Allen said if you could tell them who did this, that  
17 you'd get some money?

18 MISSKELLEY: Yeah.

19 STIDHAM: Did he say how much?

20 MISSKELLEY: Huh-uh. (Negatively indicating.) Mike, uh,  
21 Gitchell

22 told me how much it would be, but I ... (phone ringing.)

23 WILKINS: He said that later on, though?

24 MISSKELLEY: Yes.

25 WILKINS: Now, did Mike tell your dad what it is he wanted him

1 to sign? Or he just said, "I want you to sign this," and that  
2 was all there was to it?

3 MISSKELLEY: He said something about what he was supposed to  
4 sign.

5 WILKINS: You don't know what it, what he was saying to him?

6 MISSKELLEY: (silent.)

7 STIDHAM: Then what happened after your dad signed it?

8 MISSKELLEY: I got back in the car with Mike, and we, we drove,  
9 we went back to the police department. And then, I guess they  
10 handed that piece of paper to somebody, 'cause I didn't see that  
11 paper no more. And I went in to take the test.

12 STIDHAM: So you went into the room with Officer Durham?

13 MISSKELLEY: I didn't know the guy.

14 STIDHAM: Was it an older man?

15 MISSKELLEY: He didn't look old to me.

16 STIDHAM: Older than Ridge and Allen?

17 MISSKELLEY: It looked like he's about in his 40's or something.

18 STIDHAM: Okay.

19 WILKINS: Now, now, so at this point then, you have any idea  
20 what time it was (inaudible), Jessie?

21 MISSKELLEY: It still was in the morning.

22 WILKINS: Still in the morning. Okay. So basically, then they  
23 give you a lie detector test before they asked you any questions  
24 at all, really?

25 MISSKELLEY: Right.

1 WILKINS: And now you're in the lie detector test; okay?

2 STIDHAM: Tell us about where you went in and what the lie  
3 detector machine looked like? First of all, before you answer  
4 that, what is a lie detector test?

5 MISSKELLEY: I don't know. I ain't never seen one before.

6 STIDHAM: Did they tell you what it was, or tell you what it  
7 does, or...?

8 MISSKELLEY: ...he, he told me what it does.

9 WILKINS: What'd he tell you?

10 MISSKELLEY: He told me that it, it's tell us if you're lying or  
11 not. And he said, you know, "we'll kind of watch it come out."

12 WILKINS: Now they hooked up things to you where?

13 MISSKELLEY: He hook, he hooked something right here on my arm.  
14 And I was sitting in a chair facing the wall. He, he had a  
15 little thing that slipped on my finger.

16 WILKINS: Just one finger, or was there another finger?

17 MISSKELLEY: Yeah, and I was sitting like this and going like  
18 this. And I was facing the wall while he asked me some  
19 questions.

20 WILKINS: How far away were you from the wall? Right close to  
21 it, or...?

22 MISSKELLEY: ...I couldn't ...

23 WILKINS: ...was it up, you were right up next to the wall,  
24 then, pretty much? Okay. And so what he asked you then?

25 MISSKELLEY: He asked me...

- 1 WILKINS: ...did he ask you what your name was?
- 2 MISSKELLEY: Huh-uh. (Negatively indicating.)
- 3 WILKINS: Did he ask you where you live?
- 4 MISSKELLEY: Huh-uh. (Negatively indicating.)
- 5 STIDHAM: Well, what questions did he ask you?
- 6 MISSKELLEY: As far as I can remember, he didn't.
- 7 WILKINS: What was the first question he asked you; can you
- 8 remember, Jessie?
- 9 MISSKELLEY: Have I - - if I'm not mistaken, have I ever been to
- 10 Robin Hood Hills.
- 11 WILKINS: And you said no?
- 12 MISSKELLEY: And I said, "no."
- 13 WILKINS: Okay.
- 14 MISSKELLEY: And he waited for a little bit, then he asked me
- 15 this stuff. When, when, now, the first question - - I remember
- 16 now, the first question he asked me, he said, uh, "Are you going
- 17 to tell the truth?"
- 18 And I said, "Yes."
- 19 Then the next question he asked me was did I know where Robin
- 20 Hood Lane is.
- 21 WILKINS: Did you know where it was, or had you been there?
- 22 MISSKELLEY: Did I know where it was at. And I said, "No."
- 23 STIDHAM: Did you know where it was at?
- 24 MISSKELLEY: Huh-uh. (Negatively indicating.)
- 25 STIDHAM: Had you ever been there before?

1 MISSKELLEY: Huh-uh. (Negatively indicating.)

2 WILKINS: Do you now?

3 MISSKELLEY: What? Know where it's at?

4 WILKINS: Uh-huh? (Affirmatively indicating.)

5 MISSKELLEY: After they, after they told me where it was at.

6 WILKINS: Where is it?

7 MISSKELLEY: Right beside Blue Beacon.

8 STIDHAM: So after he asked you if you'd ever been to Robin Hood

9 Hills, what did he ask, what did he ask you?

10 MISSKELLEY: Then he asked me did I, did I, have I ever did  
11 drugs? Told him no.

12 STIDHAM: Is that the truth?

13 MISSKELLEY: What? Have I ever did drugs? Yeah.

14 STIDHAM: So you lied to him on that question?

15 MISSKELLEY: Uh-huh. (Affirmatively indicating.) And then they  
16 asked me, uh, did I know who killed them three little boys. And  
17 I told him "no."

18 STIDHAM: Did he repeat the questions after...?

19 MISSKELLEY: ...then he'd wait a little bit and, uh, I was still  
20 hooked up and he'd ask me them questions again.

21 STIDHAM: Same questions?

22 MISSKELLEY: Same questions again.

23 WILKINS: Did they ever ask you anything else?

24 MISSKELLEY: Huh-uh. (Negatively indicating.) He just asked me  
25 them same questions again. He asked me again, I told him the

1 answers, and then he'd wait - - wait a little bit and then he'd  
2 ask them again. Same questions. Then after I, after he  
3 unhooked me, he showed me the, the piece of paper where it was  
4 scribbled at. He said, "You must have been nervous, or some-  
5 thing."

6 WILKINS: Was it just scribbled like this: up and down; was it  
7 graph paper like this, and it goes up and down like this?

8 MISSKELLEY: Uh-huh. (Affirmatively indicating.) It was a lot  
9 worse than that. And then he told me that I was lying. Then I,  
10 then I went ahead and admitted and said, uh, I did drugs. And  
11 he said, no, he'd deal with me about them later. He meant, did  
12 I kill them little boys, and I told him no. And he kept on and  
13 kept on hollering.

14 STIDHAM: Hollering at you?

15 MISSKELLEY: He raised his voice real loud.

16 STIDHAM: Then what happened?

17 MISSKELLEY: And then I stood up, and balled my fist and did  
18 like that, and then Mike Allen said, "Sit down," and I sat down.  
19 And then, uh, we went back to the other room.

20 WILKINS: Back to this one over there, one off to the side over  
21 here? Okay.

22 MISSKELLEY: And then that's when they, after he hand, handed  
23 Mike Allen and them the paper.

24 WILKINS: So, so the lie detector didn't take but about five  
25 minutes or so, it went pretty quick then, about ten minutes, and

1 you weren't in there very long?

2 MISSKELLEY: Seemed like I was in there a long...

3 WILKINS: ...seemed like a long time? Okay. So you're back over  
4 there and they start talking to you?

5 MISSKELLEY: They showed me that paper and they said, uh, "You,  
6 you've been to Robin Hood Lane, haven't you?"

7 And I said, "No, I haven't."

8 He said, "The paper is saying you have."

9 And I said, "Well, it's lying."

10 STIDHAM: Did they tell you anything about your brain, or any-  
11 thing?

12 MISSKELLEY: After, after, uh, at the end of the, they showed me  
13 the paper, and he said, "You're lying."

14 And I said, "No, I'm not." And then I said, "Okay, I admit I  
15 did drugs before."

16 They said, "No, it ain't that," they said, "you know where Robin  
17 Hood Lane is and you know who done it."

18 I said, "No, I don't."

19 And they said, "Yes, you do, because your brain is telling us.

20 I said, "My brain?"

21 And he said, "Yes, your brain is telling me."

22 WILKINS: So how long did this go in there, Jessie; did it go  
23 over and over and over?

24 MISSKELLEY: A lot.

25 WILKINS: Asked you questions about you being there, and...

- 1 MISSKELLEY: ...yeah. Every time I got something right, then  
2 they'll change it. And then they...
- 3 WILKINS: ...did he have a tape recorder going on all this time?
- 4 MISSKELLEY: Not the first time.
- 5 WILKINS: So, what they were, they weren't taping what you were  
6 saying now?
- 7 MISSKELLEY: Huh-uh. (Negatively indicating.) Not the first  
8 time.
- 9 STIDHAM: Jessie, let's go back to after you got mad and balled  
10 up your fist. You said Mike Allen came in?
- 11 MISSKELLEY: Mike Allen came in.
- 12 STIDHAM: Did they ever do a polygraph test on you that day?
- 13 MISSKELLEY: Polygraph? What's that?
- 14 STIDHAM: You don't know what it is?
- 15 MISSKELLEY: No.
- 16 WILKINS: The polygraph and a lie detector are the same thing.
- 17 STIDHAM: So then after Mike Allen came in and got you, did they  
18 take you to another room?
- 19 WILKINS: Took you back over here to through this other door;  
20 right?
- 21 MISSKELLEY: (No audible response.)
- 22 STIDHAM: Now did you ever go into a lady's officer's room?
- 23 MISSKELLEY: That's where I was at when they asked me the  
24 questions.
- 25 STIDHAM: Okay. Was there anything hanging on the wall in her

1 office that you remember?

2 MISSKELLEY: (No audible response.)

3 STIDHAM: Pictures of anything or anybody?

4 MISSKELLEY: She had a bookshelf, some pictures of some, some  
5 people. I don't know them. And behind me was a, a bulletin  
6 board, I think.

7 WILKINS: Right here?

8 MISSKELLEY: Huh?

9 WILKINS: So, so, bulletin board was right next to you, just  
10 like this?

11 STIDHAM: What was on the bulletin board?

12 MISSKELLEY: Well, I was sitting like this. The bulletin board  
13 was right here behind me like this.

14 WILKINS: All right.

15 STIDHAM: What was on the board?

16 MISSKELLEY: And the door was right there. The, it had some  
17 pictures of some boys.

18 STIDHAM: Which boys?

19 MISSKELLEY: The ones that got killed.

20 WILKINS: Did you look at it?

21 MISSKELLEY: Huh?

22 WILKINS: Did you look at it?

23 MISSKELLEY: Yeah. It just, it just had them in there standing  
24 up. Something like that right there.

25 WILKINS: Like this?

- 1 MISSKELLEY: Yeah, like that and then they had the...
- 2 STIDHAM: ...was it a newspaper picture, or...?
- 3 MISSKELLEY: ...yeah, it was a newspaper.
- 4 STIDHAM: Did they have their names under, their names under  
5 their pictures?
- 6 MISSKELLEY: (No audible response.)
- 7 STIDHAM: Did you know their names?
- 8 MISSKELLEY: (No audible response.)
- 9 STIDHAM: So, after you got done with the lie detector test,  
10 they took you back into the lady officer's office and then they  
11 started asking you questions?
- 12 MISSKELLEY: Uh-huh. (Affirmatively responses.)
- 13 STIDHAM: What did they ask you?
- 14 MISSKELLEY: They asked me how, what, do I know where that place  
15 at, at Robin Hood Lane is and I told them "no."  
16 They said, "Yes, you do, because you told us."  
17 Said "I didn't tell you nothing."  
18 They said, "this ain't what the paper shows." And, uh, then  
19 they start talking about it. They said that, uh, get uh, then  
20 they asked me have I ever been to Turrell-Twist, and I said  
21 "no." And I haven't been to Turrell-Twist. And, uh, they had  
22 me down for being in Turrell-Twist in a, uh, a, a cult meeting  
23 with Damien. I said "no."
- 24 WILKINS: Is, is Turrell-Twist the same place?
- 25 MISSKELLEY: I don't know. I hadn't ever been there. I don't

1 know where it's at.

2 WILKINS: They said have you ever been to Turrell-Twist, though?

3 MISSKELLEY: Huh-uh. (Negatively indicating.)

4 WILKINS: He didn't say Turrell, he said Turrell-Twist?

5 MISSKELLEY: Turrell-Twist, and I said "No."

6 STIDHAM: Then what happened?

7 MISSKELLEY: Then, then, uh, Ridge said he's seen me there  
8 before. He said I, I was riding, I rode up there with Damien.

9 STIDHAM: Ridge said he rode up with Damien or you rode up with  
10 Damien?

11 MISSKELLEY: I rode up there with Damien; he said he saw me up  
12 there with Damien, and I said I ain't ever been up there.

13 STIDHAM: So Officer Ridge told you that he seen you there with  
14 Damien?

15 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

16 STIDHAM: Had you ever been there?

17 MISSKELLEY: Huh- - I don't know where it's at. I been -I went  
18 by there to go where I go to wrestling at, but...

19 STIDHAM: ...you mean you've seen the exit for it?

20 WILKINS: The sign, the sign.

21 MISSKELLEY: Uh-huh. (Affirmatively indicating.) Bit I ain't  
22 ever been there.

23 STIDHAM: So then what happened after he asked you if you'd ever  
24 been to there?

25 MISSKELLEY: Then he started, uh, he started asking me them

1 questions.

2 STIDHAM: What questions?

3 MISSKELLEY: About who killed them three little boys. I kept on  
4 telling him I didn't know.

5 WILKINS: How long did this go on, Jessie? You have any idea?

6 MISSKELLEY: From that morning they picked me up to about nine  
7 or so that night.

8 WILKINS: Now, they said that you made the statement they copied  
9 down at 2:30 in the afternoon?

10 MISSKELLEY: That ain't when it stopped.

11 WILKINS: But they have a ticket in here. This was from...

12 MISSKELLEY: ...they picked, they picked me up that morning.

13 WILKINS: Okay. And it says, uh, the time is 2:44.

14 MISSKELLEY: That, that's when they started asking me them  
15 questions, uh, put me on that tape.

16 WILKINS: Yeah, okay. But after the tape was done, did they ask  
17 you more question after that, too?

18 MISSKELLEY: Yeah, they kept on asking me about if I'd done it.

19 STIDHAM: That was the second...

20 WILKINS: ...that wasn't until the next day.

21 STIDHAM: That was at late that night?

22 MISSKELLEY: The next day is when I went to the, uh...

23 STIDHAM: ...to court?

24 MISSKELLEY: Uh-huh. (Affirmatively indicating.) 'Cause, 'cause  
25 I was, I didn't sleep, really. And, uh, then some black woman

1 wanted to talk - - they said somebody wants to talk to you, and  
2 I said "okay." They said it was a lawyer or somebody, and it  
3 was a black woman.

4 STIDHAM: Did you talk to her?

5 MISSKELLEY: Yeah.

6 STIDHAM: What did you say to her?

7 MISSKELLEY: She, she asked me did it do it.

8 STIDHAM: What did you tell her?

9 MISSKELLEY: No. And then the next - - right across the hall I  
10 saw Damien looking at me and Jason was sitting in a chair.

11 WILKINS: Was that the next morning?

12 MISSKELLEY: Yeah. 'Cause I, I asked her could I get a drink of  
13 water. She...

14 STIDHAM: What was the black woman's name?

15 MISSKELLEY: I don't know her. I hadn't ever seen her.

16 STIDHAM: Was she, was she a lawyer?

17 MISSKELLEY: I don't know.

18 WILKINS: How early was it, Jessie? You have any idea?

19 MISSKELLEY: Well, I didn't get no breakfast.

20 STIDHAM: Let's back up now. They'd just got you off the lie  
21 detector machine and Ridge is asking you have you ever been to  
22 Robin Hood Lane?

23 MISSKELLEY: After, after they asked me the, they got me on that  
24 tape and stuff.

25 STIDHAM: So how long did they ask you those questions before

1 they turned the tape recorder on, how long a time was it; do you  
2 know?

