

ABSTRACT OF PROCEEDINGS IN RULE 37, SEPT. 24, 2008

The record of proceedings on September 24, 2008, the first day of testimony in the combined Baldwin/Misskelley Rule 37 proceedings, begins with the following exchanges about the Rule 37 Petitions; amendment of the Petitions; Expansion of the Rule 37 record. The State objected that some issues are not cognizable in a Rule 37 proceeding, and the defense responded. Misskelley and Baldwin renewed their motions for the Court to be recused. The record below begins at Baldwin/Misskelley Hearing Record (hereafter BMHR) at Bates Stamp pages 000032-000033—hereafter BMHR 32-33:

MR. DAVIS: Judge, that's the court file for the Baldwin case there, and then I had Mr. Trail bring these court files from the Misskelley case in Clay County, and also the docket sheets.

THE COURT: Well, I wanted to hear that here, so let's make whatever arrangements we need to make to have it heard here.

(Pause.)

THE COURT: All right, I'm ready to start. I'm not sure where we are. There was a Baldwin file of Rule 37 petition years ago and then it's been amplified and amended at least twice since then, and I think I allowed the expanded Rule 37 petition to be filed and the exhibits that were attached to it.

It would seem, however, that most of the allegations contained in it were also issues in the Act 1780 motion and also a habeas motion had been filed in addition to the Rule 37, and as far as the Court is concerned, that's just an expansion of the Rule 37 petition.

And that's the way I'm going to treat the habeas, as a Rule 37 petition.

Now I understand that there is some question about a number of experts being called, and just exactly what the Court's going to allow to be heard in the Rule 37 petition, so who wants to start on that?

The State has objected; I think there were six major accounts in the amended petition and the State has objected to five of those, so let me hear the State's position on *[begin BMHR 33]* the Rule 37 petition with regard to the five points that have been objected to.

MR. DAVIS: Well, Your Honor, the original petition, or the amended petition for relief filed under Rule 37 alleged basically six areas, or six specific categories, basis for relief as a result of their petition.

The State's position is that basically none of those allegations contained in the claim for relief, then items number one through four are not cognizable under Rule 37, for reasons set forth in our response to the amended petition for relief.

And I hope the Court has read that but if it hasn't...

THE COURT: ... I've read it.

MR. DAVIS: It's set forth in there as to our reasoning and theory as to why those items are not cognizable basic relief under Rule 37.

The other item, which is item number five in their amended petition, which generally states ineffective assistance of counsel and then lists...*[end BMHR 33, begin BMHR 34]*

THE COURT: ... sixteen points.

MR. DAVIS: A number of points. It's the State's position that those points are basically conclusory in nature and don't set forth specific facts sufficient to make those particular claims sufficient under a Rule 37 and request for relief under those particular provisions.

But in any event, it's the State's position that the items one through four and the items six that they claim relief under are not appropriate under Rule 37, and that if there is to be a hearing regarding the allegations or claims for relief under Rule 37, then it be limited to the specific claims under section five of the amended petition.

THE COURT: All right. Who's going to respond?

MR. PHILIPSBORN: Your Honor, I am. Good morning. For the record, John Philipsborn and Blake Hendrix on the behalf of Mr. Baldwin, and as ordered by the Court, Mr. Baldwin is present.

Your Honor, a couple of things just to begin with, and I apologize because I don't know the Court's procedure in this regard, but I would ask, unless there is a basis that the Court feels require, that Mr. Baldwin be unshackled.

THE COURT: That will be fine. *[end BMHR 34, begin BMHR 35]*

MR. PHILIPSBORN: Thank you, Your Honor. The other thing before I respond specifically to the State, Your Honor, uh, there is an issue pending that I realize may be mooted if the Court accepts the State's argument, but just because I know t hat it was a matter that we were going to take up today.

The Court had ordered an attorney's affidavit that had been lodged to the court under seal, to be released to the parties under seal. And I think for a while the affidavit had been misplaced or could not be located.

My understanding is that the affidavit was located and I was wondering if the Court would permit that affidavit, at some point during the course of these proceedings, to be released pursuant to a protective order, so that the parties could review it?

THE COURT: Yes, I think I can do that.

MR. PHILIPSBORN: Thank you, Your Honor. So Your Honor, as to the issues presented, we, uh, I think both parties have briefed the issue.

Our position and response to the State's position was that in a series of cases, including most recently Rowbottom, R-O-W-B-O-T-T-O-M, the State Supreme Court of Arkansas has actually allowed the issues that we alleged in our amended Rule 37 petition to be *[BMHR at 35-36]* addressed in the Rule 37 setting, including fair jury claims and other claims that we've made.

And so we would submit that particular, uh, we would submit our opposition and reply to the State as the basis for asking this court to allow all six grounds to be part of, uh, part of this hearing.

THE COURT: Were the jury issues not submitted in the direct appeal?

MR. PHILIPSBORN: Your Honor, there wasn't a – the Court is correct, that there were jury issues submitted on direct appeal, but at the time the parties did not have affidavits from the jurors; the jury room notes; the poster-size notes had not been released to the parties as of that time, so the record has been expanded in that sense.

And so the particular claim that's being made here addresses different facts than were addressed on the appeal.

And it's on that basis, Your Honor, that we are asking for, uh, the new facts to be part of the Rule 37 proceedings.

THE COURT: Well, of course, the Court could read your pleadings

and make a decision based on the pleadings, and in fact, that's customarily done in many Rule 37 petitions. *[end BMHR 36, begin BMHR 37]*

However, the nature of this case and the exposure of this case is what causes the Court to be inclined to give you a hearing on the issues that are raised.

However, I'm of the opinion that the only issue that's really covered by Rule 37 is the ineffective assistance of counsel, and that's what I'm going to hold it to.

So the issues that we are going to hear will be issues involving the ineffective assistance, and the others, I'm holding and it's my ruling that they are not cognizable by Rule 37, which your pleadings are filed and those will go to the Court.

MR. PHILIPSBORN: Your Honor, I understand the Court's position and so there are just a couple of questions that I would respectfully ask of the Court, uh, just in terms of the Court's schedule.

I know the Court had written us a letter indicating that we would have three days this week, two days next week for this hearing, and the Misskelley attorneys are here.

I understand the schedule may have changed a little bit and I wanted to ask about that.

THE COURT: Well, the problem I have is I have a capital murder case scheduled for trial in Blytheville and I had to give them a pre-trial day, so that's why [*end BMHR 37, begin BMHR 38*] I removed Friday. But you have today, tomorrow, and certainly two days next week.

And I was under the impression that we were going to try to have Mr. Misskelley here tomorrow, is that correct? And I don't have any problem in having joint submissions made, if that's what you all want to do.

MR. PHILIPSBORN: I think that's what we were hoping, Your Honor.

THE COURT: I'm sure the State wouldn't object to that, necessarily, would you? I mean, it seems to me an economy of time would suggest that.

MR. DAVIS: Your Honor, as far as saving time, the State has no objection to that. But I think the question is as far as since the Court has determined that the scope of the Rule 37 hearing will be defined as ineffective assistance of counsel and since we are dealing with counsel and representing clients in two separate trials, I'm not sure...

THE COURT: ... well, we can proceed with the Baldwin issues today and then what's common for the Misskelley defense could start tomorrow.

MR. DAVIS: Okay. So I'll need to get an order to have him brought back.

THE COURT: Jeff, did you have something you wanted to say? *[end BMHR 38, begin BMHR 39]*

MR. ROSENZWEIG: Yes, sir. You made some statements and I think we need - “we” the Misskelley defense, need clarification.

THE COURT: Okay.

MR. ROSENZWEIG: First, I’ve been told that the current plans are to bring Mr. Misskelley to this part of the world on Sunday.

THE COURT: Where did you get that information?

MR. WALDEN: That’s what the two sheriff’s offices indicated yesterday, the Craighead County and Clay County.

We checked with Clay County and Clay County said they had already made arrangements to have Misskelley brought up Sunday.

MR. DAVIS: And if I could clarify, and I emailed Michael Burt yesterday and everybody else, uh, when at 11:45 yesterday I received the email that referred to the Baldwin/Misskelley Rule 37 hearings, it kind of took me by surprise because I thought that we were having the Baldwin hearing today, tomorrow and Friday.

THE COURT: Well, that’s what we originally talked about.

MR. DAVIS: And that some time next week we would start the Misskelley, so at that point we started *[end BMHR 39, begin BMHR 40]*

scrambling to try to figure out if we had to have Mr. Misskelley here today or not.

And what I thought was, was that the more likelihood would be that Mr. Misskelley would have to be here Monday, and that's what the plans are, that he is to be brought back Sunday and be available for Monday's hearing.

If he needs to be brought back earlier, well, I know Sheriff Cole in Clay County is the one responsible for transporting him back. He's indicated that he would go Sunday and bring him back.

We'll just have to, if we need to, just get an order and see what can be done in the interim, but I'm the one responsible for kind of assuming that we didn't need him today.

THE COURT: Well, I think I indicated that we would sort that out today. But I didn't see any problem particularly in getting him here by tomorrow.

MR. DAVIS: We may be able to.

MR. ROSENZWEIG: And Your Honor, if I could address one other thing?

THE COURT: Sure.

MR. ROSENZWEIG: This has to do with scheduling witnesses and

that type of thing, as well. You made reference to the fact that, of course, you denied the *[end BMHR 40, begin BMHR 41]* DNA habeas petition, uh, and we have some issues in our case that, uh, the DNA results are relevant, as well as ineffective counsel and we're not seeking for the basis, of course, we have prejudice.

Did I understand the Court as saying we will not be able to participate; the Court was saying we will not be allowed to present the DNA evidence in our case either, or am I misunderstanding something?

THE COURT: Well, I'm not sure exactly - you're telling me that it will have some relevancy on the issue of ineffective assistance?

MR. ROSENZWEIG: Yes, sir.

THE COURT: Well, in that context I probably will allow a limited amount of it. But I'm primarily concerned with the issue of ineffective assistance and that's what I'm going to allow you to introduce proof on.

So if you think it's relevant, I'll just have to hear what you've got to say at that time. I'm not sure I know exactly what you're talking about. I assume you're saying that the lawyers should have recognized the potentiality of the DNA?

MR. ROSENZWEIG: Yes, sir.

THE COURT: Okay.

MR. ROSENZWEIG: I had understood, or the implica- [end *BMHR* 41, end *BMHR* 42] tion of what I heard was in regard to the DNA stuff as res judicata, essentially at this point.

THE COURT: Well, yeah, that point that I have already entered an opinion on under the 1780 motion, yes. I think that's been covered.

MR. ROSENZWEIG: Well, Your Honor, and for the record, the argument that we would be making is that there is a different and lesser standard of proof on Rule 37 prejudice than there is on a DNA habeas.

THE COURT: Well, I'll listen to what you have got to say and then we'll see where we go from there.

And by the way, for the record, I have read volumes of pleadings, boxes full of it, so I mean, I can't promise you that I will remember everything that has been written in this case, but I will try real hard to.

I mean, that's just one box and I've got four or five in the back that I actually have gone through.

MR. DAVIS: And I guess one thing that would be, uh, the State may request a clarification of Your Honor, or at least request the Court look into it, if the testimony regarding DNA, and I don't know exactly what testimony they may proffer, I have some idea based on the conversation with Mr. Holt this morning, but at one point I think a lot of this was the same [end *BMHR*

42, *begin BMHR 43*] evidence that they said required, they were entitled to have it tested because there was new scientific testing available that did not exist at the time of trial, and if the reason for introducing it at the Rule 37 is to say that the attorney was ineffective for failing to having secured this type of testing, I mean, I think a large part of what was done as far as the Act 1780 DNA testing would have to be precluded, because it was done by agreement because it was ordered that if there was new scientific testing that was available that wasn't available at the time of trial; therefore, it would seem to preclude any evidence of that coming in as a claim of ineffective assistance of counsel, since the counsel couldn't have had it available to him in the first place.

THE COURT: Well, I don't want to hear proof, ,nor do I want to have to rule again on the DNA issues that were already decided in the 1780 hearing or motion, but I will allow, if it dovetails into ineffective assistance, as you pointed out, much of the allegation was that it was newly discovered scientific evidence that was not available.

If that's the case, then it can't very well mesh with ineffective assistance of counsel. But if some way the DNA is involved in decisions or actions of the [*end BMHR 43, begin BMHR 44*] attorneys, I'll hear it.

But if it is strictly the matters that I've already ruled on, I don't need

to hear that again. The Court's already got that information and any appeal, it will be available there.

MR. PHILIPSBORN: Your Honor, one thing I wanted to address was the scheduling issue in view of the Court's schedule on Friday.

There's one expert witness who is a serologist, and again, whose testimony in our view would pertain narrowly to the issue of ineffective assistance, and obviously, by the time we get to the end of tomorrow, the Court will know better from having heard the testimony where we are, uh, we have, tentatively with the Misskelley defense, scheduled that person to come in on Friday.

It's my understanding she can come in on Monday but I didn't want to take the Court by surprise at the end of our hearing; I just wanted to make clear to the Court that we will be available to present her, if the Court permits it, on Monday.

THE COURT: That will be fine.

MR. PHILIPSBORN: The other thing I wanted to let the Court know is that Mr. Hendrix and I have a few questions of one of the witnesses that is a *[end BMHR 44, begin BMHR 45]* principal witness for the Misskelley team and that's now Judge Stidham, and literally a very small amount of questioning, and my understanding, and I've been in touch with him, but

I've also been in touch with Mr. Burt, is that Judge Stidham is expected to be here on Monday.

So again, not to take the Court by surprise on that issue, but that is what I've been informed.

THE COURT: If it's all right with the State, that's fine.

MR. PHILIPSBORN: That's fine.

THE COURT: I don't want it by deposition. I want him personally here, whatever his testimony is.

MR. PHILIPSBORN: And we understood that, Your Honor. And in view of that, there's only one thing I wanted to do and again, we are doing it to preserve our record, uh, and to try to be consistent on it, uh, I think both the Misskelley and Baldwin defenses would respectfully ask the Court to recuse itself from the proceedings in this matter, and I would like to renew that particular, uh, motion.

THE COURT: Well, that's been raised before and I've denied it before, and I intend to hear it through to the end, if I live long enough.

MR. PHILIPSBORN: Well, we'll try to move it [*end BMHR 45, begin BMHR 46*] along, Your Honor, and our first witness is Mr. Ford, who is present.

THE COURT: All right, all who know yourselves to be witnesses in

this matter, please stand and raise your right hand.

Gentlemen, I don't know who the witnesses are; I'm sure the attorneys are, but is he the only witness present in the courtroom?

MR. PHILIPSBORN: Your Honor, most of our witnesses are not. There is a potential witness who is present, uh, Ms. Cureton, Joyce Cureton, and I was actually going to make a motion for the witnesses to be excluded.

I want to supply her as a potential witness.

MR. DAVIS: Judge, before we get started with testimony, Mr. Walden advises me that Sheriff Cole in Clay County can in fact pick up Mr. Misskelley and have him here tomorrow.

THE COURT: Well, I'd like to have him here tomorrow morning.

MR. DAVIS: We need to get an order to Clay County to that effect.

THE COURT: Yes. Mike, are you going to fix that?

MR. WALDEN: Yes, sir. *[end BMHR 46, begin BMHR 47]*

THE COURT: Okay.

(Witnesses sworn; Rule invoked.)

PAUL FORD

DIRECT EXAMINATION BY JOHN PHILIPSBORN

[Rule 37 Vol. 2 - BMHR 47-203]

Robin Wadley and I were working with the Rees law firm and were

appointed to the case. I had been practicing since September of 1987. (BMHR 48:11-19). My general recollection was that I was Lead Counsel in Baldwin's trial and Robin Wadley was my co-counsel. (BMHR 49).

As a result of case preparation and communications with Baldwin, I determined that "... the defense would be he didn't do it." (BMHR 51:17). Baldwin's assertions of innocence were "consistent with what I was viewing as the evidence." (BMHR 52:10-14). "Jason always maintained his absolute innocence in this case." (BMHR 52:1-2). I felt that I had investigated an alibi though I cannot recall specifically what I did to investigate. I believe I obtained some document that showed he was in school at that time, and I may have made contacts by phone, or maybe Wadley did. (BMHR 53-56). I met with Jason's mother several times. She may have provided me his school records.

At the time I undertook the defense of the case, I had defended one or two separate capital cases, and a third that ended up being negotiated. (BMHR 57-58). I can't recall whether I had attended any capital case training, or was aware of the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* at the time I undertook his defense. (BMHR 58-59).

My investigation was undertaken by my speaking to persons that I could speak to or following up on leads that were brought to me by people through sources like Jason's mother or through the prosecuting attorney. (BMHR 59:9-12).

I did not hire an investigator. (BMHR 59:24-25). The investigators working with co-defendant Echols was not working for me. (BMHR 60:9-11). At no time did these investigators work with us. (BMHR 60). I never asked for any specific information from the Lax investigators. (BMHR 64:24-25).

You are showing me some documents (Petitioner's Ex. 1) that were generated by investigator Lax. If they are in my file, then I would have had them at the time of trial, and if not, I would not have had them. (BMHR 65:23-66:13).

The Echols and Misskelley defense lawyers and I shared information only on a cordial basis. I was not comfortable with everything that other counsel were doing and I was not using the same defense plan. (BMHR 66:18-21).

I was not following what the Echols investigators and or what the lawyers for Misskelley and Echols were doing. Ours was a different case. Misskelley had to deal with a confession. Echols had a more significant exposure to the death penalty. I was concerned about getting Baldwin severed from Echols, and the Judge and I went around about that. I didn't want to share documents with any of the lawyers because I was concerned about waivers of the privilege. (BMHR at 67-69). I was not concerned that other defense teams in the case had an investigator and I did not. (BMHR 68-71). The defense was that Mr. Baldwin did not do it. I had considered an alibi defense. (BMHR 70-71). The alibi as I recall would have to cover the times between 3:00 p.m. and 9:00 p.m., which was the

time from the end of the school day and the time when the parents were concerned that their children were missing. (BMHR 73:1-6).

I tried to verify Baldwin's whereabouts by talking to Jason and his mother. I recall talking about an uncle whose yard Baldwin was said to have been mowing. (BMHR 73-74). I recall that at one point Baldwin was supposed to have been in the company of his younger brother. I can't remember at this point what I looked at or what I knew exactly. Now that I am looking at Exhibit 49 from the statutory habeas exhibits in case CR 09-60, I may have seen a statement taken by the State indicating that Matt Baldwin, Baldwin's brother, purported to have information about Baldwin's whereabouts. I don't recall if I looked at it back then. (BMHR 78-79). I felt that if I was unable to establish an alibi, presenting an incomplete one was more detrimental than presenting one at all. (BMHR 78). Now that you are showing me these records, I recall some discussion about Baldwin being home with his brother, and I specifically recall discussions with Jason and Jason's mother about calling home during the evening when she was at work. (BMHR 79:7-10). I don't remember trying to get any phone records from her place of work. You have also asked me to look at a police interview with Gayle Grinnell of 6/4/93. I can't remember at this point whether I had seen that interview. I felt that the mother desperately had wanted to provide assistance by telling me where Baldwin had been, but I didn't feel that I had reliable information from her.

(BMHR 80).

I agree that it might have been significant to the jury that during the course of Detective Bryan Ridge's interview of Gayle Grinnell that the Detective had indicated that if Baldwin could provide information about his whereabouts he could go free. (BMHR 83). It would have been something to ask the Detective if I was trying to present an alibi for Baldwin. I also agree that if I could have established through phone records that there was a call initiated in Memphis that reached the Baldwin home at about 7:30 a night, that would have corroborated the mother's information. (BMHR 81-84). I have a general recollection that Gayle Grinnell lived with a man named Dink Dent at the time of the event, and now that you show it to me as Ex. 3, I don't recall how I came to be in possession of a handwritten statement from Dent describing his recollection of events. I never went to see Dent. (BMHR 86). However, I can identify some notes from my file that I had made about the case that mentioned Matt Baldwin and Dennis Dent as well. (BMHR 87-88).

