

1                   THE COURT: All, right, you're free to go.

2                   THE WITNESS: Thank you, Your Honor.

3 (Witness stands down.)

4                   THE COURT: Call your next witness.

5                   MR. BURT: We call Phillip Wells. I'll step out-  
6 side and get him.

7                   THE COURT: Go ahead.

8 (Pause.)

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

10 THEREUPON,

11                                   PHILLIP WELLS

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

15                                   DIRECT-EXAMINATION

16 BY MR. ROSENZWEIG:

17 Q] State your name, please, Mr. Wells?

18 A] Phillip Wells.

19 Q] And you're an attorney here in Jonesboro?

20 A] That is correct.

21 Q] And the firm is McDaniel and Wells?

22 A] Yes.

23 Q] Okay, for the record, so there won't be any, uh, uh, what  
24 is, who is the McDaniel in the firm, and can you describe  
25 whether Attorney General Dustin McDaniel has ever been employed

1 by your firm?

2 A] Yes, the McDaniel is Bobby McDaniel, who has been  
3 practicing law since I believe 1974 and Dustin McDaniel, who is  
4 currently the Attorney General, practiced law with us for about  
5 seven years, until 2006 when he was elected attorney general.

6 Q] So, uh, would it be correct that Dustin McDaniel was not a  
7 part the firm at the time of your involvement in this case?

8 A] That is correct.

9 Q] Okay. And your involvement in this case, uh, was in, uh,  
10 around the time in early 1994; is that correct?

11 A] That is my understanding; yes.

12 Q] Around the time that Jessie, right after Jessie Miss-  
13 kelley's trial; is that correct?

14 A] That is correct.

15 Q] Okay. How did you become involved in the case?

16 A] Judge Burnett appointed me, I believe, ostensibly, as an  
17 attorney ad litem, uh, it was my understanding that Mr. Miss-  
18 kelley had expressed an interest to consider the possibility of  
19 testifying in the trials of the other two defendants, and it was  
20 my responsibility to make an independent representation to Mr.  
21 Misskelley if that was his idea to represent that to the Court  
22 and to provide advice as to whether he chose independently,  
23 without using the recommendation or the lack of recommendation  
24 by his defense counsel as to whether he chose to testify in this  
25 particular case.

1 Q] Was the defense counsel Mr. Stidham?

2 A] That is correct.

3 Q] All right, and did you, uh, was there some concern that  
4 maybe Mr. Stidham had not, was not communicating in a proper way  
5 with Mr. Misskelley?

6 A] I had a conference with Mr. Misskelley and Mr. Stidham, in  
7 which Mr. Stidham was very adamant about the fact that he felt  
8 that Jessie Misskelley should not testify, and that Mr. Stidham  
9 identified to Mr. Misskelley that he had an excellent chance to  
10 win on appeal and that, uh, he should not testify. And it was  
11 based on Mr. Stidham's desire that Mr. Misskelley not testify  
12 and consider the fact that he would stand a chance of having his  
13 appeal be successful; that I was there to make sure that Mr.  
14 Misskelley was given the opportunity to make an independent  
15 decision.

16 Q] Did you, uh, about how much time did you actually spend in  
17 Mr. Misskelley's presence?

18 A] The first time I met him at the Craighead County court-  
19 house, the second time I met him at the Craighead County deten-  
20 tion facility, I would say approximately three hours, total,  
21 maybe four hours.

22 Q] Did you come to any, uh, did you make any observations  
23 about whether Mr. Misskelley was able to process what people  
24 were saying, what his decision making capabilities were, was he,  
25 uh, going with what the last person told him, whatever it was;

1 that type of thing?

2 A] It was my impression that, uh, as an example when I was at  
3 the detention facility, uh, deputy sheriffs were being very  
4 friendly to him, giving him cokes and pizzas and had a  
5 conversation with him and therefore, uh, I think he was going  
6 along with their recommendation that he consider testifying. I  
7 believe the deputies, of course, wanted him to tell the truth  
8 and to testify. I didn't go into a great deal of details as far  
9 as the merits. I wanted to make sure that Mr. Misskelley  
10 recognized the severity of a decision to testify. I had not  
11 gotten into a considerable discussion with the prosecuting  
12 attorney, but was going to discuss with the prosecuting  
13 attorney's office the possibility of a negotiated plea in  
14 exchange for his testimony. And I did have a discussion with  
15 Mr. Stidham in which he was telling Mr. Misskelley about the  
16 fact that he felt like he had very good grounds for an appeal  
17 and I think Mr. Misskelley was, uh, I think he was confused  
18 about that. He was obviously very concerned about making a very  
19 significant decision and I do recall that when I was talking to  
20 Mr. Misskelley about his decision-making process, he said that  
21 "before I make any final decision, I want to talk to my  
22 parents." And when he had a conference with his parents at the  
23 Craighead County detention facility, uh, he talked to them and  
24 of course there was a conference with his parents outside of my  
25 presence. And it was after he talked to his parents that he had