3 MISSKELLEY: Huh-uh. (Negatively indicating.) They kept on  
4 going over.

5 WILKINS: Did you eat lunch?

6 MISSKELLEY: No, it was almost that night.

7 WILKINS: When did you finally eat?

8 MISSKELLEY: I'd say it was almost getting dark.

9 WILKINS: Was that when you, was that when they turn on the tape  
10 recorder, it was almost dark?

11 MISSKELLEY: Yeah.

12 WILKINS: They didn't turn it on until afternoon?

13 MISSKELLEY: In the afternoon?

14 WILKINS: Yeah.

15 STIDHAM: They turned it on twice, didn't they?

16 MISSKELLEY: Yeah.

17 STIDHAM: The first time was in the afternoon?

18 MISSKELLEY: Right.

19 STIDHAM: But you didn't eat anything?

20 MISSKELLEY: No.

21 STIDHAM: From the time you got there until almost dark?

22 MISSKELLEY: 'Till, yeah, 'till the...

23 STIDHAM: ...did they ask you if you wanted anything to eat?

24 MISSKELLEY: No.

25 STIDHAM: Did you ask for anything to eat?

1 MISSKELLEY: No.

2 STIDHAM: Did they let you go to the bathroom?

3 MISSKELLEY: Yeah, I asked to go to the bathroom.

4 STIDHAM: Did they let you?

5 MISSKELLEY: Yeah, they - - but one time they didn't.

6 STIDHAM: Did you have to wait a long time before you did?

7 MISSKELLEY: What? Go to the bathroom? Huh-uh. (Negatively  
8 indicating.) They just said "okay."

9 WILKINS: So they asked, they turned on the tape recorder and  
10 then they asked you a bunch of questions, and they turned on the  
11 tape recorder and then they asked you the same questions over  
12 again?

13 MISSKELLEY: Over and over.

14 WILKINS: And then, how long did they have the tape recorder on,  
15 Jessie? For a long, long, long time?

16 MISSKELLEY: I guess. I don't...

17 WILKINS: ...did they change the tape or turn it over or any-  
18 thing?

19 MISSKELLEY: Far as I know, they did.

20 WILKINS: Was it a big round tape like this? Or just a little  
21 bitty tape like you play songs on?

22 MISSKELLEY: (No audible response.)

23 STIDHAM: Do you remember?

24 WILKINS: Was it on a big machine with a big round tape, big  
25 round?

1 MISSKELLEY: I think it was like a, like a headphone set. I  
2 think, uh, well, it was something like that, had a, like a  
3 antenna, like a, what is, I'd say it was like this; something  
4 like that. And it had a microphone, they pushed the microphone  
5 up close to me.

6 WILKINS: Okay, but did you see the tape itself?

7 MISSKELLEY: I didn't see the tape.

8 WILKINS: Did they change tapes, or anything like that?

9 MISSKELLEY: Yeah, they changed tapes.

10 WILKINS: More than one?

11 MISSKELLEY: Uh-huh. (Affirmatively indicating.) I'd say about  
12 twice.

13 STIDHAM: Jessie, uh, after you got done with the lie detector  
14 test, they set you down in that lady officer's room, and they  
15 asked you if you'd been to Robin Hood Hills; they asked you if  
16 you'd been to Turrell-Twist; then they started asking you about  
17 Damien and Jason; is that right?

18 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

19 STIDHAM: Did they tell you you were lying to them?

20 MISSKELLEY: They asked me was, uh, well, was Charles Ashley  
21 there? I said "no."

22 They said, "Are you sure?"

23 I said, "I'm positive." I said, "He don't go nowhere with me."

24 I said, "I don't go nowhere with him, not unless it's to go to  
25 the store for his mama or something." I said, "That's the only

1 place I go with him."

2 STIDHAM: So after you told him you didn't know nothing about  
3 it, they told you you were lying; right?

4 MISSKELLEY: Right.

5 STIDHAM: Now did they also tell you that you had to get it  
6 right, or that we have to start over again, or what did they  
7 say?

8 MISSKELLEY: They didn't say nothing about me getting it right.

9 STIDHAM: They said something about going back to ground zero,  
10 or...?

11 MISSKELLEY: ...they said they, when they got something wrong,  
12 then they said we - - just start over - - uh, we ain't getting  
13 nowhere this time. Then when I got something right or some-  
14 thing, then they said now we're getting someplace. And when  
15 they asked me another question, I got it wrong, and then we went  
16 back to the, to the same again.

17 STIDHAM: Ground level again, is that what they called it?

18 WILKINS: Now when you said you're back to ground level, did  
19 they start off with the same questions over again?

20 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

21 WILKINS: So they'd start you over again?

22 MISSKELLEY: So, so, yeah. After I got...

23 WILKINS: ...so like I said to you, Jessie, okay, they said to  
24 you, uh, "today is Friday," and you said "yes." And I say "it's  
25 the afternoon," you said "yes," and I said it's uh, "it's August

1 31<sup>st</sup>," and you said "no"?

2 MISSKELLEY: No, then I had to start back (inaudible) when you  
3 asked me that question and I said yes.

4 WILKINS: So they start, I started back again saying "today is  
5 Friday"?

6 MISSKELLEY: And I'd say "yes," and they'll put a (inaudible)  
7 when I got it right.

8 WILKINS: Okay. So, and so then, so then if we go on ten or  
9 fifteen questions, you got one wrong?

10 MISSKELLEY: Then I had to all the...

11 WILKINS: ...go back to number one and start over again? Okay.

12 STIDHAM: How many times did you have to start over again, do  
13 you think?

14 MISSKELLEY: A bunch.

15 STIDHAM: Did it go on for hours?

16 MISSKELLEY: A bunch, 'cause I didn't know, I didn't know --  
17 nothing. You know, I didn't know how they was killed or not.

18 WILKINS: So it was kind of like, kind of like what we were  
19 doing here earlier; okay?

20 MISSKELLEY: Right.

21 WILKINS: And then we have to go back now and, let's go back to  
22 the beginning, Jessie. "You're, you're lying. Let's go back  
23 and start over again," now here's what, and then you go through  
24 that all over again?

25 STIDHAM: Okay, now is that after or before Gitchell drew the

1 circle?

2 MISSKELLEY: The whole time.

3 STIDHAM: Why did he draw the circle?

4 WILKINS: After you was there a little while, or at the very  
5 beginning?

6 MISSKELLEY: When I was in there for a little while. It's  
7 before they put me on the, on the tape.

8 STIDHAM: Okay. So basically, then, what you're saying is they  
9 went over it and over, over and over and over again and re-  
10 hearded it until you finally had the story right and then they  
11 turned the tape on?

12 MISSKELLEY: Uh-huh. (Affirmatively indicating.) Then when they  
13 asked, asked me, then after what they told me, I tried to  
14 remember what they was telling me.

15 WILKINS: What's a script, Jessie; do you know?

16 MISSKELLEY: A what?

17 WILKINS: A script.

18 MISSKELLEY: (No audible response.)

19 WILKINS: When they make a movie, okay, (inaudible) on TV, they  
20 have this thing called a script. In it says, Jessie says, and  
21 Jessie says what he says, and then Margaret says what she says,  
22 and you know, back and forth that way. Everybody reads their  
23 lines, okay? Is that kind of what, what they did, kinda, kinda  
24 put together a script and then read through this together, and  
25 you were there; yes, I was there; it was a brown rope; yes, it

1 was a brown rope, (inaudible.)

2 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

3 WILKINS: You got it kinda all put together; okay?

4 MISSKELLEY: (Inaudible.) They put together what they wanted  
5 everybody to know, and they (inaudible).

6 WILKINS: If, well, make it right, Jessie. It's kind of like  
7 earlier; okay? When you're being angry, okay, and I said you  
8 were having sex, I can't remember what it was, and you got  
9 angry. Well, well, if you want to say that it's okay. Is that  
10 kinda what happened that day, you wanted to say it was a brown  
11 rope, a brown rope is okay. That, that what happened; okay?

12 MISSKELLEY: He ask, they asked me was they tied up with, and I,  
13 I guessed, I just said, well, brown rope. And, uh, Ridge said  
14 no, it wasn't, and then I tried to argue with him and say yes it  
15 was. And it was like they was arguing with me so I was going to  
16 argue with them back and say yes, it was.

17 WILKINS: "Jessie, was it a brown rope?" You know, you say,  
18 "No, it was a green rope." And you said "no."

19 MISSKELLEY: They was arguing with me so I was arguing with them  
20 back, saying it was a brown rope. He asked me how they was tied  
21 up and, I didn't know. So I just guessed. I said from the  
22 front, and he said no, they wasn't. So...

23 STIDHAM: ...so you just kept guessing until you got it right?

24 MISSKELLEY: Yeah.

25 WILKINS: So you said okay and talked it back to them the next

1 time around?

2 MISSKELLEY: Yeah. I, I just guessed until I got it right, you  
3 know. I didn't know how they was tied up.

4 STIDHAM: Did you ever stop and think for a minute that you were  
5 going to get yourself in trouble by guessing, playing this  
6 guessing game with them?

7 MISSKELLEY: No, I didn't know.

8 WILKINS: Now, let me read you something, Jessie; okay? Let me  
9 see if I can find it real quick. Let me find something here.  
10 Why they asked you which two boys Damien and Jason were having  
11 sex with...

12 MISSKELLEY: ...I just guessed.

13 WILKINS: And you said, uh, Branch and...?

14 MISSKELLEY: ...no, I did, I, I don't know their name. They  
15 showed me, they showed me, uh, pictures of them. I didn't know  
16 their names.

17 WILKINS: Did they have names on them?

18 MISSKELLEY: Yeah. They had their name up on them, like, like  
19 here's their name, their picture, then they had their name up on  
20 them.

21 WILKINS: Were they, were they like the pictures on the bulletin  
22 board, or were they pictures of them dead, or what?

23 MISSKELLEY: Pictures on the bulletin board. They, he only  
24 showed one picture of them dead. (Inaudible.)

25 WILKINS: But then they told you, apparently up on the bulletin

1 board. And the one person there was is Branch and this one is  
2 (inaudible). Now point to the two they were having sex with.  
3 Is that kind of what happened?

4 MISSKELLEY: Yeah, they showed me, they showed me a picture of  
5 them.

6 WILKINS: And so you said that one and that one, or you said  
7 this one and this one, and oh, you mean, uh, Branch and Byers;  
8 yes?

9 MISSKELLEY: Yeah. And then the, uh, uh, Gitchell showed me a  
10 picture of one of them dead.

11 WILKINS: Which one; do you know?

12 MISSKELLEY: (No audible response.)

13 WILKINS: Did he tell you who it was?

14 MISSKELLEY: I didn't know his name. He had, he had black hair.  
15 It looked like it's black.

16 WILKINS: Had black hair. Was he naked?

17 MISSKELLEY: No.

18 WILKINS: Had, had clothes on? Was he tied up or anything like  
19 that?

20 MISSKELLEY: Huh-uh. (Negative indicating.) He, he was, he was  
21 laying on his side. I couldn't tell, he was just laying on his  
22 side. It was in a Polaroid picture, he was laying on his side.

23 WILKINS: Side, but he, but he, but he, but he, but he had  
24 clothes on?

25 MISSKELLEY: Yeah, he had clothes on.

1 WILKINS: You couldn't tell whether he was tied up or not,  
2 (inaudible.)

3 MISSKELLEY: It looked like his hand was in front of him, but  
4 looked like maybe to the side.

5 WILKINS: And so, and if, so you don't know whether that was a  
6 picture that was just now taken? Last year or anything else;  
7 you didn't know where that picture came from? Whether he was  
8 dead or not dead or anything lese?

9 MISSKELLEY: It could have been Satan, all I know, but you know,  
10 I didn't know.

11 STIDHAM: How did you know how deep the water was, and how...

12 MISSKELLEY: ...they told me how deep the water was.

13 STIDHAM: Who did?

14 WILKINS: What did, what did they say to you?

15 MISSKELLEY: They said how deep was the water? I, you know, I  
16 said, I said it's about knee deep. They said, I, I, I had my  
17 head down and I saw Gitchell shaking his head, so I, then I said  
18 about, about not even a foot deep, then.

19 WILKINS: Now, you said at one point that Damien and Jason were  
20 ducking, jumping down under the water?

21 MISSKELLEY: No, I told them that Damien and Jason was sitting  
22 in the water. I was sitting on one side.

23 WILKINS: Uh-huh.

24 MISSKELLEY: I said they had a, they took their pants off but  
25 they had shorts underneath, and I said Damien, one of them would

1 go down and get their hair wet, not even seconds, then they come  
2 up. Then the other one went under.

3 WILKINS: In this water that was, that was a foot deep?

4 MISSKELLEY: Might have been over a foot deep.

5 WILKINS: Okay. And they are sitting in the water a foot and a  
6 half deep; okay? And you could see their undershorts and all  
7 that, too?

8 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

9 WILKINS: But they were sitting down?

10 MISSKELLEY: Sitting down.

11 WILKINS: Then they would bend over and put their head in the  
12 water?

13 MISSKELLEY: They, they done like this.

14 WILKINS: Can you sit down and bend your head over and put, dunk  
15 any ways?

16 MISSKELLEY: No.

17 WILKINS: But that's what they were doing?

18 MISSKELLEY: That's what I told them.

19 STIDHAM: Why did you tell them that?

20 MISSKELLEY: Huh?

21 STIDHAM: Why did you tell them that?

22 MISSKELLEY: After, after they told me that they seen Damien and  
23 Jason have sex together, and...

24 WILKINS: ...and so, so did you tell them they were having sex  
25 there, too, or they were having hard-ons, or whatever?

1 MISSKELLEY: Yeah, I told, after they told me they, uh, they  
2 seen Damien and Jason have sex, then that's why I said that  
3 Damien go up under the water and then Jason, and then...

4 WILKINS: Were they, were they giving each other blow jobs, is  
5 that what you're saying?

6 MISSKELLEY: Yeah, and then I, I, you know, they said they seen  
7 them having sex, and then I told them that I seen them.

8 WILKINS: Have their shirts on?

9 MISSKELLEY: No, they had their shorts on. And then, uh...

10 WILKINS: ...shorts?

11 MISSKELLEY: Shorts?

12 WILKINS: Yeah, they got their undershorts?

13 MISSKELLEY: Yeah, they had their shorts on.

14 WILKINS: So, how were they having sex with their shorts on?

15 MISSKELLEY: After. The, when the boys was there, that's what I  
16 told them. After that. What I told them when the boys was  
17 there, then they started screwing the boys.

18 WILKINS: Okay. And did they take off their underpants, then?

19 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

20 WILKINS: And they're both naked now and they're screwing the  
21 boys?

22 MISSKELLEY: (No audible response.)

23 WILKINS: Okay.

24 STIDHAM: Why did you tell the police that?

25 MISSKELLEY: They told me that they seen Damien and Jason have

1 sex together and then I told them that I, that I seen them doing  
2 it with the boys.

3 STIDHAM: Did they tell you that they knew the boys had had sex  
4 before they died?

5 MISSKELLEY: Huh-uh. (Negatively indicating.) Nope. I, I, I  
6 just guessed at it, I just said it.

7 WILKINS: And so after you said that you saw Jason and Damien  
8 having sex with the boys and (inaudible) and pulled their ears  
9 up and then licking the blood up and stuff. They didn't say you  
10 were wrong, did they?

11 MISSKELLEY: They didn't say nothing. They asked me, then,  
12 after, you know, the cutting was going on, they asked me did I,  
13 you know, cut anyone. I said "no."

14 WILKINS: Good. And so, and so, so you thought that what you  
15 said about them having sex with the little boys and all that was  
16 true because they said, they, they?

17 MISSKELLEY: They didn't say nothing.

18 WILKINS: They didn't say, "no, that's wrong?" You didn't have  
19 to go back to the beginning again and start back at ground zero.  
20 So you knew that, that that was true, then?