I also recall that I had received information from Baldwin's uncle indicating that Baldwin had been mowing the lawn at his uncle's place on the afternoon that the children had disappeared. (BMHR 88). My notes indicate an address for the uncle of 1037 Park Drive in West Memphis. However I cannot recall ever going to the uncle's residence. (BMHR 88.) It also would not have surprised me if Gayle

Grinnell had provided the police with a time-line that included, among other things, her son having gone to his uncle's house in West Memphis to mow the lawn. (BMHR 89).

I do not recall whether I received information that Baldwin had been having phone contact with some girls on the night of May 5 when the three young boys had disappeared. I have a hazy recollection of Jason and I discussing them. I can't recall if I had a police transcript of an interview of any of them, including Jennifer Bearden. (BMHR 90) I also recall Baldwin telling me that he had a girlfriend named Heather. If there is a Heather Cliett interview with the police that was in my file, I would hope that either my co-counsel or I had reviewed it, and that we discussed it. (BMHR 89-91).

Now that I am asked about it, it would have been significant if my client had caught a school bus at 7:30 a.m. near his home after supposedly having been involved in a homicide several miles away from his trailer park only hours before the bus ride, and that no one noticed anything unusual about him. (BMHR 93-94)

I don't recall right now whether I was aware of a police interview with Echols' girlfriend Domini Teer, who had given an explanation of where Echols and Baldwin had been on May 5, 1993, but I generally recall that she had talked about those things. (BMHR 94).

I also recall that there had been some conversation from Baldwin about his

walking to a Walmart on the day of the killings after school and playing a video game. I don't recall a Don Namm, or information about his having said that Baldwin had been at Walmart, or Kenny Watkins telling the police that he had been told that Baldwin had been by his uncle's place that afternoon. If it was in police reports that were in my file, then I "should have reviewed it". (BMHR 94-96).

The State had been changing the range of the time of death. I felt it was better for me to try to poke holes in the State's case and in their estimate of time of death than to try to call alibi witnesses. (BMHR 96-97).

I believed my client at the time, and I still do. I found him to be believable. (BMHR 97).

As I was preparing for trial, one thing that happened was that the State produced a jailhouse statement attributed to Baldwin by Michael Carson, who had been in the detention unit with him. Also, I had been unsuccessful in getting a severance from Echols. I also had some understanding that Echols was going to present some kind of affirmative defense. And shortly before he did so, I was made aware that Echols was going to testify. (BMHR 98-99).

My strategy didn't change because of these things. My approach was: "My client didn't do it and the State must prove he did it, and my job is to raise reasonable doubt. And reasonable doubt pokes a hole in their balloon". (BMHR

99: 5-8). “My strategy began to be that’s just another avenue that I need to try to poke a pin in”. (BMHR 99).

The State was trying to show that Echols and Baldwin were friends and were connected with one another. When we were in trial I realized that Echols’ alibi defense was “not very, very strong...”. It was like a house of cards. (BMHR 98-101). It did not do Baldwin any good that Echols’ defense was disintegrating. “I don’t think [Echols’] defense did him any favors”. (BMHR 101). It also didn’t do my client any favors, which is why I had asked for severance.

Looking back at it, there were a number of differences between Baldwin and Echols. Baldwin went to school. There were people like teachers and other young people from Baldwin’s school who would have known him and about him. (BMHR 74-75). “I thought he was a mild mannered young man that did not seem to me to fit the suit of someone who would commit the horrific crime.” (BMHR 102-103).

I don’t recall whether it had even crossed my mind to assess whether there was evidence of Baldwin behaving in some kind of an unusual manner the day after the killing, or whether I thought of whether there might be people who could have testified that he acted and looked normal after the killings were reported. I can’t tell you whether it crossed my mind that people from Baldwin’s school could have provided a baseline about my client’s behavior and physical appearance

within hours of when the State said he had committed capital murders. (BMHR 103-104).

I had to deal with evidence of a knife that had been recovered that was attempted by the State to be linked to the homicides. (BMHR 104-105). My thought was to discredit this theory, and that this would be a way to make their case fall apart. (BMHR 106). I had a number of discussions with the State's pathologist, Dr. Peretti. I tried to address matters like time of death and mechanism of injury with him. (BMHR 105-107). I recall that at one point in one of our discussions Peretti told me "... I believe it was the cheek of one of the young boys may have been bitten by a turtle, or some of those were turtle bites." (BMHR 108:10-13). He may have said 'could have been'. (BMHR 109). But I made the decision that I was not interested in post mortem injuries. "I was more concerned about who the State, did the State's evidence prove that Jason Baldwin did anything." (BMHR 110). I was trying to show that the State's case didn't add up. I felt that the turtle bites didn't factor in to that.

I recall that Misskelley had given a statement that said something about sexual assault, and my recollection was that the autopsy findings were inconsistent with that. (BMHR 113). I can't recall doing any specific research about what kind of evidence, like DNA, might still be present, but I thought it would have washed away. I may have read about that, but I don't know about DNA and what might

wash it away. (BMHR 115).

I remember that the State had a DNA expert. I can't recall exactly what he was called to testify about. I also can't recall whether the State had tried to establish that there was some kind of evidence of sexual activity on the victims' pants. I didn't do any research on how you might detect semen or other fluids on textiles. I also didn't do any research on whether you could identify sperm fragments using the methods that had been offered by the State. (BMHR 117).

I can't recall if I ever obtained all the lab bench notes, lab notebooks, and lab test results that had been produced. If they are in my file, I had them, if not, I didn't get them. (BMHR 117-118). I do have a memory of talking to Kermit Channel at the Crime Lab. He had some notebooks with him. (BMHR 120-121). I don't have a clear recollection of doing that with Ms. Sakevicius. I don't recall ever seeing any copies of hair slides, or particularly a copy of a slide of a hair taken from one of the ligatures used to bind the victims. (BMHR 121-122). I would have been interested in getting information about that hair "[i]f the hair spoke, so to speak, I might have thought it was important." (BMHR 122:14-15). It might have figured into the cards I might have played.

I never had a criminalist in this case other than Charles Lynch who assisted us with fiber evidence. I didn't have a criminalist go to the Crime Lab with me. (BMHR 123-124). I didn't consult any pathologist other than Dr. Peretti. (BMHR

126). My billing records will give you some idea of what I did in this case, but I am not the best of record keepers. Petitioner's Ex 6 are those records. (BMHR at 124-126).

I remember being more involved in dealing with Dr. Peretti than in preparing to deal with the jailhouse informant Carson. But I did get a call from a counselor named Danny Williams who told me that what Carson told the authorities was "less than accurate". BMHR 128. "I thought he would be essential in my defense." (BMHR 128:24). In the end, I didn't call him because he wanted to cover himself, and would not agree to testify consistently with what he told me. Williams had been working for some sort of screener for programs for juveniles. (BMHR at 129-130). I think that Williams may have also met with prosecutor Fogelman.

I felt that I consulted my client about the decisions we were making, including the decision not to call Williams. (BMHR 1132-133).

Baldwin "was willing to testify" in his defense. (BMHR 133). He did not insist on testifying, although he was only 16 years old at the time.

My co-counsel Robin Wadley had been in the area longer than I had. He knew more people than I did. I think he talked to Joyce Cureton who supervised the juvenile detention unit. I don't know if he talked to anyone else. (BMHR 134-35). I can't recall if we made any efforts to interview other juveniles at the

detention unit about the jailhouse informant Carson. It is true that I was going to be arguing the case, and I would have needed to be on top of the evidence including Carson's information. (BMHR 136-137).

I also was aware from Baldwin and his mother, and maybe from Echols' defense lawyers, that Baldwin and Echols were friends. I was made aware that the two of them were not really friends with Misskelley. (BMHR 138). I can't remember ever interviewing any of the youngsters who lived near Baldwin to see what they knew about his connection with Echols. I also can't remember interviewing anyone about whether they had seen Baldwin getting rid of evidence like clothing, shoes or other evidence. I didn't interview anyone about what they may have known about comings and goings from the Baldwin trailer near the times that I understood were pertinent to the killings. (BMHR138-139).

I don't know of any evidence that Baldwin had ever been to Robin Hood Woods: "I don't believe there is any evidence that he has ever been there". (BMHR 139).

I also recall that certain statements attributed to Echols had allegedly been made at a ball game that Echols and Baldwin were said to have attended. I had asked for severance. I am not sure what was done with the witnesses to the statements, as my co-counsel was handling them. But because I was arguing the case, it was my responsibility to figure out what spin to put on them. (BMHR 142-

143). We had consulted with a child psychologist on jury issues, and we had his suggestions about how to deal with the young ladies' information about what the statements made at the ball game. (BMHR 143-144).

I remember being aware that Echols was “essentially acting as an, an anchor to weigh down Mr. Baldwin....” (BMHR 144). We talked about that a lot. You better believe that was one of our concerns. The worse it got for Echols, the more concerned our defense had to be.

We also knew, after jury selection that we had to be concerned that our jurors had gotten information about the Misskelley case, which was tried before ours.

I am not passing the buck in telling you that I relied on a jury consultant in assessing the elephant in the room, which was the Misskelley confession and the Misskelley conviction, and also the Echols defense, which I was concerned about. “But it was what it was and I had to be concerned with it, just as you have suggested, and I was”. (BMHR 146).

I tried to determine how to deal with those factors, and my concerns about how my alibi witnesses would hold up under cross examination. I also recall that “...Damien's testimony hurt him significantly...and therefore, it hurt my case too.” (BMHR 147). I was aware that the negative impression created by Echols would effect Baldwin. I thought that even though Echols had called 7 or 8 witnesses, and

testified, and dealt with fiber evidence, I could rely on reasonable doubt in my defense. (BMHR 147-48). “...I believe there was a lot of doubt in that case, and still do.” (BMHR 148:2-3).

I would agree that we hoped that the jury would concentrate on Echols as a major participant and view Baldwin as a minor participant. In that sense we acted in some regard on a ‘stealth defense’. (BMHR 149).

I thought that the Echols defense alienated the jury. I had real “reservations about some of their strategies....” (BMHR 149). I thought it was very dangerous of them to point the finger at one of the victims’ fathers. (BMHR 149). But I felt “confidence” in my ability and felt that if I did a good job, “he would have a good chance of winning.” (BMHR 150). But I did think that Echols’s defense “hurt them.” (BMHR 151-152).

The information that Baldwin’s Uncle Hubert could have supplied only covered Baldwin to about 4:30 PM on the day the kids disappeared. The statement from Dink Dent would have covered him to about 7:30 or 8 PM. (BMHR 152). I agree that this evidence would have tended to indicate that Baldwin did not have the opportunity to plan a murder that night. (BMHR 152). “[I]f you could provide an alibi from 3 PM to 9PM...it would cover a lot of ills.” (BMHR 153:16-18). Establishing such an alibi would have involved members of Baldwin’s household, and the girls from the evening phone calls. (BMHR 153-154).

A defense based only on reasonable doubt arguments places a lot of responsibility on the lawyer's shoulders, since he has to argue the case and needs to have established his credibility during the trial. I agree that you also assume the risk, when you present no evidence in the defense, that jurors may conclude that there is no evidence that the defendant didn't do the crime—since he presented no evidence in his behalf. (BMHR 155).

Looking at Exhibit 7, I recognize it as a memo from my file. It is dated January 24, it memorializes a contact I had with counselor Danny Williams on the 21st. I also recognize a police interview of Ken Watkins by Detective Ridge that mentions a Walmart. Exhibit 8; (BMHR 161). These are from my file. I don't remember them. I also don't remember Exhibit 9, which was a police interview with Don Namm who purported to have contact with Baldwin on May 5, 1993. I don't remember interviewing either of them. I don't know if my co-counsel did. (BMHR 161-162). Exhibit 10 is a police report of an interview with Heather Cliett. I kept the witness files in alphabetical order. Heather Cliett had said that she talked to Echols on the evening the children disappeared, which is evidence that would have exculpated Echols and benefitted Baldwin. (BMHR 164).

I don't recall ever trying to see if we could provide an alibi for Echols in an effort to benefit Baldwin. I didn't think Echols's alibi worked well. But I never considered whether I might try to establish his whereabouts to benefit my client. I

never looked at the reports in the case that way. (BMHR 165-166).

I did think that I needed to assess whether Echols could provide a defense because we made “a conscious decision...to pull our antenna in.” (BMHR167:15). That was my strategy. It may not have been effective. I urged the co-defendant’s counsel not to put Echols on the stand, and I was concerned about being tied to Echols and his pulling us down. (BMHR 167-168).

Whether it was reasonable for me not to have an investigator is “for someone else to decide.” (BMHR 169). There were many witnesses in the case. There was a lot of work that I put in to the case. “So could I, in hindsight, have benefitted from an investigator. Yes.” (BMHR 170:16-17). I did the best I could at the time.

I agree that we did not present any penalty evidence in Jason’s behalf. I agree that we assumed a risk in not presenting any evidence. (BMHR 172).

My approach to this case was that I could argue the case well enough to have the jury give my client a light sentence. And it’s fair to say that a lot of the approach to the defense of this case was built around my confidence in my ability to argue persuasively to the jury. (BMHR 172). I felt that I could argue that in “the absence of any evidence that he did it and the State’s absolutely void of proof”, that was my evaluation. (BMHR 173).

I agree that I could not use impeaching information about Anthony

Hollingsworth if I never received it. (BMHR at 175).

[The State reserved an agreement on whether Mr. Ford's entire file was available BMHR 148. Baldwin's attorney J. Blake Hendrix represented that the Attorney General's Office made a copy of the entire file, and that the file was available in the trunk of his car, as well. BMHR 176]

CROSS EXAMINATION BY BRENT DAVIS

I recall observing the Misskelley trial. The Misskelley alibi about wrestling, or something like that, had unraveled. (BMHR 178-178).

It seemed to me that Baldwin and I had an agreement that we were doing what we thought was best when he did not testify. He was a young man, and I don't want to put words in his mouth. I felt I discussed the issue of Baldwin's testimony with him. I arrived at the decision not to have him testify after we talked about it, and considered it. "...[A]nd I hope that [Baldwin] doesn't disagree with that." (BMHR 181:5-6). I also feel the same thing about our decision not to put on alibi witnesses, and I hope he doesn't disagree with that, either.

REDIRECT EXAMINATION BY JOHN PHILIPSBORN

I agree that I had a letter in my file that was in Baldwin's hand that I looked at and it made reference to persons who could provide an alibi for him. (BMHR 188-189). I also agree that my file contained information (Exhibit 12) indicating that my client's mother had attempted to funnel witness names and numbers to me.

(BMHR 191). I also had a set of notes from Uncle Hubert that had likely been passed to me that showed what information he had about Baldwin's whereabouts. (BMHR 192-193).

I had some notes in my handwriting with the names Kenneth Watkins, Garrett Schwarting and Don Namm. It might have been that these notes were made when I met with Baldwin's mother Gayle. (BMHR 193-194)

I also have a note in my handwriting that made reference to a head hair in the ligatures on the victim Byers, indicating that someone at the Crime Lab told me that there was a head hair in the Byers ligature. (BMHR 195-196). I don't recall following up on that. (BMHR 195).

I don't recall whether I ever memorialized any of my discussions with Baldwin, even though there are a number of notes from me in my file.

One of the bits of advice that I had received from my trial psychologist was that when Echols testified, that would be devastating to the defense. (BMHR 198). We were trying to keep our ship from going down after their ship had been hit. (BMHR 198). We really didn't pay attention to our psychologist's views about Echols.

I thought that Baldwin was truthful. (BMHR 198:25). And I felt that the decision for him not to testify was made on a difficult day. I recall that an HBO camera crew had been present at the time of the interaction between Baldwin and

me. I agree that if it was shown on the HBO film that I had told Baldwin that the State had not introduced enough evidence to convict him, then that's what I told him.

RECROSS EXAMINATION BY KENT HOLT

I took my files to Mr. Hendrix's office in Little Rock. I couldn't tell you if anything was missing from my files. (BMHR 202).

[This concluded the testimony taken on September 24, 2008]

The proceedings of September 25, 2008 begin at BMHR 204. The record reflects that after the above testimony was presented, Baldwin's counsel stated on the record that the files and records of trial counsel were acquired and maintained at the offices of J. Blake Hendrix, counsel for Baldwin, in the condition that they were delivered in. The Court stated that it accepted counsel's statement, and would allow the inventory of trial counsels' files to be made part of the record. BMHR 207.

RON LAX

DIRECT EXAMINATION BY JOHN PHILIPSBORN

[Vol. 2 - BMHR 208-321]

I am a private investigator who owns a business called Inquisitor, Inc.

(BMHR 208-209). In 1993, our firm had offices in Knoxville, Nashville, and Memphis. We worked on both civil and criminal cases. By 1993, we had been involved in twenty to thirty capital cases. (BMHR 210). We had begun our work in capital cases with the Capital Resource Center in Nashville. I received training in working on capital cases through seminars and training programs put on by the National Association of Criminal Defense Lawyers, the Tennessee Association of Defense Lawyers, and through CACJ, a defender organization in California. I was aware of the professional standards for capital defense put out by the ABA around 1989. Tennessee also had standards for capital defense. (BMHR 211).

I had volunteered my firm's services after reading about the case. I had contacted Judge Rainey in West Memphis. I eventually got a call from Val Price. (BMHR 212). I then met with Val Price and Scott Davidson. At first, those were the only lawyers we were working with. I first met the other lawyers in the case when there was some talk about an HBO television special on the case—Val, Scott, Dan Stidham and I met with the HBO producers. Stidham and Paul Ford had already agreed to do the movie special. I also remember being approached by Dan Stidham about a false confession expert, and then I had more meetings and conversations with him. I had one meeting with Paul Ford in his office. (BMHR 213).

Our job was to investigate the Echols case. We received the discovery in

installments, organized and summarized it. This was one of the biggest cases the Echols lawyers had ever handled. They had evidently not worked a lot with investigators before. They had no investigative plan. The investigator would usually determine the direction of the investigation, and they would make occasional suggestions. (BMHR 215). There was no actual theory of defense. We made recommendations as to what might be done. (BMHR 216).

There was an agreement that we could share information with the Misskelley defense. There was no agreement to do any work for the Baldwin lawyers. We were never asked to locate or interview a witness by the Baldwin lawyers. They never asked us to investigate any part of their defense. (BMHR 217). The only indication we had about what their defense might be came from hearings in which it was said that Baldwin's defense would be antagonistic to Echols'. (BMHR 217-218). We never gave any documents to Baldwin's counsel, with the exception of a background check on one of the State's experts, Dr. Griffis. They got that through one of the Echols lawyers. (BMHR 218-219).

Defense Exhibit 1 is a document that we created that had in it the names of all of the individuals whose names had either surfaced in the discovery or during our investigation.

In 1993, we would have had the facilities to search for witnesses, like Kenny Watkins or Don Namm. We had data bases we could search. (BMHR 220-221).

Exhibit 3 is a time line of the case. When we work on a case, we develop a time line of the day by day information about the case. We also develop a mitigation time line that shows a client's background and social history. It is a document that is updated often. (BMHR 221-222). The time line we created for this case had no information from the Baldwin defense. We never interviewed Baldwin, and his lawyers shared no documents with us. (BMHR 222). I was given access to Misskelley, and had unlimited access to Echols. (BMHR 222-223).

When we investigate and interview a potential witness, we write up a memorandum of interview. When we do a mitigation investigation we document events in that individual's life. We interview neighbors, friends, teachers, family members. We get background records like school, medical, mental health records. We put together a social history. (BMHR 223-224).

We were never asked to get the distance of the various alternative routes from Baldwin's house to Robin Hood Woods, or to figure out what the routes of travel were. I was never asked to get any phone records in connection with the case. (BMHR 225). I did talk to Baldwin's mother Gail Grinnell. (BMHR 227-228). I interviewed her once, and she called me several times. She knew I was working for Echols.