1 made the decision not to testify in the case. Just long story  
2 or long testimony short, uh, I think that Mr. Misskelley was  
3 capable of being influenced and I think he was influenced, one  
4 way versus the other, understandably, in terms of certain  
5 circumstances,  
6 but I would say yes, he was capable of being influenced.

7 Q] Were those the only two times you talked with him?

8 A] Yes, the time at the Craighead County courthouse; I believe  
9 there was a discussion at that time with Mr. Stidham, and then  
10 also at the Craighead County detention facility.

11 MR. ROSENZWEIG: Could I have a second, Your  
12 Honor?

13 THE COURT: Yes.

14 (Pause.)

15 MR. ROSENZWEIG: I pass the witness.

16 THE COURT: Mr. Holt?

17 CROSS-EXAMINATION

18 BY MR. HOLT:

19 Q] Good afternoon, Mr. Wells.

20 A] Good afternoon.

21 Q] Were you aware that there is a tape recording that was made  
22 of the conference that you had when you and Dan Stidham and  
23 Jessie Misskelley were present?

24 A] No, I was not.

25 Q] Okay. Would you be able to recognize, uh, if you were

1 provided with a transcript of that statement and recording of  
2 that, would you be able to verify whether or not that was - -  
3 not the conference that you had with Jessie Misskelley alone - -  
4 but the conference that the three of you had?

5 A] I think if there is a tape recording and I could hear my  
6 own words or I could hear, uh, receive and look at the  
7 transcript, I'm sure I could probably do the best I could to  
8 verify its authenticity.

9 Q] Okay. We would ask that you, uh, that he be provided an  
10 opportunity to do that at some point.

11 THE COURT: Is there a tape?

12 MR. HOLT: There is, yes.

13 THE COURT: And you weren't aware of it?

14 THE WITNESS: No.

15 MR. HOLT: It's one of the Stidham tapes, Your  
16 Honor.

17 THE COURT: Okay.

18 CROSS-EXAMINATION, continuing:

19 Q] But you said that you did have a three or four hour  
20 conference with Mr. Misskelley regarding the...

21 A] ...I think the three or four hour recollection is my entire  
22 experience with Mr. Misskelley, on two different occasions.

23 Q] Okay?

24 A] Both at the courthouse with Mr. Stidham and at the  
25 detention facility with him by himself, and also when his

1 parents came by.

2 Q] Okay. When you say "the detention facility," where was he  
3 at at that point?

4 A] That was the detention facility here in Craighead County.

5 Q] Okay. In Craighead. And do you know whether or not he had  
6 been brought to that detention facility at that time just to  
7 talk to you, or had he already given a statement to the  
8 prosecutor at that point?

9 A] All I can say is that my job as his attorney to conference  
10 with him was the reason that I went to the detention facility,  
11 to have a conference with him and talk about the case to ensure  
12 that he was given an opportunity to make a decision about  
13 testifying, and at the facility is when he expressed that he  
14 wanted to talk to his parents.

15 Q] Okay?

16 A] And I made them wait until his parents came by before, uh,  
17 I met with his parents in his presence and then I let him talk  
18 with his parents outside of my presence.

19 Q] All right. Do you know whether or not he had given a  
20 statement to Dan Stidham at that point, at the Department of  
21 Correction where he admitted his involvement and discussed the  
22 case in very specific details?

23 A] At that time I did not realize or have any knowledge that  
24 he had talked to Dan Stidham at the Department of Correction.

25 Q] Okay. During the time that you discussed this with him,

1 you said that he was capable of being influenced, uh, was he, do  
2 you ever recall or did you ever become aware of a negotiated  
3 plea offer that was on the record in his trial, that he receive  
4 a term of years plea offer that he receive at some point?