21 MISSKELLEY: No, they didn't tell me to start over or nothing.

22 WILKINS: Okay, so you just thought you had the, had the right  
23 information then; okay?

24 STIDHAM: Okay, Jessie, we're back on tape. Now you stated that  
25 after they, after Gitchell drew the circle and asked you to come

1 out of the circle and showed you the picture of the little boy  
2 laying there dead, but they asked you a bunch of questions?  
3 MISSKELLEY: Uh-huh. (Affirmatively indicating.)  
4 STIDHAM: And then, if you didn't get an answer right, they'd go  
5 back and start from the beginning?  
6 MISSKELLEY: I had to go back over to the beginning.  
7 STIDHAM: All the way back to the beginning?  
8 MISSKELLEY: To the beginning. The beginning is...  
9 WILKINS: ...do you know where Robin Hood Lane is; is that where  
10 the beginning was?  
11 MISSKELLEY: They ask - - yeah.  
12 WILKINS: Is that, is that kinda where the beginning is?  
13 MISSKELLEY: Yeah.  
14 WILKINS: So if you were along the half hour talking about the  
15 sexual content and this stuff and you made a mistake, they'd say  
16 "oop, you got to go back to the beginning"?  
17 MISSKELLEY: Right.  
18 WILKINS: So they'd go all the way back to do, you know, where  
19 Robin Hood Lane is, then they'd go through it all again?  
20 MISSKELLEY: Through the whole section over and over and over.  
21 WILKINS: Okay. And then if you go another while along and he  
22 asked about their penis being cut, and then you made a mistake,  
23 you'd go all the way back to, to, to "do you know where Robin  
24 Hood Lane is?" Then go through it all again?  
25 STIDHAM: When did they turn the tape on? How many times did

1 you rehearse it before they turned the tape on?

2 MISSKELLEY: Just that once.

3 STIDHAM: I mean, how many times did you have to start over,  
4 though?

5 MISSKELLEY: A bunch.

6 STIDHAM: Did they turn the tape recorder on after you got every  
7 thing right?

8 MISSKELLEY: The way they wanted to, the way, the way they  
9 wanted it to sound. Then they put me on the tape recorder.  
10 Then when they asked me questions again I couldn't do it. Then,  
11 then they going to ask, had to stop again, then they had to  
12 asked me the questions over.

13 STIDHAM: So once they started the tape, did they ever turn it  
14 off, and start it on again?

15 MISSKELLEY: No, the tape, the tape was running.

16 MR. DAVIS: Judge, Mr. Stidham needs a break  
17 before we come to the end of this.

18 THE COURT: All right, court will be in recess  
19 ten minutes.

20 THE WITNESS: Thank you, Your Honor.

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

23 VIDEO, continuing:

24 WILKINS: Jessie, let me ask you something right now. Here it  
25 says, it starts out, it just says, okay, it starts off, "this is

1 Detective Brian Ridge, of West Memphis; okay? Do you understand  
2 all your rights?"

3 You said "yes"; is that the way he started?

4 MISSKELLEY: (No audible response.)

5 WILKINS: And now it went on, then he talks about Robin Hood and  
6 about the truck wash, and, uh, then when it gets done, it ends  
7 with "are you scared of Damien?"

8 MISSKELLEY: "Am I scared of Damien?"

9 WILKINS: That's all it says; it ends with, okay?

10 MISSKELLEY: Nope.

11 WILKINS: Then it says, "Why did you not come forward with this  
12 information before?"

13 You said, "Because I was scared."

14 And Ridge says, "Scared of Damien or scared of the police?"

15 And you said, "Scared of the police."

16 And Ridge says, "Are you scared of Damien now?"

17 And you say, "No."

18 And Ridge says, "Are you scared of the police now?"

19 And you say, "No."

20 And Ridge says, "You're not? So we have treated you really  
21 well?"

22 And you said, "Yes."

23 MISSKELLEY: They - - them two did, but that one didn't.

24 WILKINS: But is that what you said, all that stuff?

25 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

1 WILKINS: Now, did you go from the very beginning to all the way  
2 over here on the tape just once, or did they stop the tape in  
3 between along the way?

4 MISSKELLEY: Huh-uh. (Negatively indicating.) They didn't stop  
5 at nothing.

6 WILKINS: So they went all the way through all this then, from  
7 asking you did you know who we were, and then to the end where  
8 they treated you well. They did it all at one time without  
9 stopping the tape?

10 MISSKELLEY: Uh-huh. (Affirmatively indicating.) And then when  
11 I got it wrong, then I'd just sit there and try to remember what  
12 they had told me, and did.

13 STIDHAM: So, after they went over it with you several times  
14 from beginning to end, over and over and over again, then they  
15 said they wanted to turn the tape on?

16 MISSKELLEY: Uh-huh. (Affirmatively indicating.)

17 STIDHAM: 'Cause then they turned the tape "on" they asked you  
18 the questions again?

19 MISSKELLEY: Right.

20 WILKINS: Then you went through all the tape and after all  
21 through that again, did they say you've made mistakes, we've got  
22 to do it all over again, or anything about it, or what?

23 MISSKELLEY: Huh-uh. (Negatively indicating.) After, after they  
24 put me on the tape, they asked me them same questions again.

25 STIDHAM: Off the tape?

- 1 MISSKELLEY: Huh?
- 2 STIDHAM: Off the tape?
- 3 MISSKELLEY: On the tape. Whey they put me on the tape, they  
4 asked me the questions.
- 5 WILKINS: Now after the tape was over with, okay, did they ask  
6 you the same questions over again?
- 7 MISSKELLEY: Yeah.
- 8 WILKINS: After they put you on tape again?
- 9 MISSKELLEY: They put me on tape another time.
- 10 WILKINS: Second time?
- 11 MISSKELLEY: Yeah.
- 12 STIDHAM: What time was that?
- 13 MISSKELLEY: I don't know.
- 14 WILKINS: Was it dark where you could tell, or was it...?
- 15 MISSKELLEY: ...(Inaudible response.)
- 16 STIDHAM: What did they ask you the second time they put you on  
17 the tape?
- 18 MISSKELLEY: I can't remember the second time.
- 19 WILKINS: Was it the same questions?
- 20 MISSKELLEY: Basically, most of it was.
- 21 WILKINS: So was it the confession over again?
- 22 STIDHAM: Was it about what time this happened?
- 23 MISSKELLEY: It was about, they asked me about what time  
24 (inaudible) and all that.
- 25 WILKINS: Was it getting dark?

1 MISSKELLEY: They asked me about what time did it happen, and I  
2 said about, about noon.

3 And they said, "No, 'cause the boys went to school, and they got  
4 out at two."

5 WILKINS: Okay, now. Did they do a...

6 MISSKELLEY: ...they said the boys went to school. And then  
7 they went to the truck wash.

8 WILKINS: Who said that?

9 MISSKELLEY: Uh, Gitchell told me that.

10 STIDHAM: Well, Jessie, when you were go - - when they were  
11 asking these questions over and over again before they turn the  
12 tape on the first time, when you'd get something wrong, they'd  
13 start over; right?

14 MISSKELLEY: Yeah.

15 STIDHAM: Were they screaming at you or hollering at you, or  
16 anything?

17 MISSKELLEY: Huh-uh. (Negatively indicating.) They, they raided  
18 their voices a little bit, but not much.

19 STIDHAM: So, so when you were, when you were saying this on  
20 the tape, you got some things wrong, didn't you?

21 MISSKELLEY: Right.

22 STIDHAM: Did they ask you about anything that was wrong while  
23 the tape was on?

24 MISSKELLEY: (No audible response.)

25 STIDHAM: How come?

1 MISSKELLEY: They, they, after I got something wrong, they said  
2 "that ain't what you told us before."

3 WILKINS: Now, what did you tell them about the basketball shoes  
4 and Adidas, and all that?

5 MISSKELLEY: Basketball shoes?

6 WILKINS: Yeah, tennis shoes?

7 MISSKELLEY: Basketball, I ain't got no basketball shoes.

8 STIDHAM: Didn't you tell them you loaned Buddy Lucas a pair of  
9 your shoes?

10 MISSKELLEY: That, that was way before this happened, 'cause we,  
11 we was playing out in the rain. We, uh, we was coming in from  
12 his house during the rain, when it was raining. So I let him  
13 borrow a pair of shoes of mine.

14 STIDHAM: You don't know what time it was when the second taped  
15 interview started?

16 MISSKELLEY: Nope.

17 STIDHAM: Was it dark? Had you ate yet?

18 MISSKELLEY: I didn't eat 'till about, I'd say about, four or  
19 five, I guess, somewhere along there.

20 STIDHAM: Does it get dark that early that time of year?

21 MISSKELLEY: Well, yeah. It can get dark. It, it was a little  
22 bit, it wasn't like this when I ate. It was getting a little  
23 dark.

24 WILKINS: And, and you made the second tape before that?

25 MISSKELLEY: Well.

1 WILKINS: Second tape before you ate, right before you ate?

2 MISSKELLEY: I think it was before. And then, after I, after I  
3 done told him, then they took me downstairs and then this black  
4 guy looked at me. They he said, "I can tell, I don't like you."  
5 I shrugged my shoulders, told him, "Oh, well." And they put me  
6 in one of these cells.

7 STIDHAM: The black guy was a sheriff's deputy, or a police  
8 officer?

9 MISSKELLEY: He was a jailer. And then the next morning I woke  
10 up and that's when I saw that woman.

11 STIDHAM: That black woman that you don't remember her name?

12 MISSKELLEY: Nope.

13 STIDHAM: What'd she look like?

14 MISSKELLEY: She, she looked like she was kind of tall with  
15 long black hair.

16 WILKINS: What did you say to her?

17 MISSKELLEY: Can't remember. She didn't talk to me long.

18 STIDHAM: Did she represent you in court that day? Was she  
19 there with you when the judge...?

20 MISSKELLEY: ...I didn't see her.

21 STIDHAM: Did she tell you she was a lawyer?

22 MISSKELLEY: That's what they told me.

23 STIDHAM: Who's "they"?

24 MISSKELLEY: The, the guy that let me out of my, out of the  
25 cell.

1 STIDHAM: The guy that was in the cell with you?

2 MISSKELLEY: Huh-uh. I was in a cell by myself.

3 WILKINS: The, uh, the...

4 MISSKELLEY: ...the jailer.

5 WILKINS: Jailer. You said there was a lawyer talked to you  
6 (inaudible) what not?

7 MISSKELLEY: Yeah, he said a law, somebody wants to talk to you.  
8 And then when I walked out of my cell, I saw Jason sitting in a  
9 chair, had a, a blue shirt and kind of dark pants. And I saw  
10 Damien go out across the hall.

11 (End of tape.)

12 (WHEREUPON, the video was concluded; proceedings resumed in open  
13 court as follows, to-wit:)

14 THE COURT: Was that the end of it? Is that kind  
15 of like the Nixon tapes? Is that it?

16 MR. DAVIS: Since I have never seen the original  
17 and I just saw this, part of this just last night and  
18 never got that far, I don't know it ended prematurely  
19 or if that is the end.

20 THE WITNESS: Your Honor, if I may elaborate for  
21 purposes of the record, I, I think that somehow during  
22 the transmission from VHS to digital format, that  
23 there may be some parts of the interview that, that  
24 are missing.

25 THE COURT: Where is the VHS tape?

1           MR. ROSENZWEIG: We have the original, Your  
2 Honor.

3           THE COURT: Is it the same?

4           MR. ROSENZWEIG: I've not compared it, but we  
5 have the original.

6           THE WITNESS: There are gaps in this one, and  
7 then there wasn't any gaps in the original VHS tape,  
8 as I recall.

9           THE COURT: Well, you better take a look at it.

10          THE WITNESS: Since it appears that I will be  
11 making an appearance again in the morning, Your Honor,  
12 I will be happy to, uh, uh, review the VHS tape this  
13 evening and report, uh, back to the lawyers.

14          THE COURT: I'm going to let the lawyers do it.

15 CROSS-EXAMINATION, continuing:

16 Q] Dan, you've had an opportunity to listen to the video of  
17 December 10, '93, uh, made between yourself and Dr. Wilkins and  
18 also Jessie Misskelley?

19 A] Yes.

20 Q] Okay. And you heard him, you heard the description of  
21 Jessie Misskelley as to the circumstances that surrounded the  
22 taking of his statement and the polygraph exam, where it  
23 occurred, the details of that; you heard him describe that?

24 A] I did.

25 Q] Okay. Was it, I mean, did you find that lacking in details

1 and lacking in description of what had occurred?

2 A] I found it to be dramatically different than all of the  
3 other times that I had talked to him and didn't bother to record  
4 the, uh, interviews. Each time that I would talk to him, it  
5 would be different. And that's why I stated earlier that a lot  
6 of times it was almost as if I didn't have a client, because - -  
7 I made some notes, uh, there were a couple of times when I would  
8 say, "was it Ridge, or was it Gitchell that told you about the  
9 circle?"

10 And he would say, "Ridge."

11 And I would say, "Are you sure?"

12 And when he realized that that wasn't the answer that I was ask-  
13 ing for, he would quickly change his answer to an attempt to,  
14 uh, uh, comply with what he thought was the correct answer.  
15 And, and that goes to, uh, Mr. Misskelley's suggestibility,  
16 which we tried without success in introducing it in trial.

17 Q] And all of this stuff of the tape about the Flash Market  
18 and everything, that was a little ploy that Dr. Wilkins and  
19 yourself were using to try to concoct some sort of fabricated  
20 criminal act and accuse him of having done it, and to see what  
21 his reactions would be?

22 A] It was an experiment based on, uh, Dr. Gudjonsson's sug-  
23 gestibility scale that again, we attempted to try to introduce  
24 at the time of trial, and when it got to the point to where Mr.  
25 Misskelley got angry and walked out, there was a gap, uh, so

1 that's why I suspect that there may be a difference between the  
2 digital format and the VHS format, because my recollection of  
3 the events is that Mr. Misskelley came back in the room and, uh,  
4 uh, Dr. Wilkins and I, uh, proceeded to tell him that there was  
5 a video tape of the armed robbery, uh, that was taken by the  
6 security cameras. And, uh, he said, "Okay, I did it." And  
7 that's not on the DVD that we just watched.

8 Q] So that would have been the gap of the whole purpose of you  
9 being there, and that part of it is off the tape?

10 A] It appears to be. And sometimes when you - - these  
11 machines that they make that transfer tapes to digital, some-  
12 times they, they make skips and jumps and, uh, also this tape  
13 that I discovered last night in my vault, I noticed that when I  
14 put it in the tape recorder, the first part of the tape had  
15 deteriorated, uh, I guess just because of age, uh, it's been  
16 fifteen years, and uh, after it got past a certain part then you  
17 could understand it better and it wasn't near as staticy, so  
18 that's why I think that there is a discrepancy. Also, I clearly  
19 remember, and I was looking through the trial transcripts, uh,  
20 while the DVD was playing, uh, we attempted to introduce that,  
21 uh, experiment into evidence which, uh, I believe, uh, John  
22 Fogleman objected to and the Court sustained the motion, uh,  
23 stating that since Mr. Misskelley has not, hadn't testified,  
24 that it was hearsay, I believe was the Court's ruling. Uh, I  
25 haven't had a chance to finish reading the transcript, but we

1 did attempt to offer that as part of the suggestibility scale.  
2 Uh, but it's clear that Mr. Misskelley, as you, as everyone in  
3 the courtroom saw, uh, is, you can pretty much lead him anywhere  
4 you want to lead him as far as asking him questions and putting  
5 pressure on him.

6 Q] The Court can ascertain or determine whether it can easily  
7 be put into context; that would be decisions for the Court to  
8 make; right?