I did do some investigation about Michael Carson, but that was after the trial. (BMHR 229-230).

I never acquired any Arkansas Crime Lab records. (BMHR 230-231). I was aware of the 'phone girls' and interviewed them. (BMHR 231).

I was aware that Misskelley had told the police that he had and Baldwin had talked by phone on the morning of the killings, but I was never asked to locate any phone records dealing with that issue. (BMHR 231-232).

Part of our investigation for Echols was to try to document his whereabouts. We understood that he was with Baldwin part of the day the children disappeared. We were able to get a time line of where Baldwin was. We had interviewed his brother, and I'm pretty sure we spoke with his uncle. Baldwin had cut his uncle's lawn at some point that afternoon. He and Echols had also been on the phone with the 'phone girls' that evening. (BMHR 233-234). We were able to construct a time line for Baldwin on May 5 into the early morning of May 6, 1993. He had played games at Wal-mart; cut his uncle's lawn; been at home with his brother when his mother called. (BMHR 234). There had been some teenagers who could account for his whereabouts, as well as his mother and uncle.

At one point we had tried to get interviews of the 'softball girls' who had heard Echols make statements at a softball game when he was around Baldwin after the killings in this case. They would not cooperate with us. (BMHR 209).

It was evident that though Baldwin and Echols were close, Misskelley was not in the same circle. (BMHR 237).

On further direct examination by counsel for Misskelley:

Echols was my client. I didn't talk to Misskelley until after his trial. I didn't talk to Baldwin at all. (BMHR 239).

My confidential relationship was with Echols. There was also an information sharing process involving the Echols and Misskelley defenses. (BMHR 240). This was unusual. Also, the defense teams never sat down and worked out any sort of information sharing arrangement. (BMHR 241). We began working for Echols in June 1993. We starting working with Attorney Stidham shortly before the Misskelley trial. (BMHR 242). I first started billing on that case on December 28, 1993. (BMHR 243-244).

I spent 1,513.4 hours working on the Echols case, which is not unusual in a capital case. (BMHR 246). There were still "numerous witnesses which we had identified but never had the opportunity to talk to...." (BMHR 247).

We chose to work with the Echols defense because they were "the only one[s] who called us back" after we offered to work on the cases. (BMHR 250). We ended up doing work for both Echols and Misskelley, but the lawyer for Echols was our client. (BMHR 251). The lawyer for Misskelley asked us to interview the manager at the Bojangles Restaurant, and to locate and interview several other witnesses. (BMHR 253). Some of these people were possible alibi witnesses, though they did not provide an alibi for the right date. (BMHR 257).

We had explained that to Mr. Stidham. (BMHR 258).

We had also worked on investigating Vickie Hutcheson, a woman who pertained to both the Echols and Misskelley cases. (BMHR 258-259). She had been under investigation in another matter, and reported that her son's three friends were missing. The police had used her to try to get wired statements from Echols. (BMHR 259).

We had also been asked to look into an altercation at the Misskelley trailer park that evening which could have been an alibi. (BMHR 263).

We had also written to a pathologist, Dr. Sperry, to try to get advice on time of death information. (BMHR 263-264).

CROSS EXAMINATION BY BRENT DAVIS

I never thought that we would be working for all three defendants. (BMHR 268-269). We figured that we would be working for one.

There were some things that we should have done that we didn't do—for example, getting phone records. (BMHR 273). We also failed to talk to people from the ballpark. (BMHR 275-276).

I am no longer employed by any of the defendants on this case. I was never retained by either Baldwin or Misskelley. I did some work for Echols over the years up until ten or eleven months ago. (BMHR 288-289).

I don't know if Baldwin's defense had any knowledge of my efforts to

develop an alibi for Echols, or the contacts with the phone girls, because I had no related contacts with the Baldwin defense. (BMHR 288-290).

I remember that there were discussions with the Echols team about hiring a pathologist, but they said it was a funding issue, and they didn't do it. BMHR 295.

REDIRECT EXAMINATION BY JOHN PHILIPSBORN

Baldwin's post conviction defense did not want me involved in the case because they felt I would be a witness in post conviction proceedings. (BMHR 296-297).

There was no trial level billing that we generated in Baldwin's case because we never did any work for his defense. (BMHR 297).

My memory is that the ABA *Guidelines* required the use of two lawyers and an investigator in the defense of a capital case as of 1989. (BMHR 298-299).

As for the Echols alibi, part of the problem was Echols's own testimony about the alibi. (BMHR 301).

Part of the reason that I am saying that it was an omission on my part to have failed to get the phone records in the case is that if I had gotten them, we could have established exactly when the phone calls were initiated and how long they lasted, including the calls with the phone girls. (BMHR 301-302). And we could have determined whether it was true that Misskelley had called Baldwin in connection with the case. (BMHR 302).

Based on the anecdotal information we had, Baldwin was at his home on the evening of May 5, 1993. (BMHR 305-306).

CHARLES JASON BALDWIN

DIRECT EXAMINATION BY JOHN PHILIPSBORN

[Vols. 2 and 3 - BMHR 294-380]

I am now 31 years old. (BMHR 322). My mother's name is Angela Gail Grinnell, and my father's name is Charles Larry Baldwin. I have two younger brothers, Larry Matthew Baldwin and Terry Ray Grinnell. My father was not living with the rest of the family members in 1993. (BMHR 322-323). My family lived in the Lake Shore Trailer Park in Marion, Arkansas, which is north of West Memphis. The trailer park had a few hundred trailers in it.

My mother was working in May, 1993. At the time, she had a live-in boyfriend named Dennis "Dink" Dent. He had been living there for a month or two. (BMHR 324).

My mother worked the late shift which started at 2:30 or 3 p.m., and she got home at 10:30 to 11:30.

Either Dink Dent or myself were responsible for watching the children. My recollection was that Dent left our home permanently on May 6, 1993 after I returned from school. (BMHR 325-326). I remember that day because it was

when the boys' bodies were found. My Mom told me to stay at home with my brothers. Plus her and Dink had been in an argument the night before, and she kicked him out, so she wanted to make sure that we knew what she wanted us to do.

My normal routine in the household was for me and my brothers to get ready for school, and to catch the school bus in the morning. (BMHR 326-327). At the time I was going to Marion Senior High School. The bus stopped three or four trailers down from my trailer, and the bus would usually get there between 7:30 and 8. Normally I would get up to get ready for school at 6 in the morning. (BMHR 327).

It took about 30 minutes for the bus to get us to school.

In May of 1993, I was in the 10th grade, but I was smaller than other persons in my age group. I weighed about 112 pounds. (BMHR 328). I was not a fighter. The only fight I remember being in around that time, I got licked. I was not into violence.

My school day ran from 8:15 to 3:15 in the afternoon. (BMHR 329).

I was not involved in the killing of the three boys in West Memphis on May 5, 1993. I have never been involved in the killing of anyone. I deny any involvement with Damien Echols and Jessie Misskelley in the killing of the three boys. (BMHR 329).

My experience with the court system and lawyers before 1993 was in the juvenile system when I was around eleven. I had been placed on probation when I was 11 years old. (BMHR 303). However, my first real attorney-client relationship was with Paul Ford and co-counsel Robin Wadley. (BMHR 331).

I recall seeing my lawyers once or twice a month prior to trial, though there would be times I did not see them at all. During trial I saw them almost every evening. (BMHR 331-332).

When I met with my lawyers, they did most of the talking—Paul did most of the talking for the lawyers. At age 16, I was fairly passive. (BMHR 332-333).

I do not recall the lawyers asking me much about my family background, or seeking information about the family that would allow them to go out and conduct interviews. (BMHR 333-334). They never talked to me about how my case was being put together, or how a capital case works. (BMHR 334).

I told my lawyers I was innocent. I told them I had people who knew where I was on the day of the murders, and the day after. (BMHR 334). Most of the questions they asked me “were about Damien”. It seemed to me that Paul Ford may have thought that Damien was guilty. They also talked about where I was on May 5 and 6. (BMHR 334). I thought I gave my lawyers the information they needed. I talked to my lawyers about friends and neighbors in part because I realized it was being said that I was a Satanist and a devil worshiper. I felt that there were people

who could talk about me like Mrs. Littleton, our neighbor, who knew me. (BMHR 335-336). I don't recall the lawyers spending time with me to discuss my background, school and community history, or what helpful information persons might have about me. (BMHR 335-336).

I recall telling my lawyers that on May 5 I got my brothers up for school. After school I recall returning to my house and seeing Damien and Domini sitting on the hood of an unusable car that was sitting in the front yard. Ken Watkins, another friend, came over. (BMHR 336-337). We were playing Super Nintendo.

I told the lawyers that Dink was there. Dink told me that I had a call from my uncle who wanted to know if I was going to go over and cut his grass. (BMHR 337-338). I told the lawyers that my uncle was Hubert Bartoush. My uncle lived in West Memphis close to the Boy's Club. (BMHR 337-338). I told the lawyers that Echols, Domini and I walked from Lakeshore to my uncle's house. I described our route of travel over the overpass, through the Walmart parking lot and past Kroger's straight to my uncle's house. By the time I cut the front lawn at my uncle's house, Echols and Domini had left. Echols had relayed word through Ken Watkins that he had to go call his mother. (BMHR 338).

After Watkins told me that, I finished mowing the lawn. My uncle paid me ten dollars. Ken Watkins and I had returned to a Walmart, and we ran into an Asian guy named Kim. Ken Watkins and I played a video game called "Street Fighter 2".

Watkins stayed there, I returned to Lakeshore. I went home.

When I returned home, Dennis “Dink” Dent was still there, as were my brothers. I said I was in my home for a while before I went to Adam’s house. (BMHR 340).

At the time my mother would call home from work. I knew that I had to be home or else I would get grounded. (BMHR 340-341).

I recall that day that I had tried to purchase a tape recording from Adam, who lived next door to me. I had gotten money from my uncle, and I used some of that to buy a music tape from Adam. I went back home after that. I recall eating supper, and talking on the phone to Holly and to Heather, my girlfriend at the time. I remember also talking by phone to Damien, and to Jennifer. I also recall talking to Dink Dent at home that evening. We watched TV before I went to bed. (BMHR 342).

My lawyers did not ask me about who my teachers were, or what classmates I was friendly with on May 5-6, 1993. I don’t recall being asked whether any of my school mates might have seen my physical condition on May 6, the day after the killing of the three boys. (BMHR 343).

I never practiced testifying with either one or both of my lawyers. (BMHR 343-344). The lawyers never brought in other counsel to help prepare me to testify. I think my lawyer is confusing my case with someone else’s. (BMHR

344).

My recollection of the discussions that my lawyers and I had concerning my testimony was that Ford would ask me daily whether there had been anything presented in court that would make me think that the jury would find me guilty. (BMHR 344).

I remember that the lawyers and I talked about whether it might be a good idea to present witnesses who could establish my whereabouts at the important times, but I could not get my lawyers to tell me whether they had actually talked to anyone. It seemed to me that I had to tell them over and over again what happened “without any results”. (BMHR 345).

I don’t recall the lawyers telling me that they had talked to my uncle or been provided written statements from my uncle and from Dink Dent. (BMHR 345-346).

We didn’t talk about the options we had about calling witnesses or not. I would tell them about people who knew where I was that day. (BMHR 346).

I recall that I was writing letters to my girlfriend Heather during that time concerning persons who might be able to help me establish that I was not guilty. (BMHR 346-347).

I also told my lawyers about my Mom’s phone records, because of her calls. I told them to check on calls that night.

I was not really sure at the time of my trial who makes the decision whether the defendant takes the stand in his defense. (BMHR 347-348). Paul would just ask me if I had heard anything that made me think they would find me guilty. (BMHR 347-348).

I felt I had to testify because the jurors did not know "... who I was. No one was up there to tell them who I really am, you know, or what I was doing that day. They didn't hear anything from me or from my family or anybody that I was around that day." (BMHR 348:19-22). But Ford would kind of shrug me off, and would ask if I had heard anything that made me think they would find me guilty. (BMHR 349). I remember that there is a part of the HBO film where Ford is shown talking to me and that is the way he used to talk to me during the case.

I needed glasses to see clearly. During the trial I did not have glasses, and could not see the faces of witnesses from where I was sitting. When Michael Carson was called, I didn't recognize him at all. (BMHR 350).

I never made any statements while in the Detention Unit in Jonesboro about being guilty. I never told anyone that I had sucked blood out of people or had put someone's genitals in my mouth and bit them off. (BMHR 350-351). The first time Paul told me anything about Carson testifying was when Carson was walking to the witness stand. I couldn't see him, and I couldn't recognize him. My recollection was that after Carson testified, attorney Ford told me that nobody

would ever believe Carson. (BMHR 352).

I had wanted to take the witness stand. I was shocked that I wasn't called to testify. I was shocked that no one from my family was called as a witness. (BMHR 352). My Mom was heartbroken because she had been excluded from the trial because she was a witness. Ford never called her. (BMHR 352).

I also did not recall any discussion during which Ford told me he felt that the Echols defense alibi, or that Echols' testimony, had not assisted either Echols or me in our defenses. (BMHR 353-354).

CROSS EXAMINATION BY BRENT DAVIS

I was arrested in early June, 1993. I told a dark haired Detective what I told you there today.

My lawyers worked on my case actively and consulted with me during the course of trial. (BMHR 356). I remember that the lawyers had talked to me about jury instructions and lesser included offenses. (BMHR 356-357). I advised my lawyers I did not want any instructions on lesser included offenses. (BMHR 357).

I never demanded to be permitted to testify. (BMHR 359). But I asked to testify and would be told that this was not the time to do so. (BMHR 359).

I recall telling my lawyers during jury deliberations that I had wished that I had been called as a witness, and that my mother and others had been called as well. (BMHR 360). Ford never told me that my family and friends would unravel on the witness stand. (BMHR 361). He had said that witnesses could become confused and that it might possibly hurt the case, but Ford never told me that any specific witness would unravel. (BMHR 361-362).

Ford never discussed the pros and cons of putting on my alibi witnesses. (BMHR 362). I didn't realize the my lawyers weren't calling any witnesses for me until the jury was deliberating. (BMHR 363).

I acknowledge that I had been locked up with Michael Carson, and that at no time did I take the stand to challenge Carson's testimony. (BMHR 363-364).

The necklace that had been acquired by Damien Echols at the time of his arrest was one that I believe my girlfriend Heather had given me. (BMHR 364-365). I don't recall specifically how the necklace had come into Echols' possession. I did recall the subject of the necklace and possible blood evidence being discussed towards the end of the trial. (BMHR 365-366).

My mother had some emotional difficulties. (BMHR 369).

As to the phone calls that I had the night of May 5, 1993, we were calling to one another serially. One of us would call the other. Damien Echols was not at my house during the phone calls. There was no three-way communication.

(BMHR 370-371).

I was never made aware of any concerns that Ford had about alibi witnesses. We never practiced my testimony. I told him everything I did that day. (BMHR 374). I knew I had a right to testify. (BMHR 374). I did not realize however that my failure to testify would have been called a waiver of my right to testify. (BMHR 374-375). “I thought I would” be called to testify. (BMHR 375). I recall asking Paul Ford when I was going to take the stand after Echols testified. (BMHR 376-377). I never agreed not to testify. (BMHR 378).

REDIRECT EXAMINATION BY JOHN PHILIPSBORN

When I was asked, by Judge Burnett, if I had anything to say before he pronounced sentence, I said I was innocent. (BMHR 379). I acknowledge that I had told the trial court that I had been satisfied with my lawyers at trial. But also, I was not advised that I had a right to have my family testify and the right to testify myself during the punishment phase. (BMHR 379-380).

KERMIT CHANNELL

DIRECT EXAMINATION BY MICHAEL BURT

[Vol. 3 - BMHR 383-470–September 29, 2008]

I am a 19 year veteran of the Arkansas State Crime Laboratory, now its Executive Director. I hold a bachelor’s degree in biology, and completed graduate work in statistical genetics at the University of Central Florida. My background is

in DNA and serology. I have had training in DNA from several private businesses involved in DNA work, and from the FBI Lab in Quantico. (BMHR 384-385).

I did some serology work on this case when it arose. Our Lab did not do the original DNA work in the case, because we did not do DNA testing in 1993. The original DNA work was done by Genetic Design. My original lab notes in the case have been admitted as Exhibit 21.

Items Q6 and Q10 were samples taken from two pairs of pants. I took cuttings from each of the pants. I then administered an acid phosphatase screening test. The test is a presumptive test for the presence of semen. The theory is that the test reacts with acid phosphatase which is known to be present in semen in large quantities. (BMHR 389-390). The test is also known to react to the presence of both biological and non-biological material. That is part of the reason it is a presumptive and not a confirmatory test.

In testing one of the two samples from the pants labeled Q6, I obtained a weak reaction in one of the two samples. I then completed a microscopic examination. Microscopic examination of a sample for sperm is a way of confirming the presence of semen. In looking at the sample that gave the reaction, I saw no sperm. I then went on to do a P30 test. P30 is an antigen that is found in the prostate gland of males, which would react to the presence of ejaculate in a sample. At the same time, I performed control tests to enable me to assess whether

I was getting conclusive testing. (BMHR 387-392).

I also ran a substrate control, which is a test on the jeans themselves to see whether something in the garment itself was causing any reaction that was observed. (BMHR 393).

I found no blood in either Q6 or Q10.

I also noted that the blue jeans Q6 were described as dirty, and soiled, which was significant because I would assume that there would be bacteria on the pants because they had been found in water at the scene. (BMHR 395). The same was true with respect to the pants labeled as Q10 as well.

The reported result on the P30 test was positive, but in my lab notes I stated that it was a false positive. Because I had also obtained a positive reaction to the test in my substrate control, I determined that the test was invalid. I wrote in my notes that I had obtained “false positive results”. (BMHR 395). There were no valid results because when you get a positive result in your substrate control, that means that you cannot get valid results on the test sample you are running.

I had also taken a laser to try to see if I could identify any stains. That test is not specific to the identification of semen. I was getting positive readings from the pants, which invalidated the tests I had done. (BMHR 399).

I had also obtained a reaction on one of the chemical tests used on Q10, but I again looked for sperm microscopically, and did not find any sperm. I once again

obtained a positive reaction on my substrate control. I also noted in that set of notes that I obtained a false positive. (BMHR 392-400).

I don't recall either Mr. Stidham or counsel for Mr. Baldwin sitting down with me and reviewing the lab notes and what these results meant. (BMHR 401: 7-10).

Eventually, I sent the cuttings from the jeans (Q6 and Q10), a sample of possible tissue from a knife (Q37), and tissue recovered from the ligature from James Moore (Q39) to Genetic Design which was a DNA lab. I transmitted the material covered by a letter that I had authored, in which I did not indicate that I had any positive result on the P30 tests.

After sending materials off, I spoke by phone with John Rader, a representative from Genetic Design. I made notes of the conversation, noting specifically that the DNA lab reported no amplification on three of the items. With respect to the samples from Q6 and Q10 I had written that there was some DNA found but it was possibly bacterial in nature. (BMHR 404-405).

I later testified in the Misskelley case concerning items Q6 and Q10. I did testify that on the P30 test, I got a positive reaction. I also testified that I had run a control that gave a similar reaction. I said that there may have been something in the mud that interfered with my test. I also said that I submitted the cuttings to

Genetic Design so that they could use a more sensitive technique. I would agree that DNA testing is not a more sensitive technique for the detecting the presence of sperm. (BMHR 407-408).

At trial, when questioned about other techniques I used, I described the laser as a test to identify stains including sperm. However, I would now agree that a laser is not a test. It is a tool to visualize a stain, it is not a test like acid phosphatase. (BMHR 409).

I agree that based on the P30 test I could not say whether there was semen present on the pants. I also agree that I did not identify semen using microscopy. I further confirm that in filling out my lab notes I indicated that there was “no semen found on any items.” (BMHR 411: 15). I am not sure whether that was clearly brought out before the jury in the trials.