5 A] That, of course, is vague; I don't know that I have  
6 specific recollection. I do recall that there was discussion  
7 with the prosecuting attorney's office and myself about a plea  
8 offer, and I don't remember if that was a discussion. There  
9 wasn't any specific plea offer that was made but there was at  
10 least, uh, my recollection of a term of years offer. At some  
11 point in time, I thought that that was something we were going  
12 to discuss with the prosecuting attorney's office, post-  
13 conviction with Mr. Misskelley prior to his testimony.

14 Q] I see. Do you think that the fact that he had, that there  
15 had been a plea offer for a term of years and the fact that he  
16 had gotten life in prison was upsetting to Mr. Misskelley?

17 A] I sure can't tell you that the fact that he had a term of  
18 years offer and then received a life sentence...

19 Q] ...well, if it's in the trial record, you wouldn't dispute  
20 that, though, would you?

21 A] I sure would not.

22 Q] Okay. And even just for the sake of saying hypothetically  
23 if he had a term of years, if anybody had a term of years offer  
24 and they received a life in prison as a result of a trial, then  
25 they're - - and their counsel had advised them not to take the



1 plea deal, uh, I don't know how much criminal practice you've  
2 done, but that would be upsetting, would it not?

3 A] I'm assuming it would be.

4 THE COURT: Well, for the record, at that time  
5 that I appointed you, you had had multiple death  
6 cases?

7 THE WITNESS: I've had a capital murder case and  
8 I've had fifteen years of criminal practice in felony  
9 law.

10 MR. HOLT: Well, that's what I - - I'm not from  
11 here.

12 THE COURT: No, the record should reflect that he  
13 was an experienced criminal defense lawyer and had  
14 death-penalty qualifications, which weren't required  
15 at that time.

16 CROSS-EXAMINATION, continuing:

17 Q] Did you ever make a determination - - did you ever advise  
18 him one way or the other in this particular case?

19 A] I don't think I ever had any specific, uh, we never got to  
20 the point where I was going to make a recommendation. I was  
21 still in the phase of trying to gather the facts so I could at  
22 least have a discussion with him intelligently about what  
23 decision he needs to make, the consequences, and I never got to  
24 the point where we had a discussion about "I'm going to  
25 recommend you do this, or I recommend you do that."

1 Q] Did you have any trouble communicating with him at all?

2 A] I'm going to say that it was, uh, there's no question in my  
3 opinion that he slow intellectually in terms of processing in-  
4 formation and I can assure you that before there would have been  
5 a discussion about a decision to be made, that I would make sure  
6 that he understood that. So I think there's no question that he  
7 was slow mentally processing everything that was going around.  
8 He had so many issues and he was under a great deal of stress  
9 and trauma, but yes, I think he was slow in recognizing and  
10 understanding what was going on.

11 Q] Did he ever relate the facts of this case to you?

12 A] He did not.

13 MR. HOLT: Thank you.

14 MR. ROSENZWEIG: Nothing further.

15 THE COURT: All right, you're free to go.

16 MR. HOLT: We would just like to - - since I  
17 realize this isn't the last day of these hearings, if  
18 we would at some point get Mr. Wells to identify the  
19 tape.

20 THE COURT: Yes, they wanted you to listen to that  
21 tape, so if you would make arrangements to do that and  
22 be available, it shouldn't take long.

23 THE WITNESS: I'll work with them.

24 THE COURT: Okay.

25 MR. BURT: We can probably work up a stipulation

1 of some kind.

2 THE COURT: Okay. I think they just want you to  
3 authentic the tape.

4 THE WITNESS: Thank you, Judge.

5 THE COURT: All right. (Witness excused.)

6 THE COURT: Is this a good quitting point?

7 MR. BURT: It would be.

8 THE COURT: Okay. Now remember tomorrow I'm going to have to  
9 adjourn at 3:30, so do y'all want to start early or start 9:30,  
10 it's fine with me. follows, to-wit:)

11 MR. HENDRIX: 9:30.

12 THE COURT: All right, 9:30 in the morning. Court  
13 will be in recess.

14 (WHEREUPON, a recess was taken August 10<sup>th</sup>, 2009; proceedings  
15 resumed August 11, 2009 as follows, to-wit:)

16 **AUGUST 11, 2009**

17 THE COURT: Call your next witness.

18 MR. BURT: Your Honor, we call Dr. Michael Baden.

19 (Witness sworn.)

20 THEREUPON,

21 DR. MICHAEL BADEN, MD FORENSIC PATHOLOGIST

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

25 DIRECT-EXAMINATION