9 A] I guess you're right; yes, sir.

10 Q] Okay. On page 75 of the transcript, uh, there was a  
11 question of...

12 A] ...transcript of the trial?

13 Q] Let me take that back. On page 75 of the transcript of the  
14 hearing; do you still have a copy up there?

15 A] Of the hearing that...

16 Q] ...of the last time that you testified.

17 A] The last time I testified - - I think it's on counsel  
18 table. (Pause.) All right.

19 Q] And that page, uh, the page before it indicates, or two  
20 pages before it, that in October of '93...

21 A] ...page 73?

22 Q] Yes, sir. Down toward the bottom. It looks like October  
23 12<sup>th</sup>, there is an amended motion to suppress filed?

24 A] That's correct.

25 Q] And then there was a hearing held in January of '94 shortly

1 before the trial, on your amended motion to suppress; correct?

2 A] That's correct.

3 Q] And at the top of page 75, uh, it says: Question: "You  
4 didn't allege in that motion that there was a 2.3 violation;  
5 correct?"

6 And your testimony was, "No, I did not."

7 And the question was: "Was there a reason for that?"

8 And what was your response?

9 A] "Yes. We weren't aware of any 2.3 violations because Mr.  
10 Misskelley, despite his best efforts, was essentially unable to  
11 assist us in trying to figure out what had occurred that day."

12 Q] Okay. Let me stop you right there. Is what we were hear-  
13 ing on the tape when you are asking him, you and Dr. Wilkins,  
14 are asking him on this video tape what occurred on that day; do  
15 you not feel that the account that was rendered by Mr. Miss-  
16 kelley was an account that provided you facts and information  
17 from which you could make decisions as far as the defense was  
18 concerned?

19 A] Well, if you took just that account, uh, it might seem that  
20 way, but unfortunately, uh, every time I interviewed Mr. Miss-  
21 kelley, it was a different account. And, uh, there was an  
22 interesting linguistic analysis performed by a doctor whose name  
23 I can't remember...

24 Q] ...Dan, we might be here a long time if we go into that,  
25 but so your response would be that he gives - - that you

1 couldn't rely on that, because he might tell something different  
2 the next time?

3 A] The day before, he told me something different. The day  
4 before that, he told me something else. And, uh, uh, it wasn't  
5 until later, uh, when Dr. Ofshe interviewed Mr. Misskelley that,  
6 that, uh, we began to see what we thought was the real - - what,  
7 what happened in the, the interrogation room. And in fact, at  
8 the suppression hearing on January 18<sup>th</sup>, uh, in West Memphis, uh,  
9 Dr. Ofshe was permitted to be in the courtroom to hear the  
10 officers, uh, testimony regarding interrogations. And I had  
11 planned to call him as a witness at this suppression hearing  
12 and, uh, after the officers finished testifying, he came up to  
13 me and came to counsel table and said, "You can't put me on the  
14 stand."

15 And I said, "What do you mean I can't put you on the stand?  
16 That's why you're here."

17 And he said, "After listening to the officers' testimony, I  
18 realized that what I thought happened is different. I've got to  
19 go back and review my notes and I've go to go back and review my  
20 interview with Mr. Misskelley, because I can see things now  
21 clearly that I couldn't see when I only had Mr. Misskelley's  
22 version of the events."

23 Q] Well, that's helpful. So then the not putting Dr. Ofshe on  
24 at that particular time at that hearing was not something that  
25 was an oversight on your part; it was actually not only stra-

1 tegic, but at the request of your expert because he said if he  
2 got up there under those circumstances, he might not be able to  
3 help you?

4 A] He said he, he was not prepared to, to render an opinion,  
5 uh, based on the information. And, of course, I had asked Judge  
6 Burnett on two, maybe three occasions for permission to conduct  
7 the depositions of the officers so that I would know what they  
8 were going to say ahead of time, ahead of the suppression hear-  
9 ing, and those motions were denied. And, uh, although Judge  
10 Burnett ordered the officers to make themselves available to us,  
11 they, they didn't. And so at the suppression hearing on January  
12 18<sup>th</sup>, that was the first time that I or Dr. Ofshe were able to  
13 hear the officers' versions of what happened that day. And  
14 that's when we first became aware of the 2.3 issue.

15 Q] Now let me refer you to page 81?

16 A] All right.

17 Q] And on page 81 I believe Mr. Burt is asking you questions  
18 about the drafting of the order, uh, after the Court had ruled  
19 on your amended motion to suppress, and after you had filed in  
20 the post-hearing brief, and then on line 9, what response or  
21 what answer did you make to Mr. Burt's question? Would you read  
22 that for us, please?

23 A] Let's see. Uh, starting, uh, with line 9 my answer to his  
24 question, which I have to go back and read.

25 Q] Actually, it was an answer to a question of who had the

1 responsibility of drafting the order, and you said, "That would  
2 be me." And then you went on to elaborate?

3 A] Okay.

4 Q] And what did you say?

5 A] My response was "For what it's worth, Counselor, I don't  
6 know that it matters as far as this proceeding is concerned, but  
7 the prosecution never responded at all to our amended motion or  
8 brief, nor did they ask to re-open the record, with regard to  
9 that issue. I assumed that they had waived it."

10 Q] Okay. And the issue we are referring to is the 2.3 issue;  
11 right?

12 A] That's correct.

13 Q] Okay. Now I want to ask you this because you said that you  
14 were aware when you hear the testimony of Mike Allen, and what  
15 Mr. Misskelley has told you Jessie, Sr. and Jessie, Jr., and the  
16 testimony of Mike Allen, the reason you go to the trouble of  
17 filing the 30-page brief, post-hearing brief, was because you  
18 think this 2.3 issue is real significant; right?

19 A] Yes.

20 Q] Okay. And then I think the question Mr. Burt was asking  
21 you, "And you prepared the order and the order was like three  
22 quarters of a page, and isn't real specific"; correct?

23 A] Unfortunately, that's correct.

24 Q] Okay. Well, this, this information of line 9 through 13  
25 about the prosecution never responded at all to your amended

1 motion or brief, or did they ask to re-open the record with  
2 regard to that issue and you had assumed that it had been  
3 waived. Was one of the reasons that you didn't do an elaborate  
4 and specific order for the Court to sign as a precedent in this  
5 is that you were concerned - - it looks like you were alerted to  
6 the fact that if you did that, the prosecution might request and  
7 even ask to be allowed to re-open the evidence and put on  
8 testimony and evidence that could submarine or undermine that  
9 rule 2.3 decision which you thought was the cornerstone of your  
10 appellate case?

11 A] I assumed that upon receipt of our amended motion and set-  
12 ting forth the 2.3 argument that, uh, first of all, I assumed  
13 that there would be a response, uh, and second of all, I antici-  
14 pated that, that you and prosecutor Fogleman would probably want  
15 to re-open the record and ask, uh, Officer Allen, uh, specific  
16 questions about that and, uh, His Honor ruled on the issue, I  
17 believe, on the next day. I think he gave us twenty-four hours  
18 to submit our brief, uh, it may have been forty-eight hours.

19 Q] But the reason you think you assumed we would respond, and  
20 "assumed" means assumed we would ask to put on additional testi-  
21 mony was because you thought you had us dead to right based on  
22 what had been introduced at that point; correct?

23 A] The officer said he didn't, uh, tell Mr. Misskelley that he  
24 was under no obligation to accompany him to the police station.

25 Q] Okay. So it would have to be one of two things: either

1 the prosecutors are as dumb as dirt, stupid, didn't realize what  
2 they were facing, which is certainly possible; or it was a  
3 scenario where it had slid right under the radar. The  
4 prosecutors weren't aware that you had this, this situation  
5 which gave you a very good issue on appeal, and you didn't want  
6 to overemphasize it by putting it in great detail in an order;  
7 correct?

8 A] Actually, when I drafted the order, I thought I was pre-  
9 serving the issue.

10 Q] Sure. But in the most discreet fashion possible without  
11 putting a neon sign up and saying "we've got the prosecutor  
12 painted in a box on this 2.3 issue," you did it in what you  
13 thought covered your case but in a discrete fashion so it  
14 wouldn't cause the prosecutor to re-open the record?

15 A] No, actually, uh, I can't recall the exact language of the  
16 order - - one of you may have a copy of it - - but I, I  
17 specifically, when I drafted the order, the language that I put  
18 in there is that, uh, the Court, Judge Burnett called me at my  
19 home on Sunday, the Sunday following the suppression hearing  
20 which I believe was on a Friday, and he said, "Dan, I'm," uh, he  
21 said, "it was a good brief and may very well get me reversed on  
22 appeal, but I'm denying the motion; draft an order." And I did  
23 and in the order, I believe, I don't have it in front of me, but  
24 I believe the order sets forth that in denying the motion, the  
25 Court considered, uh, the amended, uh, brief and motion. And,

1 and I, I thought that I had preserved the issue. I didn't, I  
2 wasn't trying to bury it or, or, or put a neon sign on it. I  
3 just assumed that, uh, that if Judge Burnett considered it,  
4 that, uh, the Arkansas Supreme Court, uh, would consider it as  
5 well. I had no idea that they were going to say that, uh, that  
6 I didn't raise the issue in a timely fashion. I was stunned  
7 when, when the Supreme Court said that.

8 Q] Okay. But did you recognize at the time that if you put,  
9 specifically referred to 2.3 in the order that that would give  
10 the prosecutor an opportunity to request a judge to allow them  
11 to re-open that issue for additional testimony, presentation of  
12 additional evidence that might have a negative effect on your  
13 appellate position?

14 A] No, Counselor, actually, I thought by sending you a copy of  
15 my 30-page brief that, that you would be acutely aware of, of  
16 the 2.3 issue that I was raising. And I don't mean that in a,  
17 a, I'm not trying to be a smart-aleck, I'm just saying I, I  
18 assumed you, you knew what I was arguing because, uh, it was,  
19 was very extensive, uh, I thought we briefed the issue and  
20 argued it quite extensively.

21 THE COURT: Who wrote the brief?

22 THE WITNESS: I have to give Mr. Crow most of the  
23 credit for that. He, he was the brains of the outfit.

24 THE COURT: I thought that he did.

25 CROSS-EXAMINATION, continuing:

1 Q] Dan, this case, originally, from testifying, the reason you  
2 started out is your client is charged with three counts of  
3 capital murder. What ultimately was he convicted of?

4 A] Mr. Misskelley was convicted of one count of first-degree  
5 murder and two counts of second-degree murder.

6 Q] All right. And would you agree that in terms of results or  
7 of the ultimate sentence, that he came out in better shape of  
8 any of the other two?

9 A] No, that's a, that's a, that depends on your point of view;  
10 I mean, yeah, he wasn't convicted of capital murder and he  
11 didn't, uh, we didn't have to worry about facing the death  
12 penalty, uh, when it came time for sentencing, but, but, uh,  
13 life plus forty has virtually the same effect as the death  
14 penalty, uh, I haven't been able to logically wrap my mind  
15 around how Mr. Misskelley will serve his life sentence and be  
16 resurrected to serve an additional forty, uh, so I don't  
17 consider it a victory.

18 Q] I didn't ask whether you considered it a victory. I asked,  
19 do you think that his sentence that he received was he ended up  
20 with the best results sentence-wise as any of the three defend-  
21 ants? Yes, or no.

22 A] Yes or no answer; the answer would be yes.

23 Q] Okay. And tell us, an in this situation since - - he was  
24 acquitted of capital murder, of all three charges; right?

25 A] That's correct.

1 Q] Okay. What is the difference between a trial, the presen-  
2 tation and the procedure of the trial where a person is charged  
3 with three counts of capital murder and acquitted of all three  
4 counts in a trial where a person who is charged with first-  
5 degree murder or a non-capital form of homicide; what's the  
6 difference?

7 A] I'm not sure I understand?

8 Q] What happened differently at this trial as a result of it  
9 being a capital case as far as procedurally than if it had been  
10 originally charged as first-degree murder, second-degree murder  
11 or manslaughter?

12 A] If I'm following, do you mean by your question, of course,  
13 we had to death qualify the jury.

14 Q] Well, other than jury selection and a death qualified jury,  
15 what difference was there procedurally in this trial as to any  
16 other homicide offense, uh, that was non-capital?

17 A] Other than the penalty, uh, nothing.

18 Q] No, I mean, tell me how the penalty phase in this trial  
19 differed from any other first-degree, second-degree, or man-  
20 slaughter conviction under the laws of the State of Arkansas?

21 A] I, I'm sorry. I'm not trying to be coy. I just don't un-  
22 derstand what you're trying to ask. If you would rephrase the  
23 question, please?

24 Q] What would, if Jessie Misskelley had been charged with  
25 three counts of first-degree murder and he was convicted on

1 three counts of first-degree murder, how would the sentencing in  
2 that case have differed in the way the sentencing proceeded in  
3 his case, as far as the procedure that applied?

4 A] The procedure would have been the same.

5 Q] Okay. Is there anything procedurally about how this case  
6 was handled by the Defense, other than the jury selection that  
7 was different in this case than it, as, as far as the presenta-  
8 tion at trial, than if it had been charged as a non-capital  
9 offense?

10 A] Other than the mitigation issues, uh, and sentencing, the  
11 sentencing phase, I don't see that there would be any difference  
12 procedurally.

13 Q] Okay. And when we talked about mitigation in a capital  
14 offense, someone convicted of capital murder, at the penalty  
15 phase there is specifically mitigation evidence that can be  
16 offered, because there is a particular instruction that requires  
17 the jury to consider mitigation; right?

18 A] At that point in time the law was kind of brand new on that  
19 issue; bifurcated trials were kind of brand new, and I recall we  
20 had a discussion, uh, at the conclusion of the trial informing  
21 us to exactly how we needed to do that, because there was some  
22 uncertainty.

23 Q] Do you know what the law in capital murder, and, and how  
24 jury instructions in capital murder cases are done now and how  
25 first-degree murder cases and how jury instructions and

1 sentencing is done now?

2 A] No, I don't.

3 Q] Okay. Would it surprise you to find out they're the same  
4 now as it was back then?

5 A] No, it wouldn't surprise me at all.

6 Q] Okay?

7 A] I just haven't, uh, I was elected judge, uh, in 2000 and I  
8 haven't been involved in a criminal case in over eight years,  
9 other than on the bench, uh, in district court, but we obviously  
10 don't deal with capital cases in district court.

11 Q] Are you familiar with the terms "aggravating factors" and  
12 "mitigating factors"?

13 A] Certainly.

14 Q] Okay. And what kind of cases do you have instructions that  
15 talk specifically in terms of aggravating and mitigating  
16 factors?

17 A] Uh, homicide cases, uh, and, uh, I suppose, uh, again, it's  
18 been a long time since I've done any felony criminal work, but,  
19 uh, I think there's probably also some aggravating, mitigating  
20 circumstances with regard to, uh, class Y felony such as rape  
21 and, uh, uh, again, it's been a long time.

22 Q] So your understanding of the law is that there are  
23 instructions regarding evidence and jury's findings regarding  
24 mitigation, even in non-capital cases?

25 A] I don't know.

1 Q] Would it surprise you to find out that mitigation evidence  
2 and mitigation instructions are unique to capital cases?

3 A] No, it wouldn't surprise me at all.

4 Q] Okay. And would that have an effect on your, as far as the  
5 Defense not putting on mitigation in this case, there was no  
6 mitigation instructions from a capital standpoint that there  
7 needed to be proof to address; correct?

8 A] Since we were fortunate enough to avoid the death penalty,  
9 we didn't have to deal with that issue.

10 Q] So if you, if there was error or neglect or failure on the  
11 part of the defendant to put on evidence of mitigation, it was a  
12 different - - without the death penalty being involved and  
13 without the jury making a decision on that issue, it was a  
14 different scenario, it wasn't as important; correct?

15 A] It wasn't as important in the sense that Mr. Misskelley was  
16 not facing the death penalty, but it was certainly important in  
17 the sense that, uh, uh, the jury, uh, in the bifurcated system,  
18 uh, should have heard, uh, evidence regarding, uh, uh, potential  
19 punishments and, uh, the whys and how comes and, and  
20 unfortunately, Mr. Crow and I just were not prepared to deal  
21 with that at all.