Reviewing the testimony of the State’s DNA expert, Michael DeGuglielmo, and based on my training in DNA technologies, I disagree with his testimony that implied that the DNA readings from the cuttings suggested the presence of DNA for human or higher primates. I agree that you could not rely on the type of quantitation available in this case to make that statement. I also agree that the DeGuglielmo testimony indicating that small amounts of DNA detected had been present in male or sperm portions of the extraction was incorrect in the context of

this case. (BMHR 423).

Deguglielmo also, in my view, incorrectly testified that the Arkansas Crime Laboratory had not ascertained microscopically whether there was sperm in the cuttings.

It was also incorrect for Mr. Deguglielmo to have stated on cross-examination that the extractions done in the case would have separated male and female biological components.

I agree that the testimony offered by Deguglielmo could have been followed up by questions pointing out that I had performed a sperm analysis and had found no sperm, and further that I had written a report dated June 1, 1993 indicating that there was no sperm found on Q6 and Q10, and that there was no valid positive P30 result. (BMHR 425-428). Also, DeGuglielmo mistakenly testified that the testing done in this case would have separated male from female components—which was an error. (BMHR 426-427).

It would have been reasonable for counsel to have followed up the questions asked at trial to point out that I had written a report stating that there was no sperm found, and pointing out that I had a note of a conversation with a representative of Genetic Design stating that some of the reaction for DNA might have been bacterial, and that the DNA levels shown in the testing indicated that as well.

(BMHR 427-428).

DIRECT EXAMINATION BY JOHN PHILIPSBORN

At the time this case occurred, I was involved in forensic serology and processing of evidence at the Arkansas Crime Lab. (BMHR 430). I got involved in the case about 24 hours after the bodies were discovered. During the processing of case evidence there had been some question as to which clothing belonged to what boy. I viewed that matter as the responsibility of the Medical Examiner's Office, which is one of the components of the Crime Lab. When a case comes in through the Medical Examiner's office it is given an ME number and then it will be given an associated lab number. According to my review of evidence, the number associated with Mark Byers was 93-05718; the number 93-05717 was Mr. Branch's case, and Michael Moore's was 93-05716.

I remember that ligatures were associated with the bodies of the boys. They would have been looked at by my colleague Lisa Sakevicius, a criminalist who specialized in trace evidence. I looked at them too. (BMHR 435-436).

The Lab kept both a file and a set of notebooks on the case. They were part of the official record of the case. The Lab notes indicate that item FP6 were the ligatures associated with James Michael Moore. Had one of the trial lawyers wanted to do so, that lawyer could have reviewed the laboratory notes with an

analyst prior to trial.

Our Lab has given post-conviction defense counsel copies of the notes, and allowed post-conviction counsel to go through all of the evidence at the Lab. They had criminalists look at the evidence as well. Trial counsel could also have engaged in the same process had they asked. (BMHR 440-441).

Had someone asked to review the photo logs used by the lab, and hair slides generated by the Lab, someone would have been able to tell that there were questioned hairs associated with ligature FP6, which was associated with the victim Michael Moore. One of them was a red beard hair. (BMHR 443-444). There were notations on the slide itself from Lisa Sakevicius. Defense counsel could have actually looked at those hairs. On the slide from the Moore ligature there was an indication of a red hair fragment and a beard hair fragment.

While I recall having met with Paul Ford, I never recall telling Ford that some hair had been found on one of the ligatures. (BMHR 444-445). I did not know how Ford would have come about the information concerning the ligature, though the hair were found in the Moore and not the Byers ligature. That kind of information would have typically come from Lisa Sakevicius.

[The Court also clarified that multiple animal hairs were also found in the evidence. (BMHR 445-446). Counsel clarified that the hair in the ligature was

recently identified as a human hair. (BMHR 447)]

CROSS EXAMINATION BY BRENT DAVIS

Lisa Sakevicius passed away in 2000. Her notes indicated that one of the two shoe strings might have been cut in two. (BMHR 447-448. I don't feel that I misled the Misskelley jury on the issue of whether sperm was found on the cuttings. I said that none was. (BMHR 450). If the lawyers had been interested in trace evidence, it is more likely that they would have talked to Lisa Sakevicius than to me.

REDIRECT EXAMINATION BY MICHAEL BURT

The prosecutor's closing argument read to me from the Misskelley case does indicate that the pants that I had looked at under the microscope were muddy and that I could not see any sperm. In fact, my vision was not obscured under the microscope. Normally when a stain is processed in the laboratory, there would have been an extraction that would have resulted in the separation of mud and potential sperm such that any sperm would have been clearly visible had there been some.

Given the damp and wet conditions that the jeans and other pants were found in, my opinion is that it would have been difficult to find interpretable DNA on the pants. (BMHR 461)

PATRICIA ZAJAC

DIRECT EXAMINATION BY MICHAEL BURT

[Vol. 3: (BMHR 470-505)]

I am a professor of clinical justice and Chair of the Criminal Justice Department at California State University at Hayward. Prior to that I was a criminalist in the Alameda County Crime Laboratory for almost 12 years, from 1970 to 1982. I specialized in forensic serology. I developed the Lab's basic testing procedures. I had experience with the ABO antigens system, and also enzymes systems. (BMHR 471).

I have a BS in criminalistics; Masters in forensic science; Masters degree in public administration, and a Doctorate in public administration. I currently teach courses in physical evidence to students who include law enforcement officers and forensic science students. This teaching requires me to keep up with literature in criminalistics, including forensic serology.

I have qualified on the subject of forensic serology several hundred times. Over my career I testified mostly for the Government. I have published in the field of biological fluid analysis. (BMHR 474).

I reviewed the testimony of Kermit Channell and Michael Deguglielmo as well as the portions of the closing arguments that dealt with scientific evidence. I

also reviewed lab notes referenced by Kermit Channell in his testimony. I also reviewed the available lab notes from Mr. Channell. (BMHR 475).

I reviewed a number of protocols including the Arkansas Crime Lab serology protocol, FBI serology protocols, and the protocol from QuantiBlot.

In 1993, there were forensic serologists available to testify for the defense. I had been involved in cases in which I was asked by counsel to review serology issues. If I had been contacted at that time, I would have advised counsel to get the bench notes, testing protocols, and any other materials that pertain to the case. The bench notes are useful to see whether the tests described in any report were actually performed and whether the tests supported the results stated in the report. (BMHR 476-478).

I reviewed Mr. Channell's lab notes, concerning samples Q6 and Q10, with the exception of the actual gels for the P30 test. The notes he produced did not describe how the tests were conducted, and where the controls were. I would characterize Mr. Channell's notes as having an average amount of detail in them.

Based on the results that he reported in his notes, I would not have described the results on the acid phosphatase test as 'positive'. (BMHR 480-481). A slight or 'weak' reaction is not positive for seminal fluid because there is acid phosphatase in a number of biological materials. Moreover, he should have used a substrate

control for this test, just as he did with the P30 test. One would have done that under the circumstances because the very weak acid phosphatase reaction should have spurred the retesting of substrate to see if there was acid phosphatase in the mud. Moreover, the DNA Lab that the State used didn't use a substrate control either. (BMHR 483-484).

Had the defense consulted with a forensic serologist, it could have then explained that the weak test results on screening tests as essentially irrelevant in identifying semen. An experienced serologist would have pointed out that a reaction for semen would have been a very strong reaction, had there been semen present. Also, the analyst could have explained that you don't visualize semen using a laser light. A defense serologist could have explained that.

Based on the some total of the results in this case there would have been no basis for concluding that there was any semen. (BMHR 486).

In my opinion, Mr. Channell's acid phosphatase test was not run with the proper controls. (BMHR 489). It is also my opinion that the statements in the FBI laboratory manual concerning acid phosphatase being used a presumptive means of detecting semen would be the same in 1993 as it was in the 2002 FBI formulation. In order to identify semen you either need a positive P30 or identification of spermatozoa. In this case there was neither.

I feel that a number of aspects of Mr. Channell's testimony had been accurate, however, I feel that he should have explained to the jurors that the mixed results he had obtained with some of the presumptive tests were attributable to the mud, and also he should not have indicated that the submission of material to a DNA laboratory would have been a way to obtain more sensitive testing, as DNA tests are not additional tests for semen.

Had I been approached on the case by a lawyer who had received some of the typewritten reports in this matter, I would have recommended that the lawyer make every effort to obtain the bench notes and the documentation that she had been using to review the evidence in the case post-conviction. (BMHR 504-505).

KERMIT CHANNELL RECALLED BY THE COURT

[Vol. 3: BMHR 506-513]

I examined a necklace during the trial. (BMHR 506). The item had blood on it. I sent it to Genetic Design for DNA testing. The testing detected a mixture of DNA using testing in existence at that time. (BMHR 506). The findings consistent with Damien Echols' biological material, that of victim Steven Branch, and that of Jason Baldwin. (BMHR 506-507).

CROSS EXAMINATION BY JOHN PHILIPSBORN

During the recess today, Judge Burnett asked me to obtain some information

about the DNA testing. However, in 1993 the preferred method to try to identify blood were some clinical tests to screen and then to confirm. You could then do ABO typing and PCR-DNA. (BMHR 508-509).

Had a qualified scientist been accessed to deal with the DNA issues, that scientist might have been able to refute some of the results being offered after having reviewed the details of the examination. The way that would happen was by a request for documentation.

To further explain the DNA tests done on the necklace in 1993: the technology available then would have allowed identification of alleles pertinent to chromosomes of the donors. The results using that technology would have shown allele pairings consistent with Steve Branch, and possibly consistent with Jason Baldwin also. But those pairings would also apply to a large percentage of the population. The person who understood the technology properly would have been able to address the issues. (BMHR 512-513).

GREGORY CROW

DIRECT EXAMINATION BY MICHAEL BURT

[Vol. 3: BMHR 514-613]

I was a lawyer in 1993, affiliated with Dan Stidham. We were appointed to represent Jessie Misskelley in June of 1993. At that point, I had done no prior

death penalty work. I had worked as a public defender. I had only tried one felony case, and had tried misdemeanors, though they were always bench trials. I had never tried a jury trial. I had tried four civil jury trials. At the time I handled the Misskelley case I would have not tried my first felony case, and had never handled anything like a homicide. (BMHR 515-516). I had never had to question the kind of expert you get in a homicide case.

I had no training in death penalty litigation. After I took the case, I did not get any training on the handling of a death penalty case. We dealt with issues as they came up.

Because he was more experienced, Dan Stidham was Lead Counsel. Stidham made the strategic decisions. I was the research and brief writer for the most part.

At first we presumed Misskelley was guilty. There had been a confession. (BMHR 520). We weren't concerned about alibi witnesses early on. We wanted to get the best deal possible.

We experienced difficulties with our client Jessie Misskelley, who could not tell the same story twice. It was also evident that Mr. Misskelley had mental issues. (BMHR 521-522).

We were trying to get a plea agreement that had a commitment in it

beforehand. But we never worked out a deal.

The situation changed around September of 1993. Misskelley had met with his father and the father had called us and he was upset. As a result, we went to see Jessie, and he said emphatically that he was not guilty. (BMHR 523-524). One of the problems had been a bloody t-shirt that Jessie was supposed to have had and at first it had been identified as having blood that had matched one of the victims. (BMHR 525). But during a hearing in Marion, there was a statement made by another lawyer that the prosecutor Fogelman had said the DNA or serology was not going to be used, and that the blood on the t-shirt had actually matched Jessie Misskelley. Up to that point in the case, which would have been around September 27, 1993, I had presumed Mr. Misskelley to be guilty. (BMHR 525-526).

I knew we had things to investigate, but I didn't think that getting an investigator was an option. At some point I recalled that Ron Lax, an investigator working with the Echols defense, had volunteered to assist the Misskelley defense as well.

I had taken part in interviewing third parties, alibi witnesses, and police officers. (BMHR 531-532). I also recall that we used some experts, including experts on confessions. Dan Stidham would have been making the decisions about what evidence to present. We were trying to interview alibi witnesses, and given

them touchstones to remember.

I recall that at the time, Arkansas criminal procedure had Rule 2.3 which required that a potential witness or potential defendant had to be told by police that he or she was free to go at any time. In bringing the motion to suppress Misskelley's statement, we had not raised that issue, first because they could not get Misskelley to tell them what had occurred, nor would any of the police officers.

At one point, review of the jailhouse statements issue had caused Stidham and me to tell Misskelley that he had an excellent chance on appeal because of the Rule 2.3 issue. However, the Arkansas Supreme Court indicated that the issue had not been raised properly, and had been defaulted. There was no strategic reason for us to have failed to raise it properly.

Also, I recall that we had to at least attempt to impeach the accuracy of the Misskelley confession and that some of that would involve demonstrating that the physical evidence was inconsistent with certain parts of the confession. That would also involve expert witnesses. (BMHR 539-540).

I recall that Mr. Stidham and I had thought that we could not obtain ancillary funding for serology or DNA experts.

I do not recall whether we had attempted to get any of the bench notes from the crime lab. I don't know if I had known enough at the time to interpret the notes,

however some of the statements in them would have required follow through, such as some of the positive tests for DNA being bacterial in nature. (BMHR 543-545).

I don't remember our getting, or trying to get, any assistance from a pathologist. We had no strategic reason for not doing these things.

I was concerned that Misskelley could not assist us, and could not understand his legal situation. I remember that we got Dr. Wilkins involved to assess his competency and to deal with IQ. Wilkins eventually opined that he was competent, but I really didn't think he was competent to help us. (BMHR 552). He was certainly not competent to be put on the stand. It was evident that Misskelley could not say the same thing twice, and it did not look as though there was any way "... he could even handle direct-examination, much less cross." (BMHR 552).

I recall that something had come up during deliberations, a comment from the Judge which made it appear as though the defense was going to lose the case. I do not know why the Misskelley defense had not asked for a mistrial at that point. (BMHR 556-557).

It was up to me to handle Misskelley's penalty trial. There was compelling evidence in mitigation. (BMHR 558). My intention if the case had gone to penalty was to put on a psychologist. I did not plan on calling any other witnesses in mitigation. However, I acknowledge that what I learned through Dr. Wilkin was

compelling mitigation. We didn't know that there were some serious problems with Wilkins. (BMHR 561).

I don't agree with Paul Ford that presenting a bad alibi was worse than presenting no alibi at all. Though the alibis weren't perfect, we had good, strong witnesses and I felt that we were right in trying to put on the alibi witnesses. I would call our alibi witnesses again. (BMHR 563).

CROSS EXAMINATION BY BRENT DAVIS

The alibis had been that he was at a trailer park, and also that he had been at a wrestling event.

I vaguely recall a meeting with the Court and prosecutors that had taken place at the Holiday Inn. The meeting had been to discuss publicity, but during the meeting, there had been some discussion about Misskelley testifying against the other two young men. I vaguely remember that we had discussed aspects of the potential testimony—but I think that may have been at another meeting. (BMHR 565-566).

After the meeting, Jessie Misskelley Sr. had given an interview in which he had professed his son's innocence. (BMHR 568).

I had done a fair amount of investigation on the case as had Dan Stidham. It was me who was doing most of the alibi investigation. During the process, Ron

Lax had come forward to ask if he could help us. He did so.

Some of the experts that we called in Misskelley's defense were highly qualified, including Dr. Ofshe, and Warren Holmes. (BMHR 576-577).

In retrospect, I feel that Misskelley's main issue on appeal would be the Rule 2.3 issue.

REDIRECT EXAMINATION BY MICHAEL BURT

I had never known of the ABA *Death Penalty Guidelines*.

I indicate that the time records that I and Mr. Stidham had kept indicated that after September 1993 we had made efforts to interview witnesses.

September 30, 2008 Session

JOYCE CURETON

DIRECT EXAMINATION BY BLAKE HENDRIX

[Vol. 3 & 4: (BMHR 620-672)]

I was the Director of the Juvenile Detention Facility in 1993 and 1994. I worked there for about 10 years. (BMHR 621).

My job consisted of my keeping up with Juvenile law, training staff, handling problems that other staff could not handle, and substituting for other staff when people got sick.

I would usually work from 8 to 5, but sometimes would need to respond to

calls from the facility. I was on call 24/7.

I have drawn a map of the boys' side of the facility a couple of days ago. There was a side for the boys and a side for the girls. The boys were housed in 10 cells right opposite my office. There was a plexiglass, glassed-in, pod from which staff members could monitor what was going on in the block. (BMHR 622-623). (Exhibit 32 entered at BMHR 626). At the end of the block there was an area where there were tables. The juveniles there were under constant surveillance in part because there were cameras. Staff members rotated on a 12-hour shift basis

We maintained a daily unit log that showed where the inmates were housed. (BMHR 626). Jason Baldwin was housed right opposite the pod most of the time he was there. He never had a cell mate. I was aware of Jason Baldwin's presence in the facility. He was the subject of a notorious case. We monitored him closely. Staff members had been given a directive to keep a keen eye out. (BMHR 625-629). [*Volume 3 ends at BMHR 627; Volume 4 begins at BMHR 628*]

Jason was a good kid. He never complained. He wasn't demanding. He was kind of reserved with the others. I never heard about Jason talking to the other kids about his case. (BMHR 630).

There was a great deal of documentation kept concerning the movements and whereabouts of the juveniles in the facility. There were psychological and

medical logs, as well as incident logs. Each juvenile also had a separate file. There were also visitor logs. Any acts of violence or fights would be documented. (BMHR 633). There were a number of 'CYA' type records. I would review the records every morning to see what happened the night before.

I recall that we had an inmate named Michael Carson. He had been in and out of the institution. When kids were newly admitted they would be put in lock down in a special cell for three days. They had no contact with other juveniles. (BMHR 635). According to the records, Carson was in the Unit from September 1 through September 7, 1993—a total of six to seven days. (BMHR 634-635). The records of the unit show where Carson was housed in relation to Baldwin, and what his movements and activities were. (BMHR 636-637, referencing Exhibits 32-34).

I did not testify in the trial of the case. I was outside of court when Michael Carson testified. I have no independent recollection of whether Carson, Baldwin, a kid named Biddle and another juvenile named Jason played cards together. The juveniles played cards quite often, which would have been reflected in the records.

Carson apparently told a State Trooper during an interview that Baldwin had been threatened by black inmates. If that had happened, there would have been a record of it. I have no recollection of black inmates ever threatening Baldwin.

(BMHR 639-640).

The only contact that I recall having with Baldwin's attorneys Paul Ford and Robin Wadley was in connection with an HBO filming that took place in the Juvenile Facility. Some people had lost their jobs over it.

Ford called me at home one Friday night, but that was after the trial. (BMHR 641). Baldwin's lawyers did not contact me about Michael Carson. (BMHR 641-642). Ford's contact after the trial was to ask me what kind of a kid Baldwin had been while he was incarcerated there. But the contact was not about Carson or allegations made by Carson. Nor was I asked if I had any records or if my staff had any records that could be useful to address the Michael Carson allegations. To my knowledge, the Baldwin defense team never tried to identify any of the kids who were involved in the alleged card game with Carson. Nor did any of the black inmates who were in the facility get interviewed by the Baldwin defense lawyers. (BMHR 643-644).

There was a log kept for professional visitors, and that there was no indication that Paul Ford ever came to the jail trying to interview anyone in connection with Carson.

I was asked to show up to testify about Baldwin as a person. I never did testify, however, because I was told to get out of the county and stay away until

they had sentenced the boys ((BMHR 646:15-16).

Looking at records of September 4 and 5, 1993, I can identify Anne Tate and Patty Bircham as staff members at the Detention Center. Exhibit 33 (BMHR 648). Xavier Reedus, Leonard Haskins, and Daniel Biddle were all inmates who were there at that time.

CROSS EXAMINATION BY BRENT DAVIS

Now that you show me this map of the facility again, there was a hospital cell that should have been drawn in between cells 8 and 9. The cell rosters show that most of the juveniles were double celled, one on the top bunk and the other on the lower. So, the record you're showing me shows Carson being celled with Jason Duncan. (BMHR 652).

I was eventually fired by the Sheriff for taking a county car out of the county.

There was an occasion on which one juvenile had been discovered to have committed suicide, but the juvenile's death had not been ascertained before several hours had passed. (BMHR 654-655). So there were times when things happened that the staff did not monitor.

Baldwin, to my knowledge, did not have problems with black inmates. They liked him. (BMHR 657-658).

I also recall that Carson had been in the Jonesboro alternative school where there were administrators and instructors who knew his reputation and his behavior.

It was the Sheriff who asked me to leave the county after Paul Ford had asked me to be available to testify at the sentencing hearing. (BMHR 663).

I cannot recall ever seeing Michael Carson with Jason Baldwin. Baldwin stayed to himself. He was a quiet kid who avoided trouble. He did interact with some of the African-American inmates.

If Carson and Baldwin had talked during the night, it would have been written down by the staff. (BMHR 665-666). Carson never told me that Baldwin had said anything damaging about his case. (BMHR 669).

My viewpoint is that Michael Carson was a smart-ass and a troublemaker. (BMHR 671-672).

DAN STIDHAM

DIRECT EXAMINATION BY MICHAEL BURT

[Vols. 4 - 6: BMHR 674-1264]

I am Greene County District Judge. I was in private practice as a lawyer in the 1990's. I was a part-time Public Defender for Greene County as well. I graduated from law school in 1987, and clerked for a lawyer before going into

private practice, and eventually taking on Greg Crow as an associate. (BMHR 674-675). I got the public defender job in around 1992, just about when Mr. Crow arrived. While a public defender in Greene County I handled primarily misdemeanor cases, and juvenile cases. We handled about two hundred to two hundred and fifty felony cases a year. I had never tried a jury trial as an indigent accused criminal defense lawyer.

I was appointed to represent Jessie Misskelley in early June, 1993 because of a conflict. The public defender who was originally appointed was a Christian and could not represent someone charged with a satanic crime. I was appointed even though I was from another county. Paul Ford and Val Price had already approached Judge Goodson to volunteer their services. I had indicated that I would accept any criminal appointment to help me gain experience. (BMHR 678).

At the time, I had not heard of the ABA *Guidelines for the Appointment and Performance of Counsel in a Death Penalty Case*. I did not have the jury trial experience to meet the requirements under the *Guidelines*. (BMHR 678-679). I was not familiar with death penalty cases. I had never prepared an expert witness, nor was I familiar with the presentation of experts at trial. I had not had any training in DNA and other areas like serology, pathology, crime scene reconstruction. I did eventually borrow Dr. Spitzer's [sic—Dr. Spitz's] book.

(BMHR 679-682).

Soon after I was appointed, I contacted the Arkansas Death Penalty Resource Center. I asked for assistance and learned that the Center was in no position to offer it. (BMHR 684-685. I reached out to some other attorneys as well. I didn't think that I was qualified to handle the defense of the case. (BMHR 686).

Initially, I had acquired a copy of a local newspaper and had read about my client's confession. Eventually I began acquiring discovery in the form of typed police reports and other material. It was slow in coming. They promised to start sending the stuff over as quickly as possible. (BMHR 687). They gave us voluminous stuff, but it was disorganized—seven or eight file boxes worth of information. (BMHR 688).

I eventually received some profiler information that the Police Department had received from the FBI. I recall receiving some information from the crime laboratory and the state Medical Examiner. I do not recall obtaining any laboratory bench notes and the like. (BMHR 690).

I was stunned when I saw some of the files that had been obtained in post-conviction litigation, including notations that some reactions obtained on samples taken from some blue jeans were possibly bacterial in nature. That would have

been a red flag had I seen them in preparing for trial. (BMHR 692-693). I never saw Mr. Channel's notes about the false positive reactions. I feel that it would have helped me to undermine testimony that there had been semen found on the cuttings from the blue jeans.

At one point during the pre-trial phase of the case, on September 27, 1993, the Court had granted a request from the defense allowing the defense to receive state crime lab reports and to view the physical evidence. However, I did nothing to follow up on that order. (BMHR 694).

At first, because of the confession and the publicity surrounding it, I thought that my role was to prepare my client to testify against the co-defendants. The situation changed around September 24, 1993. I was frustrated because Misskelley always got the story wrong. Then Misskelley told me he was innocent. We also received word that blood on Misskelley's shirt which I had been told was the victim's blood was actually Misskelley's. Also, Misskelley's father had been making public statements that his son had not committed the crimes. It was September 23 when prosecutor Fogelman told me that there had been a mistake with the DNA Lab, and I wrote a memo the next day explaining that Misskelley had told me that he was not guilty—which had happened three days before. Misskelley gave a sequence of events that occurred on May 5, 1993 that included

his whereabouts and contacts with persons. That caused me to begin to look into interviewing alibi witnesses.

I felt from the beginning that Misskelley had not been able to run down the facts of the case in detail, even when he was claiming to have been involved. Also, I came to understand that Misskelley did not understand what a criminal defense lawyer was, and that Misskelley felt that his lawyers were with the police. That's why he would tell his father that he was not guilty but not me. (BMHR 708).

I also had some conversations with Misskelley in which I asked him who Satan was, and I was stunned to find out my client did not know who Satan or the devil was, given what he had been accused of doing. He referred to "Satin", did not know who the President of the United States was, even though it was Bill Clinton from Arkansas. I began to realize that I didn't have enough experience in dealing with a person who was mentally handicapped. (BMHR 713-714).

In retrospect, I am of the view that I had not educated myself well enough on the issues in the case, including the scientific evidence to try to impact the jury's assessment of the reliability of the confession.

I didn't ask the Court to fund experts in a number of different fields of forensic science because of a combination of factors, even though the Court did offer to issue funding orders. My focus ended up being on the confession. I didn't

understand how to attack the corroborating evidence. I feel in retrospect that I had done a cursory job with forensic science experts. (BMHR 725).

I obtained a transcript of the tape recorded phone conversation that Dr. Peretti, the State Pathologist, had with attorney Paul Ford, during which Ford had obtained some information indicating that there was a lack of objective evidence of sexual assault. (BMHR 728-729). That tended to directly contradict Misskelley's statement to the police. I did not use the Ford transcript effectively in establishing that there was no evidence of sexual assault, ejaculation or sodomy found—I never actually referred to it. . The transcript of the Ford/Wadley conversation with Dr. Peretti had the latter stating that he did not feel that a prosecutor could stand in front of the jury and in good faith say that the boys were sodomized. (BMHR 733-734). That would have been good impeachment, but I never used it.

I recognize from my file that I had copies of photographs from Dr. Spitz's book showing animal predation. The injuries to the victims looked like the photos from the book. But then I failed to follow up with the information from the book. It did not occur to me however to confer with a pathologist to see if any of the injuries observed could have been caused by predation. (BMHR 735). I got that information later, after the trial. At the time, it did not occur to me to connect the dots.

In 1998, after the trials, I met with Dr. Michael Baden and had shown him some photographs, and had been told by Dr. Baden that there were injuries depicted that were consistent with animal predation. This caused me to talk to Neil Haskell, a well known forensic entomologist, also in 1998. (BMHR 742).

I view the approach that I had taken to the Misskelley confession as a ‘shotgun’ approach. We failed to raise a Rule 2.3 violation during the motion to suppress, and having failed to address certain factual issues as well. In dealing with the legal issues, I had thought I had effectively preserved claims, however the Arkansas Supreme Court said I had not.

My client could not assist me in defending the case in a meaningful way. And the psychologist who volunteered to assist me had problems that led to disastrous results. ((BMHR 760:11)

I had been working with Misskelley for a number of months and found I couldn’t communicate with him sufficiently to prepare him to testify against the co-defendants. (BMHR 767). Even though our expert found Misskelley competent, I didn’t think he was. I failed to consider the portions of Dr. Wilkins’ report that informed me about factors in mitigation. I failed to understand all of the evidence that demonstrated Misskelley’s incompetence.

Also, I had failed to look into the background of my psychological expert,

Dr. Wilkins. He had been the subject of some serious complaints. When the case was in post- conviction litigation, I received a recommendation that I contact a doctor with expertise in the assessment of a person with competency, and mental retardation issues.

It was Mr. Davis who had brought to my attention, during trial, that there was damaging information available on Dr. Wilkins. (BMHR 779-780). I found out about the information the night before Wilkins testified. The information ended up being discussed with the press. There had been some effort by a newspaper to get information on Dr. Wilkins. I did not do any independent investigation of him. (BMHR 797-799). I ended up seeing a part of the investigative file when Mr. Davis showed it to me.

We also failed to use a statement that Misskelley had written to impeach his statements to the police. (BMHR 806-807). I also failed to properly interpret the Rules of Evidence when I had an opportunity to impeach the testimony of Vickie Hutchison. We had access to a witness, Jennifer Roberts, who could have impeached her. The impeachment indicated that Hutchison had been motivated by the reward money. (BMHR 814-815).

Right before trial, I asked for investigator Ron Lax's assistance. At that point, I had come to believe that what was good for Echols was also good for us.

But I was leery of privilege and other issues, so I didn't just ask him to investigate for us. I didn't consider him to be our investigator. (BMHR 823-824).

Mr. Crow and I did next to nothing to prepare for the penalty trial. (BMHR 803).

I concede that I had been provided access to investigative and other reports that could have helped him in the presentation of his case.

The Baldwin defense had not shared the view that the investigation conducted for Misskelley and Echols would be useful in part because they did not subscribe to the view that what was good for Misskelley and Echols was also good for Baldwin. (BMHR 824).

I feel that I failed to recognize useful information that was in the discovery, and failed to recognize the utility of previous mental health reports pertinent to the case.

[BMHR 836-837. The Baldwin defense seeks to clarify the schedule, and the need for it to call witnesses in the hearing. The Court notes that]:

THE COURT : I think it's probably sufficient for you to just to demonstrate that there were other potential alibi witnesses that they either knew of or didn't know of, or if they did know of them and didn't call them, that should be sufficient for this hearing. (BMHR 836: 17-21).

[The September 30, 2008 proceedings concluded, and the hearing does not resume until November 19, 2008. BMHR 842]

November 19, 2008–Hearing Resumes. BMHR 843

The parties discuss the review of the Misskelley defense trial file. The Court acknowledges receipt and consideration of a brief, filed by Baldwin, on the ABA Standards/Guidelines. BMHR 846:14-16.

CROSS EXAMINATION BY BRENT DAVIS

I may have said at the Echols Rule 37 hearing that I didn't know the source of the conflict that caused the public defender not to represent Misskelley. I imagine that the information I received was hearsay. (BMHR 850). Looking back on it, I also now recall that I had learned about Dr. Wilkins when I had worked on a criminal case involving a juvenile. (BMHR 857-858).

When I first came into the case, I did know what the charges were. Judge Goodson had said to me that the case would probably not go to trial. (BMHR 859-860).

I am aware that my client had confessed. Also, I am aware that I taped conversations with my client. I have not had custody of my file for quite a while. I also made some notes of some of my conversations with my client. I remember taping a conversation with him when we first got a settlement offer in August,

1993. I taped him again at some point after the trial, on February 8, 1994. (BMHR 874). There were other tapes made as well. Dr. Ofshe made some audio tapes of him.

After the trial, we had conversations. I remember talking to him once when I asked for a Bible. I recorded that conversation. On that day he was saying that he had been involved in the crime, but his statement then was not like his original statement about his involvement.

I also do have some recollection of the sequence of events that were related to Mr. Misskelley Sr.'s statements to the press, which occurred after we had approached the prosecutors in an effort to settle the matter. It was later, and after those statements, that Misskelley then admitted involvement in the killings.

There was also a December 10th tape made that I believe demonstrates, in retrospect, that we had discovered that our client did not understand the *Miranda* warning.

The Court then received a tape recording of an interview involving Dr. Wilkins.

Volume 4 ends at RT 899–Volume 5 begins at 929

[Continued cross-examination of Mr. Stidham; a tape of Mr. Stidham and Misskelley is being played beginning at BMHR 931.]

I was asking him questions, at this point in the tape, about the sequence of events around the time he was picked up by Mike Allen for questioning. (BMHR 946)

[playing of the tape then continues, BMHR 946]

[Playing of this tape ends at BMHR 988 and is followed by a discussion between the Court and counsel about how the evidence tape was made by transferring the original VHS tape to a new format]

The tape we just heard was from my meeting with Dr. Wilkins and Misskelley on December 10, 1993. We heard the circumstances that surrounded the polygraph examination. I found Misskelley's statements dramatically different from the ones he had made before. We had also made up a robbery incident to ask him about using the Gudjonsson suggestibility scale. And it was clear to me that you could lead Misskelley to say what you wanted if you asking him leading questions and put pressure on him. (BMHR 992).

I do recall dealing with the Misskelley statement motion and the 2.3 issue. I didn't intentionally prepare a precedent in the hope of avoiding the prosecution's re-opening their case. I thought I had preserved the issue, but I hadn't.

Misskelley was eventually convicted of first degree murder and two counts

of second degree murder, which was a better result that the other two defendants got. (BMHR 1000-1001).

I don't recall the testimony of Deborah Sallings, who had been appointed director of the Public Defender system, on the needs and payments of attorney fees in the case, other than remembering that she testified against our interests on some of those issues. I would disagree with her if she testified that she felt we did not need investigative help on the case . (BMHR 1017-1020).

We did put on alibi witnesses. Alibi was our strategy. (BMHR 1026-1027). We called a number of alibi witnesses. Mr. Crow and I , and to an extent Mr. Lax interviewed the witnesses. We called at least 16 witnesses. We also called investigator Lax, and the manager from the Bojangles restaurant. We did call experts including Mr. Holmes.

It is my view that Misskelley deserves a new trial. (BMHR 1048). I have spoken about the case since the trial in a number of places.

[The proceedings of November 19, 2008 end and the November 20, 2008 session begins at BMHR 1055, cross-examination of Dan Stidham continues.]

Problems were being caused in our approach to the case because Mr. Misskelley, Sr. was making statements to the press, and we were geared towards negotiating a plea. (BMHR 1072-1073). The records I reviewed prior to my

testimony including some of the tapes indicate that in August, I was talking to Misskelley about an offer to waive the death penalty, and how I preferred a specific term of years. (BMHR 1074).

I did have an ‘epiphany’ around the time I found out that his DNA was not on the T-shirt, which was some time in late September. [*The Court then hears an audio tape of the August 19, 1993 meeting between Mr. Stidham and his client Mr. Misskelley*]. Misskelley relayed in that conversation that he had never seen the victims before, and never saw them riding their bikes. (BMHR 1077-1078). He then said that he had seen one bike. He never did anything with their bikes. He had left walking by the Blue Beacon.

On the tape, Misskelley said that he did not recall a stick in the creek. Echols carried a carved stick, but Misskelley did not remember if he had it with him that day.

When he left, the boys’ clothes were piled up by the creek. Baldwin had a pocket knife, a Buck knife. (BMHR 1081). Baldwin’s knife was one he sometimes carried with him.

Misskelley denied knowing anything about cult activities, and peoples’ faces painted in a manner described by Vickie Hutchison. He said he went to wrestling, not to cult meetings. Misskelley also described his being at Hutchison’s house once

with Damien.

Misskelley explained he had been there when the police came to get him. Misskelley explained that Mike Allen had picked him up. They then had a lie detector test. He had then spoken with the detectives, one of whom was Detective Gitchell. They had showed him a picture of one of the boys. He had started crying. One of them had later said that they would see him executed. That was after Misskelley explained ‘what happened’. (BMHR 1091-1092).

Misskelley explained that he had a white T-shirt on that day, and that he often cut himself. He did not have any blood on him that day.

Misskelley explained that there was a lot of blood at the scene where all the hitting and cutting took place.

I described my conversation with the prosecutor, and relayed to Misskelley that the prosecutor might recommend life, and that a decision would need to be made soon. If the prosecutor did make a recommendation of years, it would be something like 40 years. The prosecutor might insist on a life sentence. Misskelley responds by stating that he does not want to spent “almost all of my life in jail.” (BMHR 1098). Misskelley then indicates that he would be willing to consider a sentence in the 40 to 50 year range.

The conversation just heard took place in the big room of the Clay County detention facility.

While it is true that on that tape he answered my question about blood on the T-shirt by indicating that there was none, every day I talked to him, I would get different answers. I was frustrated by the interaction.

I didn't record every conversation. His version of events would change. (BMHR 1110-1111). When I had the conversation with him that we just heard, my concern was that he could not testify. I hadn't yet figured out that he was giving me a false confession. I didn't understand the dynamics of false confessions.

I recall the occasion where I went to Pine Bluff with the prosecutors in February, four days after Misskelley was convicted. That was the day I requested a Bible. I taped that statement.

[The Court permitted this tape to be played over Misskelley's objection that it post-dated the conviction. Baldwin also objected to the evidence, and the Court rules that "it's certainly directed towards the defense of Misskelley, not Baldwin. BMHR 1120]

As far as I know the tapes that produced the CD that we're going to be hearing are my original tapes. They may have been placed on the CD out of order.

[The tape of the February 8, 1994 session then begins. BMHR at 1127, and

ends at BMHR 1193]

The Court then heard a further part of the February 8, 1994 recording.
[Beginning at BMHR 1194, ending at 1201. Cross-examination of Mr. Stidham resumes]

The persons heard on the February 8, 1994 tape were Misskelley and myself. There were no law enforcement officers present. A Bible had been brought in, and Misskelley had his hand on it.

I filed a discovery motion in the case as standard procedure. I later filed a motion objecting to the taking of bodily fluids from my client to protect his rights. (BMHR 1203-1204). We filed a motion for change of venue because we felt our client needed a fair and impartial jury. We also filed some motions that I obtained from attorney Bobbie McDaniel. We also joined in some of Baldwin's motions. (BMHR 1211-1213).

I also did litigate other motions. I don't feel that I pursued DNA evidence effectively, because I didn't understand it well enough at the time. I did file motions and get hearings on matters like the motion to suppress my client's statements and on the issue of my client's mental retardation.

[Transcript Volume 5 ends at BMHR 1228, and Volume 6 begins at RT 1230]

Up to and through our conversation with Misskelley on August 19, 1993, Misskelley did not understand what a lawyer was, and he thought that Mr. Crow and I were police officers. I also acknowledge that I believe that our client told us things that were not true.

DIRECT EXAMINATION BY JOHN PHILIPSBORN

There was no information sharing agreement with Baldwin's lawyers Paul Ford and Robin Wadley. They refused to work with the Echols lawyers and with Mr. Crow and myself. (BMHR 1239).

The only thing they did do is to provide me a transcript of the conversation that Paul Ford had with Dr. Peretti. But otherwise they were unwilling to participate in a joint defense.

Once the Echols defense allowed us use of Mr. Lax's services, we did not share any of Lax's work product, or that of his investigators, with Ford or Wadley. (BMHR 1240).

In my view Mr. Ford was not clear in asking for severance. I recall telling him to ask for severance, but he ignored me.

I never discussed the tapes that have been played in this hearing with anyone.

I recall trying to track down the phone records of the call Misskelley said he had with Baldwin. They were not available. I don't recall either Ford or Wadley approaching me about those records.

Ford and Wadley never approached me to ask me if I had any alibi information that I could share with them. (BMHR 1244).

I don't recall receiving any information to the effect that a hair had been found in the ligatures used to bind one of the boys. (BMHR 1244).

REDIRECT EXAMINATION BY MICHAEL BURT

At first, it was my understanding that Misskelley was guilty and that my job was to try to work out a plea agreement for him. In speaking with him, I was trying to get a version of events that corresponded with what he had told the police. I felt that my role at that point was to prepare him to testify against the others. (BMHR 1247). I kept getting inconsistent statements.