22 Q] Well, what evidence are you talking about that you should  
23 have presented?

24 A] Uh, well, of course, it's always difficult, uh, as a lawyer  
25 to stand in front of a jury after your client's been convicted

1 of something that you truly in your heart believe that he didn't  
2 do, uh, and make any type of argument, uh, that, uh, makes  
3 reference to the fact that, that he's guilty but, uh, the fact  
4 that Mr. Misskelley was mentally handicapped, uh, the fact that,  
5 uh, that he was abandoned by his mother, uh, his natural mother,  
6 uh, at age four, uh, had been, uh, previously diagnosed as being  
7 mentally retarded, uh, grew up in a fractured home, uh, things  
8 of that nature. I think that that could have made a big  
9 difference, uh, uh, in the outcome. And we just, we weren't  
10 prepared for that. I thank the good Lord, uh, every night that,  
11 uh, we weren't, uh, having to deal with those issues in the  
12 context of, uh, the death penalty.

13 Q] But the fact of the matter is, you weren't having to deal  
14 with that context?

15 A] No, you're absolutely right.

16 Q] And the agreement was that Mr. Crow would handle the  
17 penalty phase; correct?

18 A] That was our agreement.

19 Q] And that was based on a strategic theory that it would be  
20 better for him to handle it, number one, he was more familiar  
21 with the psychological information on Mr. Misskelley; is that  
22 right?

23 A] I wouldn't say that. Uh, uh, I think he did, uh, do the  
24 direct examination on Mr. Wilkins - - or Dr. Wilkins, uh, but,  
25 but, uh, it was primarily decided that he would do that, uh,

1 just because I was so devastated at the end of the trial.

2 Q] Well, if he mentioned and did you discuss at any time the  
3 strategy that if you do a penalty phase at the trial, which  
4 means obviously they haven't bought your first line of defense,  
5 that it would be better for him to do the penalty phase because  
6 you might have lost some degree of credibility by having argued  
7 that your client was not guilty on the front end?

8 A] Certainly, that was an issue that, uh, uh, we discussed,  
9 and also, it was a psychological issue, as far as I was  
10 concerned because again, I was so devastated by the verdict, uh,  
11 uh, I thought we had a legitimate shot at, at winning the case  
12 and, and, uh, he and I decided that it would be better for him  
13 to handle it - - at, at what stage in the trial we made that  
14 determination, I don't know.

15 Q] Was that a strategic decision?

16 A] I think it was just a, uh, I'm-going-to-do-this-and-you're-  
17 going-to-do-that kind of decision. I don't know if you can  
18 categorize that as strategy or not, uh, uh, I guess it depends  
19 on your point of view.

20 THE COURT: What would you call it?

21 THE WITNESS: Uh, we decided that he would do it  
22 and, uh, uh, and that I would concentrate on, on, uh,  
23 the closing arguments and prepare the closing argument  
24 and, uh, that while I was doing that, uh, he would be  
25 working on, uh, the mitigation issues.

1 But the problem is he and I never sat down and  
2 actually strategized, for lack of a better word,  
3 exactly how we were going to do it.

4 THE COURT: What about a course of action?

5 THE WITNESS: I guess that would be a fair  
6 assumption, or a fair assertion, I should say.

7 THE COURT: Well, let me ask you: Didn't Dr.  
8 Wilkins give the background on Mr. Misskelley to the  
9 jury about his IQ and his history?

10 THE WITNESS: He did, uh, Your Honor.

11 THE COURT: Well, all of those issues were before  
12 the jury and available for argument, were they not?

13 THE WITNESS: And we failed miserably to address  
14 those issues during the penalty phase.

15 THE COURT: But the jury was aware of them?

16 THE WITNESS: I suppose.

17 THE COURT: Well, do you think that didn't have  
18 anything to do with the jury finding him not guilty of  
19 capital murder and giving him a lesser conviction, the  
20 fact that they knew his mental conditions, or was it  
21 just your good legal work?

22 THE WITNESS: I think that it was a classic case  
23 of, uh, the jury - - and, and I've learned since the  
24 trial was over that the initial vote in the jury room,  
25 uh, was eight to four.

1           THE COURT: How did you learn this?

2           THE WITNESS: Uh, strangely, uh, one of my  
3 students at ASU last semester approached me after  
4 class one evening and handed me, uh, uh, the jury  
5 foreman's notes; his uncle was the jury foreman and,  
6 uh, he told me that, uh, we had, uh - - I'm sorry. I  
7 said it was eight to four. It was seven to five, uh,  
8 we had five votes for acquittal.

9           THE COURT: You must have done a bang-up job,  
10 then.

11           THE WITNESS: Uh, I think it was a classic case,  
12 Your Honor, of, of, uh, uh, the seven wearing down the  
13 five and the five saying "we'll vote guilty, but we  
14 won't let you impose the death penalty, because we're  
15 not sure."

16           But that's just speculation on my part.

17           THE COURT: It sounds like good lawyering,  
18 doesn't it?

19           THE WITNESS: Well, again, my client's serving  
20 life plus forty for a crime I don't think he commit-  
21 ted, uh, but I, I've never felt that it was a victory.

22           THE COURT: Go ahead.

23 CROSS-EXAMINATION, continuing:

24 Q] Let me ask you this question, Dan: An attorney's belief as  
25 to whether their client is guilty, or whether their client is

1 innocent, or whether they're undecided on that issue, shouldn't  
2 affect how they represent that particular client?

3 A] I agree with that.

4 Q] Okay. And in this particular case you represented your  
5 client just as vigorously - - maybe from a different position or  
6 with a different strategy - - but you represented him just as  
7 vigorously from the time you were appointed in June until the  
8 time you had a change in your strategy on September 24<sup>th</sup>;  
9 correct?

10 A] I, I did the best I could with, uh, the resources and the  
11 experience that I had.

12 Q] Okay. And let me ask you one question: There was a, uh,  
13 have you got your billing records up there?

14 A] Yes, sir, somewhere. Well, I said I did, but I don't see  
15 them now. (Pause.) All right.

16 Q] Okay. Is there, I note in here that there is a call, .25  
17 hours were billed for a call to the Capital Defense - - I'm  
18 trying to find what page it's on - - The Capital Defense Center  
19 in Little Rock?

20 A] I don't remember the date, either, but I remember the call.

21 Q] Did you call them more than once?

22 A] No, uh, I called them once and they told me that all they  
23 had was a desk and an office and a figurehead who was receiving  
24 a state salary and, uh, that they couldn't help us. The Legis-  
25 lature hadn't appropriated the funds, uh, for them to assist us

1 in any way, which I found shocking but, uh, I think it was Didi  
2 Sallings who was the, was the "figurehead" who was that person,  
3 which she apologized and said that there was nothing that she  
4 could do to help us. I thought that's why she was there and why  
5 they had an office and a phone number and, and she said "there's  
6 just nothing we can do."

7 Q] Did you personally discuss with her, uh, the ability to  
8 help you with research, the ability to help you with jury  
9 instructions; the ability to help you with issues regarding  
10 capital defense?

11 A] Yes. I asked her for everything I could get.

12 Q] Was this in the phone conversation?

13 A] Uh, again, it wasn't a very long phone conversation, be-  
14 cause she told me she couldn't help me.

15 Q] Were you aware that she had like fifteen capital murder  
16 trials under her belt as of that time?

17 A] I didn't ask her and I didn't know her. I didn't know her  
18 from Adam.

19 Q] Okay. Well, do you remember that there was a hearing, I  
20 believe on September 27<sup>th</sup>, uh, wherein the discussion was whether  
21 there was actually a hearing held to determine if there were  
22 going to be fees paid by the State or by the counties?

23 A] Yeah, the wound in my back, you know, where she stabbed me  
24 is still, uh, painful.

25 Q] What does that mean?

1 A] It means she came in and cut our throats and said that, uh,  
2 uh, our time, uh, was invaluable and that we shouldn't be paid,  
3 uh, for our services.

4 Q] Well, but the truth of the matter is you really, the money,  
5 your concern at that hearing, and all proceedings, was for your  
6 client, not about getting paid; right?

7 A] Uh, I was always concerned about my client, uh, I, I set  
8 aside, uh, a substantial period of time, uh, to represent Mr.  
9 Misskelly, that I didn't practice any other law. And so, uh, it  
10 took a while for it to hit, but the next year in '94, uh, it, it  
11 put a substantial burden on us. And of course, then there was  
12 this protracted fight between the County and the State to see  
13 who would pay us and, uh, I ended up getting about nineteen  
14 dollars per hour for, for all of the time that I had put in the  
15 case.

16 Q] Well, on page 39 of the trial transcript when the Court  
17 announces it's getting ready to address the motion for a hearing  
18 on who's going to pay the fees, Mr. Ford announces: "That's  
19 correct, Your Honor," and Mr. Stidham is quoted as saying: "The  
20 only comment I would like to make for the record is that this is  
21 the least of my concerns. My concern is for my client."  
22 Does that sound like something you said at the hearing?

23 A] I remember saying it; yes, sir.

24 Q] Okay. And so you were present for that?

25 A] Uh-huh.

1 Q] Okay. And so did you hear Didi Sallings, who was actually  
2 the head of the Public Defenders commission at that time,  
3 effective earlier that summer, testify?

4 A] Yes, I did; with great dismay.

5 Q] Did you ever - - did you contact her after that and try to  
6 obtain her assistance?

7 A] About getting paid?

8 Q] No, provide assisting you with representation of your  
9 client in the capital case?

10 A] On the direct appeal, do you mean?

11 Q] No, on the assisting with issues involved in representing  
12 your client at trial?

13 A] I think I may have misunderstood your earlier question.  
14 Uh, my issue with her was when she came to testify after the  
15 trials were over about what our rate of compensation should be.

16 Q] Okay. This is a trial that was held...

17 THE COURT: ...a hearing.

18 MR. DAVIS: A hearing; not a trial.

19 CROSS-EXAMINATION, continuing:

20 Q] On September 27, 1993 at Marion, which would have been  
21 about the same time you had your epiphany about how you were  
22 going to change your strategy?

23 A] I believe Mr. Ford had filed a motion asking for the Court  
24 to consider the possibility of awarding fees as we went, as  
25 opposed to waiting until the end.

1 Q] But do you remember being there when Ms., when the comment  
2 that I read earlier, you acknowledge that you made it; right?

3 A] Yes, sir. I did make it.

4 Q] Do you remember being there when Ms. Sallings testified?

5 A] I don't remember her being there that day. I remember her  
6 being in Paragould the day, uh, that she testified, uh, and the  
7 judge had awarded our fees. I don't remember her being there in  
8 September.

9 Q] Would you agree at that time that Ms. Sallings was about as  
10 experienced in the defense of capital murder cases as anybody in  
11 the State of Arkansas?

12 A] I don't have enough information to have an opinion one way  
13 or the other. I'm not familiar with her in that regard.

14 Q] Okay. And the testimony in that hearing reflects that she  
15 has represented fifteen defendants to trial in capital murder  
16 cases. Do you believe that that represented someone who was at  
17 least in the upper echelons with experienced trial attorneys in  
18 that area?

19 A] Sure. I mean, yes, I think that's a fair number, uh, of  
20 capital cases.

21 Q] And in her testimony on page 47 of the transcript, she  
22 stated in a death case: "I would not feel comfortable delegating  
23 the responsibility of investigating and working at mitigation to  
24 anyone else. So, no, I did it all myself, and I think that's  
25 essential." And she said that in response to a question: "In

1 the number of hours that you indicated that you worked preparing  
2 a case for trial did you have someone in your, who worked at the  
3 public defender's office or the other organizations you  
4 mentioned that did investigative work and background work?" And  
5 she said, "At the death penalty resource center we had an in-  
6 vestigator at the public defender's office, we had an investiga-  
7 tor who essentially is a subpoena server. In a death penalty  
8 case I would not feel comfortable in delegating that  
9 responsibility."

10 Would you agree with that?

11 A] When did she say this?

12 Q] In September of 1993 at a hearing in which you were present  
13 and involving this case?

14 A] I would think that, uh, first of all, I, I honestly don't  
15 recall her being there, number one. Number two, I, I don't  
16 recall her saying that or anyone saying that.

17 Q] Do you want me to show you where it's referenced?

18 A] Oh, I'm not, I'm not disagreeing with the record. I'm just  
19 saying I don't recall it. But, but, uh, it's, it's standard,  
20 uh, most, uh, capital defense lawyers, uh, it's commonplace for  
21 them to use, uh, investigators and psychologists, psychiatrists,  
22 and, and others to, uh, help prepare, uh, for mitigation. And  
23 your question may have been investigation, not mitigation. I'm  
24 not, I want to make sure that we're on the same page.

25 Q] There was also a question asked of her on page 47 by Ms.

1 Harberg, who I believe is out of the Attorney General's office,  
2 says: "You said that your office would be available to serve as  
3 a resource. Could you expand on what you mean by that?"

4 And Ms. Sallings' response was: "As far as my knowledge, doing  
5 research, helping work up mitigation, helping work up  
6 instructions, short of coming and actually trying, and if we can  
7 help in any way. But that doesn't include help in preparing  
8 motions."

9 The Court then interjected and said, "I don't think they need  
10 any help on motions."

11 And the witness said: "As far as working out voir dire questions  
12 and making sure the record is preserved for purposes of appeal.  
13 When it gets to that, we will be available for that."

14 Do you recall hearing that testimony?

15 A] And this was in September of '93?

16 Q] September 27<sup>th</sup>, the same day these other hearings occurred  
17 that you said Mr. - - you testified earlier it was the that Mr.  
18 Fogleman talked to you?

19 A] All I know is when I called her early on and, uh, again, I  
20 can take the time to go through my billing records; she said  
21 that she could not offer me any assistance whatsoever. And I  
22 took her at her word.

23 Q] The part about where she said that investigative, she pre-  
24 ferred to investigate things herself because she didn't trust  
25 other people doing it; did you hold that same viewpoint your-

1 self, that if at all possible, you would prefer to do your own  
2 investigations?

3 A] In, in a case of this magnitude with the amount of  
4 discovery and the number of witnesses, uh, I don't know how any  
5 reasonable attorney could possibly do that on their own. I had  
6 that opinion then and I have that opinion now, uh, I didn't have  
7 an investigator. Uh, Mr. Lax did provide us with some assist-  
8 ance, uh, later on, uh, as the case got closer to trial but, uh,  
9 uh, I don't know what fifteen capital-murder cases Ms. Sallings  
10 tried but, uh, I would venture to guess that they weren't nearly  
11 as complicated as this one; probably combined.

12 Q] On page 155 of the transcript of the hearing in response to  
13 Mr. Burt's question and the question begins on page 154 and it's  
14 inquiring about whether you could have gone to court and asked  
15 for investigators and it ends and it says "I don't have the time  
16 or the resources to do it myself; this is a capital case; *Ake*  
17 *vs. Oklahoma*, I need these funds; please grant them. What would  
18 have prevented you from doing that?" And on page 155 you said,  
19 "I wanted to do it myself"; which indicates to me that you  
20 basically took the same view that Ms. Sallings took?

21 A] Are you talking about my testimony on September 29<sup>th</sup>?

22 Q] I'm talking about at the bottom of page 154 and the top of  
23 page 155, which was in your testimony at the hearing that we had  
24 on September 29<sup>th</sup>?

25 A] Okay. (Witness examining same.) My answer at the top of

1 page 155 is "I wanted to do it myself."

2 Q] Doesn't that indicate - - wasn't that response to indicate  
3 that you felt just like Ms. Sallings did?

4 A] If I could have had an investigator or the assistance of  
5 experts who were not controlled by the State Crime Lab or the  
6 State Hospital, someone who, uh, like the system is set up now,  
7 uh, who answer only to the public defenders or the Death Penalty  
8 Resource Center, then, then, uh, yeah, I would have loved to  
9 have the help. But at the time in 1993, I, I, I wanted to do it  
10 by myself because I didn't trust, uh, uh, the system, uh, to  
11 provide me with, with that kind of help that I needed.

12 Q] And your decision to do your investigation was because you  
13 wanted to do it yourself; right?

14 A] I didn't, I didn't have any choice.

15 Q] That's what you said under oath. I just, uh, you didn't  
16 lie when you said that, did you?

17 A] No, I didn't lie. I think that, I think that you've got to  
18 take it into context of the way the question was asked, and Mr.  
19 Burt, uh, asked the question, uh, in, in regards to the ABA  
20 standards, and, and, uh, you know, why didn't I make application  
21 for funds, and my response, and I'm looking for the answer, but  
22 I think my response was something to the effect just like it was  
23 when I testified in the Echols' Rule 37 hearing some eight or  
24 ten years ago, uh, I didn't want to lay my cards on the table.  
25 And, and I felt like if I were to, uh, apply to the court for

1 funds for an investigator or a psychologist or a forensic  
2 psychiatrist, a profiler or something to that extent, that I  
3 would have essentially been tipping my hat to the prosecution to  
4 that and, uh, I didn't feel like there was a mechanism for me to  
5 be able to do that.

6 Q] Well, as I understand it, when it came to hiring investiga-  
7 tors and things of that nature, your strategy was you didn't  
8 want to tip your hand, but when it comes to holding back and not  
9 putting on experts that have acquired information which the  
10 State isn't aware of, that wasn't strategic - - that was just a  
11 dumb move on your part?

12 A] Well, I don't think it was a dumb move on my part. I was  
13 able to secure the services of several experts, uh, who I think  
14 were tops in their field.

15 Q] Well, you would pick them again today, wouldn't you? If  
16 you had a chance to pick Holmes and Ofshe and get them for what  
17 you paid for them or get them for any price, you'd go with them  
18 right now, wouldn't you?

19 A] Well, free is hard to beat, uh, as far as the price.

20 Q] If you had unlimited funds, would you pick two different  
21 people?

22 A] I think if I had a, a blank check and, uh, I think I would  
23 still, uh, want both of those individuals, but I would also  
24 want, uh, uh, uh, someone like, uh, Dr. Gudjonsson, uh, who was  
25 the pioneer; Dr. Richard Leo, uh, who has also, uh, worked ex-

1 tensively in the area of false confessions; uh, I would have  
2 wanted a forensic entomologist; I would have wanted a profiler;  
3 I would have wanted, uh, I had a, I had a very large wish-list,  
4 I just didn't have enough room on my credit card to, to get it  
5 done.

6 Q] Now, Mr. Stidham, again, I'm going to ask you to listen - -  
7 you've bounced back and forth a little bit - - but on page 44 of  
8 that hearing that occurred on September 27<sup>th</sup> where Ms. Sallings  
9 testified?

10 A] September 27, 1993?

11 Q] '93. The hearing where you made the statement "my only  
12 interest is my client. I don't care about the rest of this"  
13 when she testified regarding the fees and she has testified at  
14 the top of the page that she's actually been involved in twenty  
15 death cases throughout the State of Arkansas in the capacity as  
16 Arkansas Death Penalty Resource Center. And Ms. Harberg asked  
17 the question at line 10: "Tell me, what type of involvement,  
18 preparation and investigation it takes for a capital case?"  
19 And she says: "A lot of it depends on the complexity, obviously,  
20 of the case. I would say a person like myself who has tried a  
21 lot of cases, would require perhaps less time to prepare for a  
22 case. A person who has never tried a case is going to have to  
23 do a lot of research and background and investigation and that  
24 sort of thing, just on issues, just to narrow down the issues.  
25 In my experiences, the cases I tried, the more complex cases, I

1 would say I spend eight hundred to a thousand hours working up  
2 the case and that's including all the way through trial." She  
3 further says: "In a local case, it's my understanding in this  
4 case, the witnesses are local, the victims are local, you're not  
5 going to have as much travel time finding your witnesses, so I  
6 would say your hours might be less."

7 Now how many hours did she say she put in this? I can hand you  
8 the transcript and you can read it.

9 A] She said that? I wish I could remember. I, I don't  
10 remember what I had for breakfast yesterday.

11 Q] Here it is right here.

12 A] This is not the hearing we had in Paragould; this is a  
13 hearing that we had before the trials?

14 Q] On September 27 - - the transcript says September 27, 1993.

15 A] On whose motion?

16 THE COURT: She had been appointed public  
17 defender, the director of the Public Defender system  
18 in July, I believe, of that year.

19 THE WITNESS: July 1<sup>st</sup>.

20 MR. DAVIS: After leaving the Capital Conflicts  
21 office.

22 THE COURT: And the issue that was involved in  
23 hearing was just how, uh, what the mechanics were for  
24 y'all getting paid and what was available for investi-  
25 gative help.

1           The statute provided for up to one thousand  
2           dollars prior to that and after that, it changed.

3           THE WITNESS: I recall that and Your Honor de-  
4           cided that *Blair* case out of Independence County.

5           THE COURT: Yes, I'm the one that said lawyers  
6           ought to be paid for their time; not in just one case,  
7           but in two.

8 CROSS-EXAMINATION, continuing:

9 A] Well, in Crittenden County I guess you could say this case  
10 was local and the witnesses were local, but I wasn't. I was  
11 probably further away geographically than, than any of the other  
12 lawyers appointed to the case, so I had a lot of travel time  
13 involved, uh, I was not familiar with Crittenden County, had,  
14 had been over there maybe one or two times in the course of my  
15 law practice at that time, uh, I think I'd have to look at my  
16 billing records, but I think I had about two thousand hours in  
17 the case.

18 Q] It was double what she says in what she would require to  
19 prepare in a case, uh, a complex capital murder, which she said  
20 she had twenty cases under her belt; right?

21 A] Again, I don't know what cases she's tried but, uh, I don't  
22 know of any case more complex than this one, uh, in the State of  
23 Arkansas. There probably are.

24 Q] Based on that standard, wouldn't you say the time and  
25 effort you were allotted in this case far exceeded anything that

1 she described as necessary to adequately represent someone in a  
2 capital murder case?

3 A] If Ms. Sallings told me, uh, the sky was blue, I would run  
4 outside to, uh, make sure, because I wouldn't believe her.

5 Q] Do you think - - let me strike that.

6 A] And I can tell you a story about, uh, Judge Fogleman  
7 appointing me to represent an indigent person in a Rule 37 case,  
8 uh, I submitted a bill, uh, sent it to her for her approval in  
9 Little Rock; she sent it back saying that I wasn't asking for  
10 enough money, uh, that I needed to ask for more. So I submitted  
11 a new bill to Judge Fogleman; he granted my petition and then  
12 she refused to pay me.

13 Q] Before you go any further, do you know what that has to do  
14 with the price of eggs in China?

15 A] Well, you asked me if I would believe anything she said,  
16 and I wouldn't.

17 Q] Okay. Her qualifications as having served and represented  
18 defense counsel or defendants and twenty capital murder cases of  
19 which fifteen went to trial, do you think that qualifies her  
20 also as head of the public defender's commission and head of the  
21 Capital Case Resource Center, do you think that qualifies her to  
22 express an expert opinion regarding the amount of time required  
23 to represent someone in a capital murder case?

24 A] I suppose I couldn't argue with that.

25 Q] Do you think she's in a better position to gauge that than

1 you are, based on your experience?

2 A] Uh, my experience with capital, uh, cases and trying  
3 capital cases is limited to this one.

4 Q] Now there was talk and testimony, and I think we've heard -  
5 - there were questions asked on this tape about the lady who  
6 came and talked - - what the defendant said about some lady who  
7 talked to him at the jail the night he was arrested or the  
8 morning after he was arrested; do you recall that?

9 A] I do recall that.

10 Q] Okay. And you previously testified here back a few weeks  
11 ago and said that there were two incidences where the defendant  
12 had recanted his confession, uh, that had you been on your toes  
13 or whatever, they couldn't have been admissible; right?

14 A] That's my understanding of the law; yes.

15 Q] Okay?

16 A] It wasn't my understanding of the law at the time; I had an  
17 incorrect understanding of the law and, uh, uh, I did try to  
18 find this alleged public defender, uh, in Crittenden County and  
19 she denied having ever spoken to Mr. Misskelley.

20 Q] Okay. And of course, even though you said you never could  
21 put any credibility in what Mr. Misskelley said, you never could  
22 trust him to say the same thing from one time to the next, you  
23 know that to be true, and she must be mistaken; right?

24 A] I'm just saying that, uh, uh, every time that I would talk  
25 to Mr. Misskelley, uh, the facts would change, the script would

1 change.

2 Q] I guess what I'm asking is, if it's something that he tells  
3 you that is beneficial, that you perceive as beneficial to him,  
4 you take it as gospel. But if it's something he tells you  
5 that's incriminating to him, it's something that's confusing,  
6 uh, it's incorrect and wrong, it's the result of some improper  
7 coercion or pressure; is that pretty accurate?

8 A] Well, with all due respect, Counselor, I, I, at this exact  
9 moment in time I remember the testimony of Gary Gitchell when I  
10 asked him at trial, uh, how could he account for Mr. Miss-  
11 kelley's getting the time of death, uh, the time of the murders,  
12 the brown rope, uh, assaulting with the sticks and all of that  
13 stuff wrong, and his response to me was "Jessie just, uh, uh,  
14 was mistaken." And so I guess we can all, uh, take that point  
15 of view. I would have loved to have played that tape, uh, that  
16 we just watched to the jury in Corning, uh, I would have loved  
17 for them to have seen that. And I asked that it be introduced  
18 along with, uh, the results of the polygraph, uh, pursuant to  
19 *Patrick v. State; Rock v. Arkansas*, but, uh, it didn't happen.

20 Q] And you think that tape represents that the defendant is  
21 not competent to stand trial, based on his ability to relate  
22 facts and to assist his attorney?

23 A] In the context of it in a vacuum, no. But if you take it  
24 in the context with all of his other statements that he has  
25 given, including statements that he has given to you, uh, uh,

1 statements that he has given to me, statements that he has given  
2 to the police, uh, they're all, they're all over the board. So  
3 I guess the answer, to answer your question, we, we all have to,  
4 uh, decide what we want to believe. My, my overriding goal in  
5 this case for the last fifteen years has been the truth and, uh,  
6 when you have a client who, uh, is mentally handicapped, some-  
7 times it's hard to, to get to the truth. And when you can't  
8 even conduct the deposition of a police officer who interrogated  
9 your client, whereas if I was in a civil case suing someone I  
10 could get their deposition under oath...

11 Q] ...well, you made your motion on that and the Court ruled  
12 on it and you disagreed with it; correct?

13 A] I still do.

14 Q] Let me ask you this question: You put on a witness -- the  
15 first witness you put on was Stephanie Dollar?

16 A] I believe that's correct.

17 Q] Why'd you put her on?

18 A] I believe she was an alibi witness.

19 Q] All right. Was that a strategy?

20 A] Uh, our strategy was Mr...

21 Q] ...I mean, if you could, we might be here this time in  
22 December. I asked was it a strategy? I think that was a  
23 question that could be responded to with a yes or no?

24 A] Alibi was our defense.

25 Q] Okay. Was this a strategic move to support your defense of

1 alibi?

2 A] Are you talking about putting her on first, or are you  
3 talking about putting her on at all?

4 Q] I don't care. First - - at all - - period?

5 A] Alibi was our, uh, strategy.

6 Q] Okay. And was that a strategic move to put her on the wit-  
7 ness stand in your case in order to bolster your alibi defense?

8 A] Yes.

9 Q] Okay. So that's a strategy on your part to present that;  
10 correct?

11 A] To present an alibi; yes.

12 Q] Okay. And the second witness was a Josh Darby. Do you  
13 remember what he was put on for?

14 A] The same purpose.

15 Q] Okay. To bolster an alibi defense?

16 A] Yes, sir.

17 Q] How did you learn of about Josh?

18 A] Basically, I canvassed the neighborhood and looked for any-  
19 one who, uh, had come into contact with Mr. Misskelley on that  
20 evening.

21 Q] And you found somebody, you interviewed them and you got  
22 their information down?

23 A] Yes, sir.

24 Q] Okay. And that was also designed to further your strategy  
25 of presenting a quality alibi defense?

1 A] Well, I don't know that it was a "quality alibi defense" in  
2 the fact...

3 Q] ...your strategy was presenting a quality alibi defense,  
4 but whether it was quality or lack thereof is not the issue.  
5 The strategy was to present one, and was that part of your  
6 strategy, to canvass the neighborhood and find out who these  
7 people were?

8 A] Yes. We, we sought out all of the alibi witnesses that we  
9 could to account for Mr. Misskelley's whereabouts, uh,  
10 including, uh, a police officer, uh, a truck driver, uh, and  
11 several other people that lived in the neighborhood.

12 Q] Okay. And did you interview Stephanie Dollar before you  
13 put her on the witness stand?

14 A] Either I did, or Mr. Crow did.

15 Q] Okay. And that was so you would be prepared to adequately  
16 present the information she had in behalf of your client, was  
17 part of your defense strategy; right?

18 A] Yes.

19 Q] Okay. Ricky Deese. Do you remember who he is?

20 A] I believe he was the gentleman that we located at the last  
21 minute, from Texas.

22 Q] That doesn't sound like the guy who the defense rooted  
23 for; I mean, you said he was with until noon on the 5<sup>th</sup>?

24 A] Yes, I think I'm confusing him with a, with a Mr. Hamilton,  
25 now that I think of it.

1 Q] Okay. Ricky Deese. Was he part of the alibi defense?

2 A] Yes.

3 Q] Was he also interviewed and his statement taken?

4 A] Again, I'm remembering events that happened fifteen years  
5 ago, but yes, we interviewed the witnesses and discussed with  
6 them, uh, what the nature of their testimony would be, uh,  
7 before trial.

8 Q] Okay. And the reason you decided to put him on and you had  
9 interviewed him prior to that so you could determine what he  
10 said, and strategically, try to put him on to benefit your alibi  
11 defense; correct?

12 A] There was no other purpose to put him on.

13 Q] Okay. And so that was a strategic move?

14 A] Yes, sir.

15 Q] Do you think presenting an alibi defense was a sound  
16 decision?

17 A] Yes.

18 Q] Okay. And that benefited the defendant's chances of being  
19 successful at trial?

20 A] I think it did.

21 Q] Okay. Was Susie Brewer also someone that was presented as  
22 an alibi defense?

23 A] Yes, sir.

24 Q] Okay. And was that also a strategic move?

25 A] We, again, tried to find everybody that we possibly could,

1 uh, that could testify as to Mr. Misskelley's whereabouts.

2 Q] Okay. And also, when you just go round up alibi witnesses  
3 and throw them up on the witness stand, uh, and plus, effective  
4 when you locate them, check out to see what they're going to say  
5 and see which ones may be best to suit your case; correct?

6 A] It's never a good idea to put a witness on the stand with-  
7 out knowing what they're going to testify to ahead of time.

8 Q] And y'all prepared and you knew what they were going to  
9 testify to and did your jobs as attorneys in interviewing and  
10 obtaining what information they would testify to; correct?

11 A] We did interview the alibi witnesses; yes, sir.

12 Q] Okay. Stephanie Dollar, again, testified and in the same  
13 situation and I believe you already mentioned her?

14 A] Yes, sir.

15 Q] James Dollahite, the deputy?

16 A] Yes, sir.

17 Q] Was he put on as part of your strategic move?

18 A] He was; he wasn't helpful but, uh, uh, as we would have  
19 liked for him to be, but, uh, he was one, one of our alibi  
20 witnesses.

21 Q] Okay. And he was the center of the trailer park alibi  
22 where he reports out there, there's been an altercation and a  
23 lot of these alibi witnesses were saying Jessie's out there, and  
24 he's kind of the focal point of all of their attention when he  
25 gets there; correct?

1 A] That's correct. There were witnesses who testified that  
2 Mr. Misskelly and Officer Dollahite had a conversation, uh, at  
3 the scene; uh, Officer Dollahite said that he didn't see Mr.  
4 Misskelley but there were other witnesses who said they did see  
5 the two of them talking.