Misskelley's father started complaining about his son's innocence, and then Misskelley said that he was innocent, and my approach changed. He maintained his innocence until the conversation on February 8, 1994 after the trial. (BMHR 1248). Then he again said that he was involved. Even after that, there was another tape

recorded interview on February 17th. That one was made with their recorder. That happened when Joe Calvin, the Clay County Prosecutor called to tell me that Misskelley was in his office and was going to give a statement. Then after that, there was another conversation, this one that occurred around March 2, 1994. It was recorded with a microcassette. In this last recording, Misskelley is explaining that he was not involved, but that people were pressuring him, and telling him how he could get out of prison.

When I talked to Misskelley on February 8, I got a copy of the crime scene map, which I still have. It is Exhibit 43 (BMHR 1255). It was clear to me when we were talking that he had no idea where the crime scene was. He also talked about water being over his head. He talked about the pipe going across 10 Mile Bayou as being as thick as his thigh when it was four or five feet across. In his original statement, he had said nothing about sperm on pants, but now, having heard the testimony and arguments at trial, he is referencing sperm on pants.

End of session at RT 1264. The November 21, 2008 session begins on that same page. The Misskelley defense called Dr. Tim Dering.

DR. TIM DERNING

DIRECT EXAMINATION BY MICHAEL BURT

[Vol. 6: RT 1269-1422]

I am a licensed psychologist with a bachelor's degree in psychology, master's degree in clinical psychology, and a PhD in clinical psychology. I received my PhD in 1987. I worked in a school for adjudicated adolescents in Rockford, Illinois, and later worked as a test administrator in the Federal Bureau of Prisons while finishing my doctoral training. After finishing that training I worked as a staff psychologist at the Stockton Developmental Center in California. It was an institution that housed people with developmental disabilities and involved forensic practice as well. I was working with people with mental retardation, and evaluating and testifying about matters like competency to stand trial. (BMHR 1272). I worked there for seven year in total. I also worked in other settings as well. (BMHR 1269-1274).

I was licensed in 1990. I did additional training after my doctoral training, in neuropsychology. (BMHR 1274-1275). Once I went into private practice, the emphasis was on patients with neuro-cognitive disabilities. I worked with children and families. After doing that, I was contacted at one point about court-related cases in Arizona, and I did my first forensic evaluation in private practice. I continued to develop expertise in dealing with patients who are mentally retarded as well as those who have brain defects that affect cognitive functioning. These could include autism, fetal alcohol syndrom, or other types of developmental

disabilities.

There are special issues that arise with persons who are developmentally disabled. You have to be aware of pertinent normative data; appropriate tests; how to communicate with them. This is a growing field. When I first came in to it, I was one of the few people who had expertise in mental retardation in the forensic context. (BMHR 1279).

I am familiar with the American Association of Mental Retardation which had been around for some period of time. I am also familiar with the manual on mental retardation that the Association published in 1992.

[Dr. Dering was offered as an expert on neuro-cognitive and neuro-behavioral disabilities, including learning disabilities and mental retardation. BMHR 1279. The Court ruled that he could testify as such BMHR 1280]

I was contacted by Mr. Stidham in 2000. (BMHR 1280). It was after the trial. He had concerns about Misskelley and wanted me to evaluate him. Nothing happened for a while. I was then contacted again in 2004. At that point I was asked to look at his *Miranda* waiver and to see if he was competent to stand trial. I was sent and reviewed a series of materials including Dr. Wilkins's testimony. (BMHR 1286).

Exhibit 44 lists records that I reviewed, and also provides some scores of

testing that had been done on Misskelley throughout his life. I also reviewed trial transcripts, and the disciplinary hearing involving Dr. Wilkins. I also reviewed tapes of Misskelley talking to his lawyer and to Dr. Wilkins.

I administered a series of tests to Mr. Misskelley, including achievement tests, malingering assessments, functional skills tests, a test of nonverbal intelligence, and some forensic competency assessments. (BMHR 1287-1288). I also administered instruments addressing competence to waive *Miranda* and competence to stand trial. I used instruments that were validated and reliable.

In my opinion, Misskelley was not competent either at the time of his arrest or at the time of his trial. Misskelley's *Miranda* waiver was not given knowingly and intelligently. It is my opinion that his post conviction statements were influenced by inducements and intimidation. I cannot opine whether he was induced during the pre-trial interrogation itself. Misskelley did not understand the process. (BMHR 1289-1290).

Asked to review Dr. Wilkin's testimony, I disagree that a mental status examination could produce data specific to competency. It's a screening instrument, though some of the responses that Misskelley had given explained his difficulty with abstract reasoning (BMHR 1294-1295). In my opinion, Misskelley is mentally retarded. (BMHR 1296).

In reviewing the Wilkins disciplinary file, I examined the evaluation by Dr. Hazelwood who noted that Wilkins was holding himself out as an expert in fields in which he was not qualified, and was using non-standardized procedures. He was holding himself out as a neuropsychologist, though he did not have appropriate training. In this case he was testifying about his use of tests that should not have been given. The MMPI is not appropriate to this population of patient. (BMHR 1204-1305). Also, the MMPI is a test that assesses psychopathology, and it is not designed to assess cognitive functioning.

In assessing mental retardation, part of what you are looking at is a longitudinal study of the data available. You are looking for a person's strengths and weaknesses demonstrated over time.

In the tests I gave Misskelley, I found that he did not malingering. Looking at his record of academic achievement, it was very poor. He would have been subject to manipulation.

Looking at the *Miranda* waiver situation, Misskelley could not read something that long and complicated and respond to it with comprehension.

I also evaluated his trial competency, and it is my opinion that he could not understand language well enough to track proceedings. He could not do it in 2004 when I evaluated him, and looking at his 1993 tapes, he couldn't track the language

back then either.

CROSS EXAMINATION BY BRENT DAVIS

Part of the work I did at the Stockton facility was to assess competence and to assist in restoring competency. At the time, we did not have very good instruments to assess competency. We used the Georgia Court Competency Test, and some other instruments.

Mentally retarded people can be competent to stand trial. (BMHR 1348). When you assess their ability to assist counsel, part of what you look for is their ability to contribute to the process. (BMHR 1350).

Providing information about a time line, or about an alibi, is part of providing assistance. You are showing me some additional information here in court from his file that I did not have. Knowing about it, while I would have preferred to have seen it before, does not change my opinion about Misskelley's competence. I viewed about 8 chapters of a DVD showing interaction between Misskelley, his counsel, and Dr. Wilkins about two days ago. I did not listen to any further audio tapes, except one tape explaining that Misskelley had his hand on a Bible. (BMHR 1369-1370). What I heard on the tape was not unlike what I had heard before, it was counsel structuring questions, probing, and Misskelley rarely spontaneously saying anything.

I provide information for the Court to make a decision on competency. *[The Court remarks that “Just from my memory, you’re a far better witness than Dr. Wilkins was. BMHR 1344]*

Misskelley’s IQ scores on a WAIS III were: full scale IQ 72; verbal 71; performance 77. (BMHR 1376).

His history of huffing and drinking may have impacted his performance.

Misskelley is a concrete thinker, which does not mean that he isn’t capable of making things up, or in being convincing about things that did not happen. (BMHR 1386-1387).

The Court asked Dr. Dering whether someone with Misskelley’s IQ and concrete thinking would be able to provide varying accounts of the scenario of the crimes charged in this case, and to describe specific details to his counsel or others as did Misskelley. Dr. Dering explained that he is not surprised by the sequence of events, or that certain parts of Misskelley’s accounts hung together better than others, while parts of them did not conform to known information. Dr. Dering concluded by explaining that: “And to come up with some of these facts, I really don’t find that very surprising, since he’s been exposed to quite a bit of information.” (BMHR 1394)

I did not assess the voluntariness of Misskelley’s statement to police. I did

assess his functioning, and under the current definitions of mental retardation, including sub-average functioning, Misskelley fits that definition. I also sought to assess his adaptive functioning, which had also been done when he was 10 years old.

If you considered the Flynn effect or rising IQ scores, at the time of the trial of this case, Misskelley's full scale IQ would have been less than 70.

REDIRECT EXAMINATION BY MICHAEL BURT

I also made inquiry about Misskelley's understanding of the current proceedings. He has little understanding of what it is for, or why his counsel was called to testify. That provided some corroboration for my opinion that he was not competent at the time of his trial.

Misskelley's stories kept changing, even at the point at which it appeared that his goal was to make some kind of deal. His approach was consistent with his impairments.

DR. WERNER SPITZ

DIRECT EXAMINATION BY JOHN PHILIPSBORN

[Vols. 6, 7 & 8 - BMHR 1425-1870 beginning on November 21, 2008 in Volume 6]

In response to the Court's inquiry about the relevance of this testimony in a Rule 37 proceeding, Baldwin's counsel stated that Dr. Spitz was practicing in 1993

and 1994, he is an author and the editor of a standard work on forensic pathology which one counsel in the case, Mr. Stidham, said he obtained material from. Since Baldwin's trial counsel did not consult with a pathologist, seek advice from one, or consult the pertinent literature, the testimony addressed those omissions. BMHR 1423. The Court permitted the testimony. BMHR 1423

I am a medical doctor specializing in pathology and forensic pathology. I teach at Wayne State University, and at the University of Windsor in Canada. I do private consulting now, having retired as Chief Medical Examiner in Wayne County, which is Detroit and the surroundings. I worked as well in Macomb County as Chief Medical Examiner, and retired in 2004. (BMHR 1425).

I have been a physician since 1953. After working in the Department of Legal Medicine in West Berlin, beginning in 1959, I worked at the Office of the Chief Medical Examiner in the State of Maryland. (BMHR 1426).

I have published 95 scientific articles, most in peer reviewed publications. I have published a textbook in forensic pathology which has worldwide circulation.

I am certified by the American Board of Pathology and have been certified since 1965 in pathology. (BMHR 1427-1428). I have testified in all states of the United States, before the Congress of the U.S in the investigation into the death of President Kennedy.

Pathologists are trained through a teaching program in a board accredited institution. Candidates can be certified in anatomic pathology. One can also be board certified in forensic pathology. For a while, I was in charge of the training program for forensic pathologists in the Office of the Chief Medical Examiner for the State of Maryland. (BMHR 1429-1430). A forensic pathologist will have gone to medical school, completed a residency in anatomic pathology, and then another year in forensic pathology. The American Board of Forensic Pathology offers examinations once or twice a year depending on the nature of the certificate sought.

Normally, forensic pathologists first undergo training, after medical school, in hospital-type pathology, with an additional year in forensic pathology.

The third edition of my book, *Medicolegal Investigation of Death—Guidelines for the Application of Pathology to Crime Investigation* had come out in 1993. The first and second editions had come out in 1972 and 1980 respectively. (BMHR 1432-1433). A number of other books in the field had been published by the early 1990s including Bernard Knight's book, and several others. There are also journals related to forensic pathology, including international journals. (BMHR 1434).

It is customary for pathologists to consult with other colleagues or to review

pertinent literature.

I have published on issues surrounding drowning, and authored a book chapter about it as well.

It would have been customary for a pathologist in one part of the country to consult with another elsewhere. Forensic pathologists do that all the time.

You ask me about a physician who left medical school, spent four years training in anatomic pathology, and another year in forensic pathology. That physician's training is not complete until he has taken the supervised training and has documented his ability to pass the test. (BMHR 1438). It would be a red flag if you were told that such a person had not passed his board exams. It is a red flag that someone practicing forensic pathology is not board certified. (BMHR 1439).

I know Williams Sturmer, and knew him when he was the Chief Medical Examiner in Arkansas. I heard of Dr. Frank Perretti before. I think he wrote me to ask if he could come train with me. (BMHR 1440).

As a pathologist, it is recommended that you do only about 250 autopsies a year. We do more. I have done autopsies on people who drowned - I testified in the drowning death of Mary-Joe Kepechne in the matter of Senator Ted Kennedy. Pathologists seeking help in looking into drowning deaths might look at the literature, and then call a colleague. (BMHR 1441).

In my review of the present case, I reviewed materials that I received from the Dennis Riordan Office. This included photographs of 3 eight year olds. After reviewing the case, I sent a letter out to Mr. Riordan (Exhibit 46) (BMHR 1443). After I wrote that letter, I obtained and reviewed some tissue slices from the remains, and I then prepared the second letter (exhibit 47) that you are showing me. (BMHR 1443).

The information that I received in this case would have been of benefit to me had I been consulted on the case in 1993 or 1994. It is common for a pathologist to be asked to review a case, and to consult. It would have been accepted at that time to review a case based on photographs, and it still is. (BMHR 1444).

Reviewing a series of photographs beginning with 48 A and proceeding in order, I arrived at an understanding of where the bodies were found. I also recall that each of the boys was given a separate number by the Medical Examiner's Office. I normally ask for as much information as possible, including the photos. I have reviewed the information pertinent to this case, and I have opinions on what the mechanism of injury was. (BMHR 1447).

Looking at photo 48 E, I see remains that show mutilation of the genital area. The scrotal sac has been torn off. It is not cut off. Looking at photo 48 F, I see areas where the skin has been rubbed off. 48 G shows the same phenomenon,

and you can see where there is a tearing off of the scrotum. You see three marks on the posterior, parallel marks. You can see where the skin is discolored, and drying.

Had a lawyer come to me with these photos in the 1990s, I would have asked for distant and close up shots, and then I would have looked at the close ups, like 48 G, and I would have said that this is post mortem animal mutilation. (BMHR 1451-2). If you look at the missing area of the scrotum, and of the gouge marks, and areas where the upper surface of the skin is missing, and looking at the linear scrapes and other marks on the extremities, large animals, dogs for example, do this kind of thing. The scrotum is loose. I can show you a picture like this from a publication. The scratches that you see are left by an animal like a dog. The scratches all go in the same direction. (BMHR 1453).

Counsel then were asked to review their schedules, and a new date was agreed on. Dr. Spitz's testimony was temporarily halted. A date in January, 2009 was picked. The Court also asked counsel to prepare 'a precedent that fits your theory of the case'. BMHR 1454. Testimony resumed on April 2, 2009. It was then announced that the testimony of attorneys Stidham and Crow would be concluded. BMHR 1455. During the further discussion which included Misskelley's lawyer Jeff Rosenzweig, and State counsel Kent Holt, the presence of the Misskelley trial file, and the existence of an index were discussed. The State offered the index as

State Exhibit 6. BMHR 1457-8.

The Court and counsel also discussed the June 3, 1993 statement to police by Misskelley, and agreed that it was played at trial. The transcript of the statement was received at BMHR 1459. The defense preserved its original objections to the statement. The state then asked to introduce the December 10, 1993 interview of Misskelley by Mr. Stidham and Dr. Wilkins. BHMR 1460-1. The State also introduced Misskelley's post conviction February 8, 1994 statement made at Pine Bluff, and another Misskelley statement also from Pine Bluff of February 15, 1994. BMHR 1461-2. This was followed by a February 17th statement, which Misskelley objected to as having been subject to a grant of immunity. BMHR 1462. The transcript was introduced, as were two taped Misskelley statements of February 23, 1994, one involving attorney Phillip Wells, and the other Misskelley and attorney Stidham. This was followed by a brief tape of March 2, 1994 involving Misskelley and Stidham.

The State also referenced the Stidham billing records as Exhibit 29. BMHR 1463-4. Judge Stidham was then recalled for cross-examination. BMHR 1465.

Witness Dan Stidham recalled at Volume 7, BMHR 1465, on cross-examination. Cross-examination is resumed by Kent Holt, Esq. with the Attorney General's office. Also identified are David Raupp, Esq., and Mike Walden, County

Prosecutor. Mr. Holt resumed the examination. BMHR 1465.

DAN STIDHAM, RECALLED

CROSS EXAMINATION BY KENT HOLT RESUMED

My billing records are an accurate reflection of my participation in the defense of Misskelley's case. The notations being pointed out are an accurate log of what I was doing in the case. The billings I am being shown reflect both my activities and those of Mr. Crow. (BMHR 1470).

I do not dispute that we first met Misskelley around June 8. He didn't seem to understand who we were. I don't recall if I taped or noted that conversation. I would have left everything in the files I provided to the new lawyers. I think the index of the files was probably prepared by them. (BMHR 1476).

Going over the memoranda in my file, including the one of September 24, I recall Misskelley not being particularly accurate. Misskelley had said until my ephiphany in September that he had been there. His accounts changed. I had been influenced by information that the blood on Misskelley's shirt was inconclusive and could not be matched with his. It is also true that Jessie had maintained that he had never gotten any blood on him. (BMHR 1487).

I probably was first made aware of Misskelley's statement on June 10, according to an entry in my billings. (BMHR 1490).

Now that you are showing me some notes, I recognize that we have some file memos, some of which are legible and others are not. (BMHR 1498). There are some notes from an interview with Misskelley in my file. The interview was June 11, 1993. It was marked as State's Exhibit 12E. It describes what he is telling me, which is that he had seen pictures of the three boys a week before the murder at a cult meeting, the notes continue that the three teens were in the water. Damien hollered at them. Jason hid in the weeds. The boys started fighting with Damien, Jason started fighting with them. Damien stuck his penis in one boy's mouth, Misskelley hit one of the boys. Jason 'screwed' the blond boy in the mouth and in the butt. Misskelley realized it was time to stop. Misskelley helped one of the boys up. Damien screwed the Boy Scout. Jason stabbed one of the boys in the face. Misskelley choked the Boy Scout. Damien and Jason threw them in the water. They were kicking around. All of this was on June 11, 1993. (BMHR 1508).

I knew I had to ask him questions because the blond boy wasn't the one who was castrated, but that is what Misskelley was saying. He was back and forth on what had happened. Misskelley simply couldn't give me a narrative. (BMHR 1510).

I did eventually, once I found out that there was no clear DNA match, meet

Mr. Lax. I think it was that day that I had lunch with him. (BMHR 1519). Lax said he would mail me an article that had appeared in a magazine about Richard Ofshe.

I had been trying to prepare him (Misskelley) to testify, so when you ask me about my concerns that he kept saying they were tied up with a brown rope, I would ask him if he wasn't actually talking about shoe laces. (BMHR 1526-1527).

[Volume 6 ends at BMHR 1527.]

[Volume 7 begins at BMHR 1528, Stidham testimony continuing at BMHR 1529.]

At that point, I was trying to do the same thing the police had been doing, to give him some options. I was trying to prepare him to testify. I was concerned that he would be impeached because he could not get the story straight.

I may have screened Misskelley's correspondence. I don't recall. But I may have been concerned that he was very suggestible.

It is true that I have sent material, since the conviction, to some people who operate a website. (BMHR 1540-1541). I get a fair number of inquiries about the case. [Misskelley objects to questioning about the website, and its relevance. The Court rules that it is relevant as demonstrating Mr. Stidham's performance. The Court limits use of third party hearsay from the websites. (BMHR 1546-47)]

The tape of the August 19, 1993 session shows that I am trying to explain to Misskelley the options that he had, and the plea offers.

As I testified before, I also prepared a number of motions. I asked other lawyers for motions. I received no assistance from the Death Penalty Resource Center.

When you ask me further about communications with Misskelley, it was not until I saw how Dr. Richard Ofshe conducted his interview with Misskelley that I began to understand that there was a better way to communicate with him than I did. I did not understand how to deal with a client with his handicaps. (BMHR 1557).

In reviewing the statements that Misskelley gave me, it was my view that if I had witnessed a traumatic event, I would at least know what time the killings occurred, and get certain of the information that I was concerned about right.

On the issue of sexual assault on the boys, Misskelley was all over the place, including after he heard the Medical Examiner testify about it. I think he was all over the map with things that would have been obvious to anyone who was actually there. (BMHR 1564-65).

As you take me through the detail of my billing records, they are consistent with my recollection that while I was working steadily on the case from June

through the middle or latter part of September, it was not until the later part of September that I received the information from Mr. Fogelman about the DNA, and we started then organizing ourselves differently. Once I had the epiphany, we started cataloging everything we just kind of ignored. (BMHR 1589). We had started communicating with experts on false confessions, and were dealing with additional suppression of statement matters.