6 Q] Okay. And, and it was important to put him on, because  
7 being the responding officer, he could put it in terms of times  
8 that he responded to the trailer park; right?

9 A] We had a police report that he had prepared, so we knew  
10 exactly what time he had been there.

11 Q] But without putting Officer Dollahite on, you couldn't get  
12 in the testimony as to the particular times that, that he  
13 responded, without putting him on where he could refer to that  
14 report; right?

15 A] That's correct.

16 Q] So even though he might not have been as strong as you had  
17 hoped in terms of the alibi itself, he did benefit your case by  
18 giving you certain times that you could use to reference other  
19 testimony; right?

20 A] That's a fair statement; yes, sir.

21 Q] Okay. And that was a strategic move designed to benefit  
22 the alibi defense?

23 A] Yes, sir.

24 Q] A Jennifer Roberts, sixteen-years of age up there. Do you  
25 remember calling her?

1 A] I remember the name but I don't remember the specifics of  
2 what she knew or what, what she testified to without looking at  
3 the transcript.

4 Q] Again, she would have been an alibi witness that was called  
5 to help the alibi defense?

6 A] Yes, sir.

7 Q] A strategic move?

8 A] Yes, sir.

9 Q] One that you felt like was effective?

10 A] Yes.

11 Q] Christy Jones Moss, also an alibi witness. Was that  
12 strategic?

13 A] Yes, sir. Again, I wish I had a better grasp of recollect-  
14 ion of who each of these people are. I remember the names, but  
15 I don't remember exactly what they testified to.

16 Q] Charles Ashley, Jr., uh, who testified about the incident  
17 with the police and said he was out there. Was that put on in  
18 order to bolster or help the defense?

19 A] Yes, uh, unfortunately, Mr. Ashley, I believe, had already  
20 given a previous statement to the police saying that, uh, he  
21 didn't see Mr. Misskelley that evening, but later, uh, after  
22 looking at the calendar and, uh, talking about the wrestling,  
23 uh, alibi, he remembered that he was with Mr. Misskelly, as I  
24 recall.

25 Q] And he also caused a few bumps, because he also said that

1 Jason and Jessie used to hang out together and went places  
2 together?

3 A] I believe that's correct.

4 Q] Okay. And he was called to help bolster the alibi defense;  
5 right?

6 A] Yes, sir.

7 Q] And you also called Jessie, Sr.; right?

8 A] That's correct.

9 Q] Okay. And that was part of the alibi defense?

10 A] Yes.

11 Q] And that was a strategic move; correct?

12 A] Yes, sir.

13 Q] Okay. And was there another alibi defense, other than just  
14 the trailer park alibi?

15 A] Uh, there were, uh, I assume you're talking about in  
16 addition to the incident that Officer Dollahite responded to at  
17 6:25 p.m., uh, at the trailer park, uh, and the other alibi  
18 would be the fact that Mr. Misskelley was with several persons,  
19 uh, in Dyess at a wrestling arena.

20 Q] Did you, did you call Jim McNease, who was Jessie Miss-  
21 kelly, Sr.'s boss, to bolster the alibi about the incident with  
22 the sheriff out there in the trailer park?

23 A] Yes.

24 Q] Okay. Did you call Louis Hoggard?

25 A] Oh, I'm sorry. Louis Hoggard was the truck driver.

1 Q] Truck driver?

2 A] Louis Hoggard was the truck driver, Mr. McNease was, uh,  
3 that's right. Mr. McNease was Mr. Misskelley, Sr.'s boss who  
4 owned the shop there, the repair shop.

5 Q] Okay. And was Mr. Hoggard, your research and investigation  
6 produced a, uh, his records of where he had been on the truck  
7 and of times of when he came in and when he was off; you were  
8 able to acquire that in order to not only present him as an  
9 alibi witness, but to put certain timeframes in what they were  
10 with in conjunction with his testimony; correct?

11 A] That's correct. Yes, sir.

12 Q] Okay. And was that part of your strategy to benefit the  
13 alibi defense you were trying to proffer?

14 A] I thought he was one of our strongest alibi witnesses.

15 Q] Okay. And with Jessie, Sr., did you go out and locate and  
16 track down receipts where he had paid money for his first trip  
17 to DWI school, showing that in fact that his story that he was  
18 at DWI school and then left there and came and saw what he saw;  
19 did you get that receipt in order to corroborate his story?

20 A] Yes, sir, we did.

21 Q] And was that part of your efforts as the research and  
22 investigate and locate alibi witnesses to provide information to  
23 corroborate their testimony?

24 A] Absolutely.

25 Q] Is that part of your strategy?

1 A] Yes, sir.

2 Q] Okay. So it just didn't happen by happenstance; that was  
3 part of your work and effort, this eighteen hundred hours that  
4 you put out in this case?

5 A] Absolutely. Yes, sir.

6 Q] Okay. The second defense, or the second alibi defense was  
7 the rest of the defense, you put on Dennis Carter. Do you  
8 remember that?

9 A] Yes, sir.

10 Q] Okay. And was he interviewed and located by your defense  
11 team in order to further this wrestling alibi that was part of  
12 the Misskelly defense?

13 A] Mr. Crow and I, and to some extent, perhaps, Mr. Lax, uh,  
14 interviewed, uh, these witnesses.

15 Q] Fred Revelle, the fifteenth witness that you called. Was  
16 he one of the wrestling "wrestling alibi witnesses"?

17 A] Yes, sir.

18 Q] All right. Did y'all interview him, locate him and deter-  
19 mine if he could benefit you and use him as a witness as part of  
20 your defense strategy?

21 A] We did.

22 Q] Roger Jones. Did you call him as the sixteenth defense  
23 witness as part of this list of alibi folks?

24 A] Does he have a middle name or another name that he goes by?

25 Q] The transcript doesn't say.

1 A] I don't specifically recall him.

2 Q] Do you recall he testified about Jessie being at Dyess;  
3 would he be one of the witnesses that you discovered in your  
4 investigation through your efforts and interviews to put on in  
5 order as part of your strategy in the defense and alibi at the  
6 wrestling match?

7 A] Yes, sir.

8 Q] Okay. Keith Johnson?

9 A] Yes, sir, I acutely remember him. He was, uh, the brother  
10 of, uh, Kevin Johnson, who was on the search and rescue team in  
11 Crittenden County.

12 Q] Okay. And did you locate Keith through your efforts and  
13 investigation and interview him and make a decision, a strategic  
14 decision to put him on as part of your defense, alibi defense?

15 A] Yes, sir.

16 Q] And was number eighteen Kevin Johnson?

17 A] Yes, sir.

18 Q] Who was he and why did you call him, and how did you locate  
19 him?

20 A] Uh, he was Jessie's next-door neighbor; lived in the  
21 trailer behind him in the trailer park and, uh, he was also a  
22 member of the search and rescue team, uh, he didn't go to the  
23 wrestling match that night, as I recall, or the wrestling  
24 practice, because he was called out to the search and rescue to  
25 look for the little boys that were missing.

1 Q] And as part of your defense strategy, you called him as a  
2 defense witness because you felt it would help the defendant as  
3 far as establishing an alibi?

4 A] That, and also, uh, he had a conversation with Mr. Miss-  
5 kelley about the particular wounds on the, on the bodies.

6 Q] Okay. So that witness not only helped establish an alibi  
7 from your perspective in terms of negating Mr. Misskelley's con-  
8 fession, but he also provided another avenue that you could use  
9 in argument to attack Mr. Misskelley's confession as far as  
10 where he gathered information about certain injuries to the  
11 boys?

12 A] That's correct.

13 Q] Okay. And so strategically, that was one of those things  
14 that was a real benefit to the defense to be able to call some-  
15 one of that nature to bolster not only the alibi, but other  
16 areas of your case?

17 A] I thought it did; yes, sir.

18 Q] And he didn't just fall out from heaven; you actually  
19 investigated him and located him and tracked him down and inter-  
20 viewed him and presented his testimony?

21 A] He wasn't hard to find, but yes, sir, we did interview him.

22 Q] Did you call Ron Lax?

23 A] Yes, sir.

24 Q] Do you remember calling Ron?

25 A] I don't remember exactly what the purpose was but, uh, I do

1 recall, uh, him testifying.

2 Q] And in fact, Ron Lax assisted you in the latter part of  
3 December and January, he provided assistance to the Misskelley  
4 defense team; correct?

5 A] We were running out of time and having difficulty locating  
6 witnesses because of the distances between Paragould and  
7 Crittenden County, and with his close proximity in Memphis, uh,  
8 we asked him and he graciously agreed to assist us in tracking  
9 down a couple of witnesses.

10 Q] Okay. And with his assistance were you able to track down  
11 everybody you felt was crucial to the alibi defense?

12 A] It seems that there were several that we couldn't locate,  
13 uh, but for the most part, we were able to locate, uh, everybody  
14 that we felt was important.

15 Q] You also called a Marty King; do you remember that  
16 testimony?

17 A] Yes, sir, I do.

18 Q] All right. And what was the nature of that testimony and  
19 how did you arrive, or how did you come up with that individual  
20 to call as a witness?

21 A] How did I find out about him?

22 Q] Yeah?

23 A] Uh, I received a phone call from a reporter, uh, who  
24 indicated that, uh, there was a gentleman who had stumbled into  
25 a fast-food restaurant on the night of, uh, May 5<sup>th</sup>, covered in

1 mud and blood and that, uh, he asked me if I knew about that and  
2 of course, my answer was no. And, uh, I then obtained, uh, the  
3 police report regarding that and, uh, Mr. King was called to  
4 testify as to the fact that number one, it did occur, and number  
5 two, that the police, uh, had a slow response in, in, uh,  
6 responding to that, uh, and that was the purpose that he was  
7 called to testify.

8 Q] Okay. And so this was the Bojangles incident that was also  
9 used in the Echols/Baldwin case to bolster both of those  
10 defendants?

11 A] That's correct.

12 Q] And the theory about this was not to bolster an alibi or  
13 not to necessarily negate the confession; this was part of the  
14 defense, entire overall defense feature to show an alternate  
15 possibility as to a potential perpetrator; correct?

16 A] That would be correct assertion; yes, sir.

17 Q] Okay. And was that part of the defense strategy to have  
18 that accompany your two alibi defenses and the attack on the  
19 confession; is that all part of the defense strategy to try to  
20 achieve the best results for Mr. Misskelley?

21 A] Yes, sir, it was.

22 Q] And you were able to locate this individual and present his  
23 testimony effectively at trial; correct?

24 A] Yes, sir.

25 Q] Your next witness, your twenty-second witness, was Warren

1 Holmes, and I believe you testified you'd get him today if you  
2 had it to do all over; right?

3 A] Uh, I think he's probably the world's leading expert on  
4 polygraph, and also is an expert witness in police interrogation  
5 tactics.

6 Q] Okay. And I, have you read his testimony or re-read his  
7 testimony in recent weeks, or has it been years?

8 A] Uh, it's been a while, but I, I remember his like it was  
9 yesterday, because it was so important.

10 Q] Okay. And you remember there were a lot of things Mr.  
11 Holmes said, even though he did provide some beneficial things  
12 to the defense, he also provided some pretty beneficial things  
13 for the prosecution; correct?

14 A] Uh, our inability to get the polygraph evidence in, uh,  
15 was, was, uh, was a serious problem for the defense strategy  
16 but, uh, yes, I, I, to answer your question, he, uh, uh, I  
17 thought he answered questions on cross-examination quite truth-  
18 fully and, and I think quoted some statistics that you had  
19 provided him, or confirmed some statistics that you had provided  
20 him.

21 Q] We had video tapes from his previous seminars where he in-  
22 dicated at a minimum of four hours before he would expect to see  
23 anybody provide a confession in interrogation, and we agreed  
24 with that. It wasn't necessarily something the defense was  
25 tickled with; correct?

1 A] Mr. Misskelley was interrogated for twelve hours.

2 Q] And, and Mr. Holmes' testimony was that the length of time  
3 as far as the interrogation in this case was not something that  
4 caused him a concern?

5 A] No, he seemed to be more concerned about the, uh, the use  
6 of the polygraph, uh, and the fact that the officers did not  
7 take Mr. Misskelley to the crime scene to confirm what he was  
8 telling them was accurate.

9 Q] Are you, have you become familiar with any cases in the  
10 State of Arkansas where the results of a polygraph have been  
11 made admissible in a criminal case?

12 A] No.

13 Q] Okay. And so going in with Mr. Holmes as a witness, it was  
14 your strategy to hopefully allow him to testify as to what he  
15 perceived the correct results of that polygraph to be, and use  
16 that in your case, but you understood that that would be a  
17 precedent setting case for that to occur; correct?

18 A] Yes, we were hoping to break new ground in that regard.

19 Q] Okay. And even though your hopes didn't materialize, and  
20 according to the law today still wouldn't materialize, it was  
21 still your strategy to put him on for the interrogation aspect  
22 of the case and you thought he was effective and that was part  
23 of your defense strategy; correct?

24 A] That's correct.

25 Q] And you'd do it again today?

1 A] Yes, sir.

2 Q] Did you think that you were well prepared to deal with him  
3 and you presented those issues regarding the polygraph, uh,  
4 competently to the Court; it just turned out to be a loser or an  
5 argument, despite your best efforts?

6 A] I think Mr. Holmes was easier to prepare, uh, to testify  
7 than Dr. Ofshe was, uh, and, uh, but in all candor, uh, I did  
8 not have any experience in dealing with, uh, preparing an expert  
9 to testify properly, uh, and, uh, looking back, you know, hind-  
10 sight is always 20/20, uh, I could have done a much better job  
11 had I had more experience.

12 Q] And with these guys like Ofshe and Holmes, you've dealt  
13 with them; I didn't. These guys were expert witnesses and they  
14 prepared you as much as you prepared them; correct?

15 A] I wouldn't say that, uh, there's, there's a great deal of  
16 effort that should go into preparing, uh, an expert, uh, and,  
17 and, uh, I just don't think that we were prepared to do that in  
18 the way that, that, uh, it should have been done, especially  
19 with regard to Dr. Ofshe. I know you haven't asked me that  
20 question yet, but I assume it's coming.

21 Q] Dr. Wilkins, you worked with - - we see now - - I didn't  
22 know until last night that apparently not only Dr. Wilkins  
23 evaluated and tested your client, but he helped interview your  
24 client; correct?

25 A] He did, uh, obviously as we saw in the, in the DVD.

1 Q] And apparently from what we see in the DVD, y'all worked  
2 closely together and he expended a great deal of time in  
3 assisting you in preparing the case; correct?

4 A] Yes, sir, he did.

5 Q] And as we know now, your decision to bring Dr. Wilkins into  
6 the case was not just randomly, or you had used him in some case  
7 before, but we know now that it was because you had in fact seen  
8 him used as a forensic expert consultant in a murder case  
9 involving a teenager; correct?

10 A] I can't be entirely one hundred percent certain about that,  
11 but I believe that he did consult in that cross-bow case from  
12 Greene County.

13 Q] Okay. And setting aside his problems with the Psychology  
14 Board, setting aside those problems, did you feel comfortable  
15 about his testimony that occurred at the suppression hearing - -  
16 not before the suppression hearing - - but the competency and  
17 the juvenile issues before you found out about the issues  
18 involving licensure and certification?

19 A] Setting aside the competency issue would be similar to try-  
20 ing to set aside a nuclear blast, but, but, uh, to answer your  
21 question, uh, I thought that the services that he provided, uh,  
22 up to that point were, were, uh, sufficient. I would have  
23 preferred to have had a much more qualified expert in that  
24 regard, but I didn't have the ability to retain one. Uh, I  
25 tried, uh, but I didn't have the funds to do it.

1 Q] And even though you hoped otherwise and you think it might  
2 be possibly different, there was still a strong possibility that  
3 had you had another expert, you still wouldn't have gotten in  
4 the information on the suggestibility scale that the Swede or  
5 the Norwegian - - Gudjonsson - - you wouldn't have gotten that  
6 information in?

7 A] I think that, and I, I may have to be corrected on this,  
8 uh, by someone much more learned than myself, but I think that,  
9 uh, that type of evidence comes into the courtroom routinely,  
10 uh, in today's world. In 1993, uh, it wasn't, uh, as recognized  
11 as it is now, but I still think that it fit, my personal  
12 opinion, I still think that it met the scientific reliability  
13 standards and should have been admissible. Obviously, Judge  
14 Burnett didn't agree, nor did the Supreme Court.

15 Q] And it was - - and you acknowledge at that time it was a  
16 novel theory?

17 A] It, uh, had been tested, uh, empirically, uh, not in the  
18 United States, but in the UK where Dr. Gudjonsson is from.  
19 Actually, I think you're right. I think he's from Sweden, uh,  
20 Denmark, somewhere - - Iceland, actually, I think is where he's  
21 from, uh, uh, but based on, uh, what Dr. Ofshe and, uh, who  
22 contributed, uh, to Dr. Gudjonsson's work and theories, uh, and  
23 Dr. Richard Leo, uh, I think that - - there's no reason to think  
24 that those studies, uh, were not, uh, cross cultural, uh, but  
25 again, uh, that's water under, under the bridge, I suppose.

1 Q] Uh, Johnny Hamilton, who you put on towards the end of the  
2 case, but was another alibi witness?

3 A] He was out of state and we found him at the last moment,  
4 uh, I believe, uh, I think he was in Texas and we were able to  
5 locate him, if that's the same guy I'm thinking of.

6 Q] Okay. And in fact, Dr. Wilkins, the reason that you chose  
7 to, decided to pick a psychologist to present evidence was so  
8 that you could lay the groundwork, hopefully, for some of the  
9 testimony that Ofshe was going to testify to about the mental  
10 deficiencies and how that might affect him in police  
11 interrogation settings; correct?

12 A] His testimony, as well as Mr. Holmes.

13 Q] And the Court - - and Dr. Wilkins attempting to provide  
14 testimony that - - where you made a motion for him to be found  
15 mentally retarded so that, uh, he would automatically be  
16 prohibited - - from the State to be prohibited from seeking the  
17 death penalty, that testimony, the Court didn't agree with your  
18 motion but the testimony went adequately in that regard in order  
19 to establish that; correct?

20 A] I can't argue with that, Counselor. No, I can't.

21 Q] Dr. Ofshe. Would you hire him again, you said, to testify?

22 A] Yes, I would.

23 Q] Do you think he was prepared to testify?

24 A] I don't think that I prepared him well enough to testify.

25 Q] Did you supply him with information and materials for him

1 to review before his testimony?

2 A] I did.

3 Q] Did you give him an opportunity to interview - - and  
4 apparently it's something we haven't seen yet, but an interview  
5 with your client?

6 A] He did conduct an interview with Mr. Misskelley and, uh, he  
7 was provided, uh, uh, Mr. Holmes', uh, work with regard to the  
8 polygraph, uh, results and of course, copies of the police  
9 officers' notes with regard to the interrogations but, uh, I  
10 just was not sophisticated enough at that point in my legal  
11 career to adequately prepare an expert, uh, to testify and, uh,  
12 you know, looking back through the prism of my fifteen year  
13 history on this case, uh, it's easy for me to say yeah, I would  
14 hire him again and he, he did a bang-up job, but I, I think that  
15 had I done a better job of, of, uh, bolstering his scientific  
16 credibility, I think, uh, the result would have been  
17 dramatically different.

18 Q] And had it been a situation where his expert testimony  
19 would have been presented on a topic or in a field that was  
20 commonplace, maybe sophisticated but commonplace, he would have  
21 been easier to prepare than somebody presenting testimony that's  
22 pretty cutting edge or novel, uh, particularly in this part of  
23 the world?

24 A] Well, he had been, uh, as I under - - as I, I recall and as  
25 I understand it, he had been qualified as an expert in, in

1 federal court in Arkansas previously.

2 Q] He had also been denied qualified as an expert also, hadn't  
3 he?

4 A] I believe that's correct.

5 Q] So, I mean, there have been other attorneys in other cases  
6 that had difficulty qualifying him as an expert in certain  
7 areas; you weren't the first?

8 A] I, I, I, I think that's a correct assertion of history.

9 Q] Well, do you recall in the trial transcript that prior to  
10 the trial starting that the judge asked your client, uh, was he  
11 satisfied - - the trial was getting ready to get started, was he  
12 satisfied with his attorney and representation and was he  
13 prepared and ready to proceed? Do you remember the judge asking  
14 this?

15 A] Well, it happens in all trials. Yeah, I remember.

16 Q] Did he state that he was?

17 A] That's what he said.

18 Q] And in fact, after the trial was over, uh, in fact, I guess  
19 after the testimony was in and arguments were concluded, the  
20 Court once again went on the record and I believe it's on page  
21 1630 of the transcript, and again inquired not only of Jessie,  
22 Jr., but of his father as to were they satisfied and did they  
23 feel that their attorneys had done an adequate job and had  
24 represented himself and his son in Mr. Misskelley's situation  
25 and they both replied in the affirmative?

1 A] I believe that's correct; yes, sir.

2 Q] Okay. And isn't it - - even though you've had limited  
3 experience with criminal cases either before this or after this,  
4 for that matter, you were familiar with Rule 37 proceedings  
5 before you ever entered into this representation; right?

6 A] Certainly.

7 Q] Okay. And you've known for some time that as soon as the  
8 case was over that short of getting relief on direct appeal,  
9 Rule 37 was one of the last steps available to the defendant to  
10 receive relief on adverse trial decision; correct?

11 A] I've known it for fifteen years and six months.

12 Q] Okay. And would it be fair to say that for the last  
13 fifteen years and six months, you've done everything humanly  
14 possible to try to help out and reverse the result of that trial  
15 that occurred in Clay County?

16 A] Well, I think the Court's inquiry, and I'm certainly not  
17 trying to substitute my thoughts and opinions for, for His  
18 Honor's...

19 Q] ...I really think that we could get on with this and you  
20 can explain.

21 A] I do need to explain.

22 Q] Was it "yes" or "no," and then we can worry about the  
23 explanation.

24 A] Okay. Uh, I've given it everything, uh, that I could.  
25 I've worked my guts out for this kid.

1 Q] I must have missed something. I'm not asking how much  
2 effort you put in. I'm asking since the result came down, has  
3 it been your conscious and determined effort to do whatever  
4 possible to see to it that the results of that case were, were  
5 reversed, or a new trial granted?

6 A] You're talking post-trial?

7 Q] Yes, sir?

8 A] Yes, I've spent every, uh, moment that, uh, that I could,  
9 uh, working in that regard.

10 Q] And as you sit here and give all the testimony in this case  
11 here today, you do that from the standpoint and the viewpoint of  
12 someone who, as you told a few weeks ago in this court, you, you  
13 want to see this matter reversed and you want to see a new trial  
14 granted?

15 A] I want to see justice and truth done in this case. That's  
16 what I want.

17 Q] And in your mind and in your belief and your viewpoint,  
18 that equates with the Court granting Rule 37 relief; right?

19 A] Whether it's a Rule 37 grant or it's a new trial based on  
20 new evidence or, uh, whatever the case is, I, I think that, uh,  
21 Mr. Misskelly deserves, uh, a new trial.

22 Q] Do you think your desire to see that result has had an  
23 effect on your perception as to how effectively you represented  
24 Mr. Misskelley at the trial?

25 A] I'm not sure I understand what you, what you, what you

1 mean.

2 Q] Your desire to see - - to get some relief, Rule 37 or  
3 otherwise, do you think that strong desire which you've said for  
4 fifteen years and six months has driven you, do you think that  
5 affects your perception of how effective your representation was  
6 of him at trial?

7 MR. BURT: I object to that question; he never  
8 said he was "driven"; that's a mischaracterization.

9 MR. DAVIS: I'll remove the word "driven."

10 THE COURT: All right.

11 CROSS-EXAMINATION, continuing:

12 A] Uh, and that's what I was trying to explain earlier, uh,  
13 and if you'll permit me to, I think I can, uh, and I'll try to  
14 be as brief as I possibly can. I'm probably one of the few  
15 lawyers on the planet who has the fortune or misfortune of  
16 having their entire performance, uh, as a trial lawyer in a  
17 murder case, uh, on DVD. And, uh, as you work on a case for  
18 fifteen years and six months, it's easy for you to look back on  
19 those years and months and days and hours and say, you know, "I  
20 did a good job and I did, uh, the best that I could and, uh, I  
21 stuck by my client all of these years because I made a promise  
22 to him," but, uh, the defining moment came for me when someone,  
23 uh, I can't remember who, sent me the trial, uh, the Misskelly  
24 trial on DVD from beginning to end and as I eagerly put the DVDs  
25 in the DVD player and started to watch my performance, I became

1 physically ill...

2 MR. DAVIS: ...Your Honor, I don't think the  
3 witness is being responsive to the question.

4 THE COURT: I don't think you need to make a  
5 speech. Just answer the question.

6 THE WITNESS: I don't know how else to answer the  
7 question.

8 MR. DAVIS: Well, maybe I worded it poorly.

9 CROSS-EXAMINATION, continuing:

10 Q] Dan, do you think because of your viewpoint as to what you  
11 would like to see as a result of this case, do you think it has  
12 biased your ability to objectively evaluate how effectively you  
13 represented your client at trial?

14 A] No, and...

15 Q] ...okay. So you feel like, in spite of all of this, you  
16 can still objectively look at it and say where you did good,  
17 where you did bad, and you're as objective as anybody; right?

18 A] Absolutely. I...

19 Q] ...okay...

20 A] ...I'm sworn to tell the truth and, and I have, and will  
21 continue to do so. But you can't separate what I did in '93 and  
22 '94, uh, or you have to separate I should say what I did in '93  
23 and '94 from what I did from, uh, the time the Arkansas Supreme  
24 Court denied the direct appeal until today. It's two different  
25 animals.

1           THE COURT: This Court is not so much concerned  
2 about what you did after the trial. I'm concerned  
3 with your performance during the trial, at the trial.

4           THE WITNESS: Well, he asked me specifically  
5 what, what I wanted...

6           THE COURT: ...no, what he asked you was, was  
7 your opinion of your own performance jaded by the fact  
8 for fifteen years and six months, you've worked  
9 diligently to effect a change in the outcome.

10           That's what he asked you.

11           THE WITNESS: I'd like to be able to answer the  
12 question.

13           THE COURT: Well, go ahead and answer.

14           THE WITNESS: I can't do it in two or three  
15 words.

16           THE COURT: Go ahead.

17 CROSS-EXAMINATION, continuing:

18 A] Uh, uh, when I went back and looked at my performance, uh,  
19 it's easy to look at your performance through a prism of fifteen  
20 years of, you know, what I know now, uh, that I didn't know  
21 then. Uh, I couldn't, I couldn't bear to watch the DVDs because  
22 I couldn't believe it was the same me, uh, and looking back, I  
23 immediately knew that, uh, I wasn't prepared to deal with this  
24 case and, uh, I don't like sitting up here saying it. I didn't  
25 like saying it on September 29<sup>th</sup>. It was the worst day I can

1 ever remember in the courtroom, other than the day he got  
2 convicted.

3 Q] Haven't you traveled all over the country talking about it?

4 A] Yes, I have. And I'm going to continue to do that.

5 Q] How many places, and I asked you this weekend to compile  
6 this and whatever you could as far as this, over the last  
7 fifteen and half years, how many different states have you been  
8 to, how many countries have you been to, how many college  
9 campuses have you been to where you talked - - and I assume when  
10 you talk about it, you tell them all of these things, do you  
11 tell them about Jessie's confessing to you all summer long  
12 leading up to September?

13 A] I tell them the truth.

14 Q] All right. Well, you talk about this and you talk about  
15 your representation of the case, how many, how many engagements  
16 have you had where you spoke on this, to the best of your  
17 recollection?

18 A] I think the list was twenty-two that I sent you, uh, how  
19 many states? California, Florida, Nebraska, Kansas, uh,  
20 Mississippi, Tennessee, uh, I, I go where I'm invited to speak  
21 and I, I don't go necessarily to promote this case. I go to  
22 promote the idea that there is such a thing as false confession,  
23 there is such a thing as satanic panic, there is such a thing  
24 as, as, uh, uh, basic fundamental fairness and, and, uh, I don't  
25 want to see this ever happen again to anybody. I don't want

1 there to be any more Jessie Misskelleys or Jason Baldwins or  
2 Damien Echols, but what I've done in the last - - since, since  
3 1996 doesn't change the fact that I had never tried a jury  
4 trial, uh, in 1993, uh, as first chair. I had sat as second  
5 chair in a drug case, uh, in, in Lawrence County. It doesn't  
6 change the fact that I didn't know how to, uh, retain and  
7 properly vet, uh, a, expert, uh, when this kid's life was at  
8 stake. It's the equivalent of a, uh, someone needing, uh, an  
9 organ transplant and going and finding, uh, a first-year law  
10 student or a first-year med student to, to do the surgery  
11 without any experience. I didn't have any and, and I don't like  
12 to have to sit up here and say that, but it's the truth. I  
13 was...

14 THE COURT: ...all right, that's enough. Go  
15 ahead, Mr. Davis.

16 CROSS-EXAMINATION, continuing:

17 Q] As you - - as a result of these trips, as a result of any  
18 lecturing, you spent at least four to six hours?

19 A] Yes, sir.

20 Q] From all over the country, uh, when you go to these places,  
21 do you get wined and dined and to some degree treated as some-  
22 what of a celebrity?

23 A] I don't think so.

24 Q] Okay. I'm just asking? You can say "yes" or "no" or "I  
25 don't know."

1 A] I don't get compensated and my travel expenses are normally  
2 reimbursed, uh, I enjoy it so much I, uh, started teaching, uh,  
3 last semester here at Arkansas State, uh, I teach criminal pro-  
4 cedure and common law, uh, in fact, I'm going to miss my class,  
5 uh, tonight, uh, uh, I enjoy it, uh, but I don't see that it has  
6 anything to do with, with as His Honor said, what happened in  
7 1993 and 1994, uh, I certainly have not, uh, uh, gained anything  
8 pecuniary...

9 Q] ...just answer my question...

10 A] ...uh, by doing so. In fact, I think, uh, I told you in,  
11 in my e-mail, uh, I've lost a lot more money than, than I've  
12 ever gained in this case.

13 Q] And this is another one of those yes or no, is there, have  
14 you from your engagements and from your notoriety from making  
15 these presentations, has there been, uh, is it somewhat of an  
16 ego trip or is it, uh, does it give you, increase your self-  
17 esteem or make you feel better, uh, make you feel more important  
18 when you go do these things?

19 A] If wanting to prevent another injustice, uh, is an ego  
20 trip, uh...

21 Q] ...I think it's a "yes" or "no" answer, and then you can  
22 explain.

23 A] No.

24 Q] Okay?

25 A] And I'd love to explain if you would let me, but I get the

1 impression you don't want me to.

2 Q] If you say "no," I'll accept your answer.

3 MR. DAVIS: Your Honor, at this point, I guess  
4 it's time to break for the day, but we've got to  
5 review all of these audio tapes.

6 THE COURT: Yes. You need to be back in the  
7 morning. Court will be in recess until 9:30 in the  
8 morning.

9 (WHEREUPON, the proceedings were recessed 11/19/08 until  
10 11/20/08.)

11 **NOVEMBER 20, 2008**

12 THE COURT: Court's back in session. Call your  
13 next witness.

14 MR. DAVIS: Your Honor, we're waiting on Mr.  
15 Stidham to get here. Has anybody seen Dan?

16 THE COURT: Has he been here this morning?

17 MR. DAVIS: I haven't seen him.

18 MR. BURT: I'm going to step out and try to call  
19 him, Your Honor.

20 THE COURT: Yes.

21 MR. BURT: Thank you.

22 (Pause.)

23 MR. BURT: He's in the parking lot, Your Honor.

24 THE WITNESS: I'm here.

25 THE COURT: Well, yes, we're waiting. What do you