In October I did participate in some interviews of witnesses, including potential alibi witnesses.

April 2, 2009 session ends with Judge Stidham still on the stand. BMHR 1612; on April 3, 2009, BMHR 1613,

GREGORY CROW, RESUMED

CROSS EXAMINATION BY KENT HOLT RESUMES

I recognize a letter from me to Jessie Misskelley dated February 21, 1994. The letter discusses the pluses and minuses of his testifying, in return for some kind of reduction in sentence. I recall this coming up before the trial started. Joe Calvin made the offer. (BMHR 1614-1615). The offer was 50 years. I discussed the plea offer with him.

[The Court then heard a tape of a conversation between Misskelley and attorney Crow. Starts at BMHR 1617. The tape ends at BMHR 1604.]

I do have some recollection of there being discussions about Misskelley testifying that do appear to be reflected in our billing records. My recollection is that Misskelley got aggravated at Dan Stidham around the time that there was discussion about the possibility of his making a deal and testifying.

REDIRECT EXAMINATION BY JEFF ROSENZWEIG

Dan recorded a lot of things. I did not. If we are talking about a recorded call, then it would have been something that Dan had.

The conversation that was being referenced towards the end of my cross-examination occurred after Misskelley had given a statement without any defense lawyers being there, and then at some later point we were there. That statement would have been the one on February 21, 1994. This would have been before attorney Wells got involved.

My experience was that Misskelley had a very hard time giving a narrative version of events. (BMHR 1640-1641).

I too had a type of conversion on how to approach Misskelley's case. It was in September when both Misskelley and his father had gotten mad. At that point, Misskelley was insisting that he was innocent. I recall thinking about the evidence, and I think it was around that time that the prosecutor had indicated that the bloody t-shirt would not be used because it was not a match. (BMHR 1641-42). The

blood had been identified as consistent with both the victim's and Misskelley's, and he had stated that his blood would have been on the shirt because he had injured himself.

Misskelley maintained his innocence during trial. Then, after the trial, he was talked to without lawyers being present, and it appears that they made some promises to him, and he made a statement. Ultimately he decided he would not testify. (BMHR 1642).

CROSS EXAMINATION BY KENT HOLT

We prepared a time line of Misskelley's alibi before the trial. It is part of Exhibit 12.

It is likely correct that Dr. Ofshe asked Misskelley about things that were in one of the officer's notes. I am sure I provided those notes.

We also were able to have Mr. Holmes as an expert. He had volunteered. He testified in a pre-trial and at trial. He had also given a polygraph examination. (BMHR 1654-1655).

On being further asked about the sequence of events, I was incorrect about my prior recollection. It appears we did receive an offer in Brent Davis' office in August. Then right before trial Mr. Calvin came in and made an offer. The Court inquired of Mr. Misskelley in chambers.

We did work steadily through the end of the year and into January, preparing the case.

There were, as reflected in my billing records, activities after the trial, including meetings with Misskelley, apparently a meeting with Dr. Ofshe that I did not recall. In early March we were drafting a motion for a new trial. (BMHR 1672-1673).

I also acknowledge that I was invoiced by some experts, including Dr. Ofshe, Dr. Wilkins, and Dr. Berry, who was a jury selection expert.

There are items in my file folder that I received in corresponding with experts on false confessions even after I concluded my representation of Mr. Misskelley. [*These were admitted for the limited purpose of showing Mr. Stidham's interest in representing his client. BMHR 1679-1680*]

DAN STIDHAM, RESUMED

REDIRECT EXAMINATION BY JEFF ROSENZWEIG

On the eve of the Baldwin and Echols trial, Mr. Lax and I went to visit Misskelley. The prosecutors and the Craighead County Sheriff as well as the Clay County Sheriff were still approaching Misskelley at the time. We went to Pine Bluff, the diagnostic center. As a result of that interview, I concluded that Misskelley's position was that he had nothing to do with the crimes and saw none

of the other people there. (BMHR 1691-1692).

Reviewing the sequence of Misskelley's various statements again, he would provide varying information, and at least twice, including once after the trial, referenced the brown ropes as being the ligatures, though he explained at one point that he had said that to throw them off. (BMHR 1693-94). I do view this back and forth on the ligatures as an example of his suggestibility.

Even after the trial when there was a discussion of having him be a witness against the other two, it was my opinion, after going over the crime scene map with him in early February, 1994, that he was unable to describe the crime scene correctly, and that he was wrong about it in several significant ways. (BMHR 1696-97). He also was incorrect about where the bodies were thrown. He was inconsistent in describing sodomy by Echols, the mutilation by Baldwin. In the statement after the trial he talked about an older man who told Damien to do it, which was the first time that issue surfaced. (BMHR 1698). He was also inconsistent in the description of what Baldwin and Echols were supposed to have been wearing, and after the trial told the prosecutor he did not remember what they were wearing. (BMHR 1699-1700).

To explain the conversation in which Misskelley got angry with me, I recall getting a call that Misskelley was at a prosecuting attorney's office and about to

give a statement to the prosecutor. I was stunned. I had no idea that Misskelley was there. When I got there, Misskelley would not talk to me. The tape indicates that he did talk to Mr. Crow. Apparently Misskelley had been told that I was not a good lawyer and that I had only handled a DWI case and was not capable of representing him. He needed to listen to them if he ever wanted to get out of prison. That is why he did not talk to me. (BMHR 1707).

[The April 3, 2009 proceedings concluded until August 10, 2009. BMHR 1709. The transcript of the beginning of the session on that day appears in full below, as Misskelley and Baldwin renewed their motions to recuse.]

RENEWAL OF MOTION TO RECUSE

THE COURT: All right, I can't remember where we left off. Who was our last witness?

MR. ROSENZWEIG: Good morning, Judge.

THE COURT: Good morning.

MR. ROSENZWEIG: Your Honor, the last time we were here, was to finish the Stidham cross-examination.

THE COURT: Did we finish that?

MR. ROSENZWEIG: I believe so.

MR. HOLT: Almost, but for purposes of that false confession issues

and his connection to the professionals.

MR. ROSENZWEIG: Yes. The last time we were here, Your Honor, uh, Mr. Baldwin was not here at all. We did two days with Mr. Stidham, but the Baldwin team was not here at all.

Before we start, Your Honor, I think it's appropriate at the beginning of these proceedings. A year ago, we had moved for Your Honor's recusal on several grounds, and of course, were denied it.

We need to, uh, I think it would be appropriate to renew that, and largely because of the, well, at least from the reports in the newspaper that Your Honor is running for the Arkansas state senate next year.

And so I would renew that motion. I assume the reports are accurate, that you are running? And if they are accurate, it would be our position...

THE COURT: ... well, that would be the reason for recusal? You're talking about something that will happen in the future.

MR. ROSENZWEIG: Yes, sir.

THE COURT: I'm still a judge.

MR. ROSENZWEIG: That's correct, Your Honor. It is not, as I read the rules in the Canons of Judicial Conduct, because you're sitting as a special judge, it would not be, it's not a violation of the Code of Judicial

Conduct; however, that doesn't resolve the problem, because as we perceive it that Your Honor is a candidate for a partisan political office and it would be our position that it would violate the spirit, if not the letter, of Amendment 80.

You have every right to run for office, there's no question about that, uh, as a retired judge, as would be the right of any citizen, including yourself.

But the issue is whether or not it is appropriate under the violation of due process of the federal and state constitution.

THE COURT: How would it violate due process?

MR. ROSENZWEIG: Because, uh, you would be sitting concurrently as a judge, but also as a candidate for a partisan political office; not a nonpartisan office such as the Supreme Court or circuit court, or something like that.

And that's the basis for it, because it is a partisan political office and it is our position that those two roles are inconsistent.

Amendment 80 basically holds that, uh, Amendment 80 which says that if a person files, which you can't do until...

THE COURT: ... you can't do it until next year.

MR. ROSENZWEIG: That's right.

THE COURT: If I do.

MR. ROSENZWEIG: But at least the newspaper is indicating you have announced for that position.

THE COURT: I announced that I am looking at it and intend to, yes. I have done that.

MR. ROSENZWEIG: And so although it's not a violation, technically, of Amendment 80, it would be, our submission is it would be a violation of the spirit of the Amendment, under the circumstances.

THE COURT: Well, I don't follow it. What's the state's position on that?

MR. RAUPP: Well, Your Honor, our position is the same as briefed in the Arkansas Supreme Court. The parties, uh, have briefed this in the Arkansas Supreme Court, uh, you may know that there is a pending motion to have this case remanded for fact-finding on whether or not you should recuse, uh, the bottom line is, we chose recusal to rest on the conscious of the Court.

THE COURT: Well, I'm having a hard time finding where it would - I mean, I guess you've got a legal argument, but I certainly don't feel any

compulsion to recuse the case.

I mean, frankly, I'd love to drop it in somebody's lap, but I feel like it's my burden to bear. I'm the one that tried the case originally; I'm the one that has the familiarity with a case that's been going on for fifteen or sixteen years, and I think it's appropriate that I finish it.

MR. RAUPP: Certainly, case authority is that the trial judge can sit in a Rule 37, ordinarily, the Court rules they can. A matter of bias or recusal in case of discretion can be reviewed on direct appeal.

THE COURT: I think if I were a filed candidate for office, your motion would be well-taken. I am not, and there are several months before that occurs, if it does occur. So I'm going to deny the motion.

MR. ROSENZWEIG: Well, we've made our record, and for the record, it would be our position that this would violate the spirit of Amendment 80, and federal and state constitutional rights of due process.

THE COURT: How does it violate due process?

MR. ROSENZWEIG: *Tumey vs. Ohio*; *Ward vs. Monroeville* , and there are a number of other cases like that, that specifically talk about the circumstances in which a, uh, that bias, uh, that bias, either explicit, or even implied bias, uh, could...

THE COURT: ... well, where would bias be implied?

MR. ROSENZWEIG: Because, Your Honor, is a candidate for a partisan political office.

THE COURT: And what would that have to do with it?

MR. ROSENZWEIG: Because, because, uh, you are, as any candidate would be who is wanting to appeal to the votes of at least the majority of his electorate, which is a totally different motivation from attempting to apply the law.

And that's why certain matters are regarded as implied or structural bias, and do not need to look into the head or the character of the particular, uh, of the particular judge, just as in the same way you can't sit on your first cousin's case, uh, because even though you may not have talked to your first cousin for a hundred years, you can't do it because the law says there are certain structures.

And it's our position this would be one of those structures.

THE COURT: Well, I don't have any biases, and your motion is denied. I'm going to hear it through to the end.

MR. PHILIPSBORN: Your Honor, on behalf of Mr. Baldwin, we have made a similar argument, uh, before the Supreme Court.

We've joined in the Misskelley motion before and we respectfully ask the Court to show us as having joined in the motion.

THE COURT: Sure. No problem.

MR. PHILIPSBORN: Thank you.

MR. RAUPP: Your Honor, if I could make a brief point to the due process argument. The state's position is pleaded both in this court and the Arkansas Supreme Court, but it would be, uh, among other reasons that the due process claim, I think, is founded on a concern that a party have a fact-finder who is not interested in the outcome.

And the parties are the financial interests or personal lives in the outcome, and the suggestion that a candidate for office at this stage of the game, whether it's a judicial candidate or a house or senate candidate, has an interest in the outcome to sway voters, and I think it's speculative, at best. Certainly, that's the state's position, and it certainly wouldn't - it would certainly undermine the notion that elected circuit judges at all could sit in cases because they're going to come up for election.

And at least taken to the extreme, a due-process argument suggests that all judicial candidates have an interest in the outcome of the case.

MR. ROSENZWEIG: If I can respond briefly to that, uh, there is a

difference between a nonpartisan election as circuit judgeships are, and a partisan election.

And a judge for a judicial candidate has certain restrictions, uh, some of which may or may not be constitutional, but has certain strictures on what they can and cannot say and do in a way that a candidate for a partisan political office does not.

THE COURT: Is that it?

MR. ROSENZWEIG: Yes, sir.

THE COURT: All right. Call your next witness.

DR. WERNER SPITZ, RESUMED

DIRECT EXAMINATION BY JOHN PHILIPSBORN

[At the end of the above motion hearing, testimony resumed with Dr. Werner Spitz. BMHR 1716]

Before you become certified as a forensic pathologist, you must be certified with the American Board of Pathology in either anatomic or clinical pathology. Most people are accredited in both. I did search to see if Dr. Peretti was listed by the American Board of Pathology as having been certified in forensic pathology. He was not. (BMHR 1717).

Looking at the body of Michael Moore (Exhibit 48Q) I see a pattern on the

right shoulder. The pattern is shown in other photographs including 48I. The pattern is all part of one event. It is inconsistent with a tool like a serrated knife. This seems to look like the paw of a large animal. (BMHR 1721-22). There are also scratches that look to me like animal mutilation.

Photograph 48I also shows the left upper eyelid, the left nostril, and the ridge of the nose, all of which show injuries reminiscent of animal predation. They are not consistent with beatings with fists or sticks. (BMHR 1722-23).

The subject of animal predation was covered in the 1993 and 2006 editions of my book. What you have here is characteristic of animal predation.

Looking at further autopsy photographs pertinent to the victim Moore, I do not see the kinds of injuries consistent with beating with a stick, or with fists. What I see is consistent with the kind of environment that they were found in.

In the 48 series exhibit, photographs 48M and 48L do show areas of the skull that are fractured. The bony part of the skull is indented. 48N shows that as well. Looking at the types of fractures, particularly where one meets the other, you can see where one fracture was stopped by the other, and there are marks that are consistent with tooth marks. I can show them better with a pen. (BMHR 1733-34). These injuries are not like those that might be caused by a hammer. Moreover, an 8-year old's skull is a lot more resilient and has a lot more fibrous

tissue in it than that of an older person. Where you see fractures in a skull like this, there is an element of tearing. You would not see that in an older person. (BMHR 1735-36). If you look at the injuries that are on the body, you see claw marks from some kind of a large animal that might be able to go into the water. To better understand that, you have to look at the overlying skin, and I am showing the Judge the totality of the injuries to the head to demonstrate my point.

My opinion is that all three boys died of drowning. (BMHR 1738).

The process of drowning involves among other things the absorption of water in the blood stream. The absorption of water dilutes the blood stream, and there is an imbalance of the chemicals in the blood. There is more pressure in the blood stream as a result of that, and a drowning victim often bleeds more from the same injury than someone who was injured similarly but died of a different cause. (BMHR 1739-40).

My view is that the fractures that I found on the skull are likely post-mortem, because the skin that is associated with them did not bleed significantly.

Looking at the injuries to the victim Moore's face, my opinion is that he shows a number of injuries, including those to the left eyelid and other areas that are consistent with the kinds of injuries that are inflicted by aquatic or marine animals. (BMHR 1741). A number of types of animals will do this.

Autopsy No. 330 is related to further photographs in Exhibit 48 beginning with 48R. Just looking at the initial photograph, you can see the artifacts of drowning when water mixes with protein in the airways which causes foam. There are nibbles on both eyelids and what I take to be biting on the left cheek. There is a rough area on the left cheek which is from an animal biting that area and licking it with a rough tongue. Dogs and cats have those kinds of tongues, perhaps other animals as well. (BMHR 1744). These injuries to the eyelid of Autopsy 330, which is Mr. Branch's number, are similar to those of Mr. Moore.

Looking at the injuries, which in my opinion you need to look at as a group, I view the injuries to the lips as consistent with those that would have been caused by an animal. (BMHR 1745). I don't see injuries looking at what you are showing me, including 48R, that is consistent with a beating and a knifing. (BMHR 1745).

There is a close-up of the left cheek, which is Photograph 48T. These are not knife wounds. Looking at other photographs in this series, including 48U which shows the body further down and 48V which shows the left side of the face, all of these are injuries sustained after death. I am not sure about superficial scratches, but the significant injuries, gouging type and bites, are not bloody. These look like tooth marks from an animal. (BMHR 1748-49).

Animals that would have claws or nails of some sort, dog, perhaps a turtle, I

don't know that I can distinguish the type of animal would have likely made these injuries.

It is possible that some of the injuries may have occurred, particularly those to the lips, when there was still some blood pressure.

Looking at the totality of the evidence, I see no chipped teeth or defects that would be consistent with a punch to the lip or mouth area.

Looking at the area in the back of Mr. Branch's head near the spinal column, I do see evidence of some degree of force, some kind of solid object that caused a bruise. The abrasion that covers the area is irregular, and it is rough. It is not entirely consistent with a tree branch, particularly because right next to this area is where some kind of animal both bit and licked the tissues. (BMHR 1755-56).

Looking at some of the injuries to the top of the head, I do not see evidence of a significant blow to the head. I do see what in my opinion, especially when the scalp is reflected, as shown in Exhibit 48AA, what appear to me to be tooth marks. This is not a post-mortem injury. It does have a hemorrhage underneath it. It could have been sustained when this person was in the process of dying. (BMHR 1758-59).

It is possible that a person who dies by drowning would have been rendered unconscious before drowning.

There is an area of the skull that shows a fracture, but it is unusual. It is not consistent with strangulation or with some kind of a fall. There are no related injuries. (BMHR 1762-63). The area that is fractured here is very difficult to reach. It is very deep, and it is concealed from the surface of the body.

Looking at another picture of this same person, Photograph 48CC shows the left side of the chin. I do not see a stab wound, a cut or a gouging here. It is hard to tell exactly when this would have occurred, but there is no bruise discoloration. However, there is also no cut in the tissue made during the autopsy that would assist us in identifying a hemorrhage. (BMHR 1765).

I agree with Dr. Peretti's signing off Mr. Branch as a drowning death. I don't believe that I see any injuries that I would associate with a loss of consciousness. I do not see a wide array of man-made injuries here. (BMHR 1766).

Dr. Peretti did not find any hemorrhage in the area of the ligatures which would tend to mean that the victim was not fighting against the bindings. (BMHR 1769).

Photograph 48DD corresponds with Medical Examiner No. 331 (Mr. Byers). This person's face shows injuries on the tip and bridge of the nose, and superficial scrapings in the left upper eyelid. There are some triangular shaped bite marks.

Some of the injuries are like those found in Mr. Branch. The photographs show evidence consistent with drowning. Photograph 48E shows an area of mutilation, a tearing of the genitalia. This was not done by a knife. It shows claw marks. (BMHR 1770-71).

Looking at these further photographs I do not find any evidence that he was beaten. I do see evidence that he was mutilated after death, including the edges of the scrotum and penis, in what would appear to be claw marks. (BMHR 1770-71). Looking at the close-up shots, including 48FF and 48F, I see no evidence of knife wounds. I see claw marks, and irregular wounds that are inconsistent with what a knife would do. A knife would leave a sharp surface. Looking at the photograph you can see that the skin was pulled off of the penis and you see the tearing of the tissue, and numerous claw marks, tooth marks, and bite marks around this whole area.

Having handled knives and cutting instruments with around 60,000 bodies, I can tell you that this is not caused by a sharp instrument like knife or scissors. (BMHR 1772-73). I see some puncture wounds in the crotch area.

I cannot tell you whether a grapefruit gives a proper illustration of how a body would be affected by a knife. I have never used one. I have used pig skin or pig bones for reconstruction. I would not use a grapefruit. (BMHR 1774-75).

Photograph 48LL shows some claw marks, some scraping marks, which are also shown in 48MM and 48G. You can see where some of the epidermis is missing. These are all post-mortem injuries. (BMHR 1777).

Looking at the injury to the top of this person's head, 48GG, I do not believe that shows a stab wound. First, it does not go into the bone. Second, the skin on the top of the head is extremely thin. It does not look like a cut, it looks like a tear.

Autopsy number 331 is Mr. Byers. He is the person we are talking about. His face, which is depicted in Photographs 48C and D, does not appear to me to have been the subject of a beating. (BMHR 1779). I don't see anything here that is consistent with a knife wound.

To me the injuries that I see are not consistent with the application of a full force blow by somebody who is 16 or older. (BMHR 1782-83). I see injuries that to me are consistent with bodies being addressed by animals that may be moving them around.

There are some fractures here that we have previously discussed, in the skull. One of them is a radiating fracture. (BMHR 1786-87). It was caused by some kind of blunt trauma. But I have no evidence of injury to the brain or to the membranes of the brain. To me it seems like a post-mortem injury. (BMHR 1787). Mr. Byers died of drowning in my opinion. All three boys died of

drowning. (BMHR 1789). I disagree with Dr. Peretti's view that he died of multiple injuries. (BMHR 1790).

I also disagree that there is any evidence of sexual assault on these young men by a male. There is no evidence of sodomy. I don't see any abnormal dimensions.

In my view, a qualified forensic pathologist would not have found a valid scientific basis for evidence of sexual assault here. (BMHR 1792-93).

In addition to the book I edit, there would have been other American books available in 1993 and 1994, including Dr. Adelson's *The Pathology of Homicide*. Bernard Knight would also be an expert whose works were available.

DIRECT EXAMINATION BY MICHAEL BURT

I am aware that Dr. Peretti has written a letter dated May 30, 2008 [Exhibit 49] that references me as a defense pathologist. I am aware of the contents of the letter.

It is true generally that as a normal part of an autopsy process tissue samples are taken from various wound sites. (BMHR 1796). In a case like this, you would take representative sections. You would then prepare a microscopic slide. You look at the tissue and you can assess whether there is hemorrhage. That helps you understand whether the wound was inflicted before or after death. (BMHR 1797-

98). According to Dr. Peretti's report in the Moore autopsy, his microscopic slides were prepared from tissue in the area of the ligatures, the wrists and ankles. With Mr. Moore he found no hemorrhage around the right wrist, but he did find hemorrhage around the right ankle. Similarly, he found some hemorrhaging in the left ankle. He found none in the anus and rectum. However, he took no slides from any of the injuries that could be characterized as animal predation. (BMHR 1801-1803).

Similarly, in the Branch autopsy, he found no hemorrhage in either the right ankle or right wrist, or in the left ankle or left wrist, under the ligatures. There was no slide taken for any potential animal predation injuries in Mr. Branch.

With Mr. Byers, there are no hemorrhages found in the microscopic slides. There were some bacterial colonies found in the slide of the penis (where there was a degloving injury). There were no slides taken of the other areas of injury. Thus, when Dr. Peretti wrote in his letter that the samples demonstrated hemorrhaging indicative of ante-mortem injury and not post-mortem injuries, the autopsy reports do not indicate the preparation of any microscopic slides that would corroborate that statement. The statement makes no sense in view of the content of the autopsy report. (BMHR 1807-08).

I examined the tissue slides made available to me and none of them changes

my opinions regarding the animal predation.

As to Dr. Peretti's third criticism concerning his physical examination of the genital area injuries to Mr. Byers, and a description of bridging of the soft tissue, and wounds indicating the use of a sharp instrument, is an interpretation I disagree with. First, his statement is incorrect. In part this is because Dr. Peretti is incorrect that you do not necessarily have bridging in circumstances of a bite wound by an animal. In order to have bridging you need crushing of the skin as well. (BMHR 1809-1812).

Reviewing page 833 of the Misskelley trial transcript, I disagree that this is some kind of knife wound. You see that there is skin missing on the left cheek, there is tissue torn out. It is animal predation. (BMHR 1811-1812).

In the Byers autopsy where Dr. Peretti opines that there are multiple gouging injuries, I believe that this is consistent with predation. The scrotum has been pulled away. A knife does not leave a ragged edge like that. There is a picture in Dr. Knight's book that I can show that depicts a scrotum that is bitten off like the one here. (BMHR 1813-1814). Having heard Dr. Peretti's testimony in response to a series of questions about a child being grabbed by both ears in relation to Mr. Branch, I am disturbed by the fact that there are no injuries on both ears. Also, the entire left side of the face was involved in trauma from biting and licking. The

opinion he gave sounds “like voodoo”. (BMHR 1816). I recall first seeing these photographs, I was told nothing about them, and was told to call back with my views. I called back without hesitation and said these were animal predation. (BMHR 1817).

I also disagree with Dr. Peretti’s description of there being contusions associated with abrasions of the upper extremities of Michael Moore. The microscopy shows that there are no contusions or bruising. (BMHR 1817). I also disagree with testimony that Dr. Peretti offered that at page 824 of the Misskelley trial that the wounds we saw were defensive. Looking at the other injuries here I don’t think that you could say they necessarily are defensive. I think that is a misleading way to describe them. (BMHR 1819).

Had counsel approached me and asked me about the case, or the illustrations in my book, I would have been able to consult and testify if asked to do so. (BMHR 1821).

CROSS EXAMINATION BY KENT HOLT

Normally I do not do microscopy, or microscopic examination, until I have done the actual autopsy. I might ask for a technician to prepare autopsy slides.

While it is correct that it helps to have actually attended an autopsy, it is not correct to say that there is no substitute for doing so. (BMHR 1826).

In going back into the material I had, I did have the autopsy reports; tissue slides; photographs of various kinds, including some crime scene photographs. *[End Volume 7, BMHR 1827, begin Volume 8, BMHR 1828.]* I don't remember whether I had crime scene reports. (BMHR 1829).

I have never discussed the autopsy with Dr. Peretti. (BMHR 1830).

Reviewing photographs of an autopsy helps me review a pathologist's opinions. (BMHR 1831).

I view forensic pathology as being part science and part art. It also involves knowledge of the subject matter. (BMHR 1832-1833).

I do not believe that animal predation would have masked other injuries like a stab wound, but I do not think that is the case here. (BMHR 1833-34). My view is that it is indisputable that the three boys died of drowning. My view is that they did not die of injuries, but died of drowning. (BMHR 1834-1836). I do not know whether they were conscious when they entered the water. (BMHR 1836).

My interpretation of the injuries to the head was that first, there is no evidence of bleeding in the brain. (BMHR 1838). My interpretation is that they may have been handled by large animals, shaken around. I agree that the boys were tied up, but I do not know who did that. (BMHR 1839-1840).

I cannot tell you what circumstances they were tied up under, and whether or

not they were subdued. The injuries that I saw are entirely consistent and compatible with animal predation and the shaking of the bodies by an animal. The injuries to the face, to the head, the degloving of the penis, the tearing off of the scrotum, those injuries are not man-made. I cannot tell you where they occurred. The penis was not removed, it was degloved. Degloving or mutilation of the genital area by certain animals is not that unusual. I have an exemplar of it with me in one of the books I referenced. (BMHR 1842-1843).

Looking again at the picture of Michael Moore in the series of photographs marked Exhibit 48(o), you can see two semi-lunar injuries that are closely associated. I do not see any sign that this child died as a result of some kind of brain injury. The heart continues beating when someone dies of head injuries. There is no blood consistent with that kind of activity here. (BMHR 1849-1850).

I agree that biting injuries can look like knife wounds, but many of the wounds here are triangular, some of them are straight. Some of the wounds are round or semi-round, and irregular shaped. To me they look like the kinds of wounds you would see inflicted by some kind of carnivorous animal. (BMHR 1853-1855).

REDIRECT EXAMINATION BY JOHN PHILIPSBORN

I can explain to you how I eliminated human involvement in a number of

these injuries. The child who had an abraded cheek on the left side. If you look, there is no clear pattern to the marks. There is no specific kind of distribution. But they do have certain kinds of shapes. Some look triangular. Even looking at some of the areas around the head or under the head, there is no evidence of anything specific that would have caused those kinds of injuries. (BMHR 1859-1861). In my comments about the injuries to the skulls, I would note that because of the age of these victims, the skulls are thin. You can see that in the picture. (BMHR 1861).

I agree with the statement, which was written by Dr. Perpher in my book that post-mortem injuries by various kinds of animal life can cause injuries that simulate pre-mortem trauma. (BMHR 1862-64). (Whereupon the Court received Exhibits 46 through 48, including all of the photographs shown to Dr. Spitz (BMHR 1864).

REDIRECT EXAMINATION BY MICHAEL BURT

Dr. Knight's book contains a photograph showing a degloving injury of the type found here.

RE CROSS EXAMINATION BY KENT HOLT

I never had the opportunity to talk to Dr. Peretti or to Dr. Sturmer about this

case.

PHILLIP WELLS

DIRECT EXAMINATION BY JEFF ROSENZWEIG

My name is Phillip Wells. I am an attorney in Jonesboro, practicing with the firm of McDaniel & Wells. The current Attorney General of Arkansas practiced with our firm until 2006 when he was elected to office. The Attorney General was not involved in our firm when it was involved in this case.

I became involved in the case when Judge Burnett appointed me as an attorney *ad litem* for Mr. Misskelley. It was my understanding that Mr. Misskelley had expressed some interest in testifying in a trial of two other defendants. It was my duty to provide advice so that he could make a choice independently. (BMHR at 1872-73).

I had a conference with Misskelley and his lawyer Mr. Stidham. Stidham was of the view that Misskelley had an excellent chance on appeal and that he should not testify. (BMHR at 1873).

I also spent time with Misskelley. I met him first at the Craighead County Courthouse. I later met him at the Craighead County Detention Center. I spent three to four hours with him. I recall that when I was at the Detention facility the Deputy Sheriffs were being friendly to him. They were giving him Cokes and

pizzas. I think he was going along with their recommendation that he consider testifying. My recollection was that Misskelley seemed confused about his lawyer Stidham's view that he had good grounds for an appeal. I also recall that before he made any final decision he had wanted to talk to his parents. It was after he talked to his parents that he made the decision not to testify. In short, my view was that Misskelley was capable of being influenced by others. (BMHR at 1873-1874).

CROSS EXAMINATION BY KENT HOLT

I was unaware that any tape-recording was made of the meeting at which I was present with Misskelley and Stidham.

I had no knowledge of whether Misskelley had talked to his attorney Stidham at the Department of Correction before I spoke with him at the Detention Center.

I do not recall any discussion of a specific kind of plea offer. I was still gathering information when I was communicating with Misskelley, and I never got to the point of making a specific recommendation to him. Based on my observations of him I felt that he was slow intellectually. He was slow in processing everything that was going on. (BMHR 1869). He never discussed the facts of his case with me. (BMHR 1870).

[The following testimony was given beginning on August 11, 2009]

DR. MICHAEL BADEN

DIRECT EXAMINATION BY MICHAEL BURT

[Vol. 8: BMHR 1880-1996]

I received a medical degree from New York University School of Medicine in 1959 after receiving a bachelor's degree in science from the City College of New York in 1951. I am a physician and a forensic pathologist who has practiced as a forensic pathologist for 44 years.

I interned and then did a residency at Bellevue Hospital Medical Center in New York, and began working as a part-time assistant Medical Examiner for the City of New York. I completed my training in 1965 and became a full-time Medical Examiner. I stayed on with the Office of the Medical Examiner in New York, and held various positions, including that of the Chief Medical Examiner.

In 1985 I became the Chief Forensic Pathologist for the New York State Police, a position that allows me a private practice as well. I am testifying here as a private forensic pathologist. As the Chief Pathologist for the State Police, I have statewide jurisdiction, and cover the 62 counties of New York State. (BMHR 1881-1882).

My CV lists my publications and presentations.

To be Board certified means that you have received and demonstrated the pertinent training, and that you have passed the examinations. There is a better chance that physicians are good if they have passed the relevant boards. (BMHR 1884).

There are sub-specialties in pathology that include clinical and anatomical pathology. Forensic pathology is another sub speciality. A forensic pathologist has training beyond a hospital pathologist. I passed the boards in anatomical, clinical, and forensic pathology. (BMHR 1884-1885).

I have taught at the New York University School of Medicine, the Albert Einstein School of Medicine, the Albany Medical Center, the John Jay School of Criminal Justice and the New York Law School.

I have consulted with a number of government offices, including Attorney General and District Attorney offices, homicide investigators, the FBI, the Dept. of Justice, DEA, ATF, as well as with defense counsel. (BMHR 1887-88).

I have consulted with both plaintiff and defense counsel, prosecutors and the defense.

I was the Chief Forensic Pathologist for the U.S. Select Committee on Assassinations back in the 1970's, which investigated the deaths of President John F. Kennedy and Dr. Martin Luther King. (BMHR 1888).

I have also been called upon to provide consultation outside of the U.S. in a number of countries. I have qualified as a forensic pathologist over a thousand times.

The reason that you need independent pathologists in cases is because law enforcement related forensic pathologists can make mistakes. A recent report from the National Academy of Sciences pointed out that crime laboratories and Medical Examiners have a prosecution bias. When I work for the State Police, I welcome the presence of an independent pathologist. (BMHR 1890-1892).

When I was a young Medical Examiner, I was encouraged by the head of my office to consult with the defense in addition to working for the Office of the Medical Examiner to get a better perspective on why a Medical Examiner should be independent.

I have been involved in a number of cases in which persons have been found in water. (BMHR 1892-1893).

My involvement with this case dates back to 1998 when I was a presenter at a meeting of the American Academy of Forensic Sciences. I was approached by somebody who showed me some photographs. My recollection is that I looked at photographs and it looked like necrophagia, or the eating of tissue from dead bodies by animals. (BMHR 1894-1895). I was subsequently sent a letter by

attorney Dan Stidham. Exhibit 52; (BMHR 1895). Mr. Stidham might have sent me some additional materials at a later time. I then received another letter from Mr. Stidham dated May 25, 1998 which enclosed affidavits from a dentist, and an entomologist. I was asked if I could testify at a hearing that was two weeks away, and was provided with no further information. (BMHR 1896-1867). I recall that one of the declarations was from a “bug guy, Dr. Neil Haskell, a well-known entomologist.” Dr. Haskell had opined that various animals had caused marks on Steve Branch’s face, and the suggestion was that these might be some kind of arthropods or freshwater fish. (BMHR 1898-1900).

I did not recall any further contacts in the case until 2003 or thereafter. At that time, Dr. Spitz had shown me some photographs, and I recall that I felt they showed animal necrophagia. After the meeting with Dr. Spitz, I was formally retained by counsel for Damien Echols. (BMHR 1899-1901).

By then, I had received some material about the case. I understood that some of the evidence in the case involved the notion of cults, and the cutting off of body parts. I attended a meeting in Little Rock that was also attended by Dr. Perretti. I recall as well that Dr. Vincent Di Maio, the recently retired Chief Medical Examiner in San Antonio, Texas, who has written a number of good books on forensic pathology, as has Dr. Spitz, had separately and independently

come to the same conclusion about necrophagia. (BMHR 1900-1901).

Both Dr. Di Maio and Dr. Spitz are renowned in the field of forensic pathology.

Attorney Riordan had sent me the autopsy reports; many photographs, and Dr. Peretti's testimony. I was of the view, having reviewed the material, that the testimony about the cutting off of the penis and scrotum by a human being was "just wrong." (BMHR 1901). I explained that it sounded as though the finding by the pathologist in this case had been seized upon to go along with the theory that the case involved satanic cult activity. (BMHR 1901-1903). My opinion was that while there were a number of injuries to the victims, some of the injuries had a lot of blood around them and some of them had none. That indicated to me that some of the injuries were post-mortem. (BMHR 1902). There was also an indication that there were skull fractures and damage to the brain that was likely to have rendered all three boys unconscious. (BMHR 1903-1904).

In my opinion, the cause of death would have been multiple injuries and drowning. My view was that the three boys were most probably not conscious at the time they were immersed in the water. In looking at this case, I was concerned that a "proper forensic pathologist" should know the difference between post-mortem and pre-mortem injuries. (BMHR 1904). It was in part for that reason, as

well as because of my views about the animal caused injuries, that I suggested to defense counsel Riordan a meeting with Drs. Peretti and Sturner in a non-adversarial situation. (BMHR 1904).

A meeting was arranged and a number of experts were present with the exception of Dr. Spitz, who had a prior commitment elsewhere. A series of letters was written, including one by me to Dr. Peretti indicating that the meeting would take place on May 17, 2007. The prosecutors were present. So was Dr. Di Maio who had known Dr. Peretti. I had contacted Dr. Sturner, with whom I had previously worked in New York. Dr. Sturner was then retired, and according to my recollection he did not remember that much about the case and would not be at the May, 2007 meeting. (BMHR 11895-1897). Dr. Souviron, a forensic dentist was there, and so was Dr. Robert Wood, another forensic dentist, from Canada. Dr. Di Maio and I talked to Dr. Peretti at the beginning of the meeting, and thanked him for being accommodating. My recollection was that Dr. Peretti's response having heard the opinions about animal predation was that he thought he had previously seen examples of animal predation but that "... he was or was going to do a study about the last 10 years in all drowning cases in Arkansas..." to see what kinds of injuries would have been found in those cases. (BMHR 1909-1910).

Dr. Peretti had agreed to get back to the other doctors about a couple of

things, but never did. He hadn't told any of us at the meeting his opinions. He had stated that he would consider what we had discussed. (BMHR 1911-1912). I know that some letters were written after the meeting. I had thought that Dr. Perretti was eventually going to provide the information about his experience with post-mortem injuries to bodies by animal activity and other activities. The prosecutor did write a letter.

Eventually, Dr. Peretti provided a written response in the form of a letter on the Arkansas State Crime Lab letterhead dated May 30, 2008 in which he referenced a finding by a local dentist who had indicated that there had been no human bite marks on the bodies which I agreed with. (BMHR 1912-13). The letter also indicated that microscopic samples demonstrated the presence of hemorrhage meaning that these were ante-mortem injuries and not post-mortem. In my opinion this was "just plain wrong." (BMHR 1913). The only tissue samples taken had been from under the tie marks around the wrists and ankles, and around the testes of one of the boys. Otherwise, there were no sections or slides made from any of the other tissues, including those where there may have been animal predation. (BMHR 11913-1914).

I was concerned that Dr. Peretti's letter stated things that were not true, in that not only had there been no microscopic slides taken that would have refuted

the theory of animal predation, but there were no samples of the penetrating wounds either. (BMHR 1914-1915).

I also disagree with the statement in the Peretti letter that some of the wounds had incised edges indicative of having been caused by a sharp instrument. I am of the view that all of the wounds to the boys' heads had been caused by "blunt force trauma." There were tears in the skin and not sharp cuts. (BMHR 1915-1916).

In some of the photographs, you can see areas where the skin has been rubbed away from the left side, plus penetrating wounds that are very shallow that are consistent with animal activity, not wounds caused by a knife. (BMHR 1916-1917). Steve Branch had wounds to his face that showed small punctures and abrasions. A number of the wounds show no bleeding into the tissues which would be post-mortem predation or necrophagia. I have seen injuries like this in my own practice. (BMHR 1917-1918).

I cannot be specific about what animal might have caused the injury, but my view is that the injuries I saw were consistent with animal activity. I did review the affidavits of Shawn Ryan Clark and Heather Hollis, who explained that they had been swimming in the ditch and had seen alligator snapping turtles in it. Exhibit 32; (BMHR 1920-1921).

I would not purport to identify specific animals that might have inflicted the injuries. I would defer to forensic veterinarians. They could have been turtle injuries, there were scrape marks that might look like turtle claw marks, and there might have been dogs or other animals. Some of the injuries on the bodies are triangular and consistent with my experience with the sorts of triangular injuries caused by snapping turtles. (BMHR 1921-1923).

In my view, the knife that was depicted as the murder weapon, which is shown in Exhibit 48N did not inflict any of the injuries that I observed. Also, the use of a grapefruit in closing argument to mimic the skin of a body was “awful”. (BMHR 1924). The most common way to mimic human skin in a replication is the use of pig skin. (BMHR 1925-1926).

Reviewing the injuries to Michael Moore, it appears to me that the injuries to the area around the ear, and elsewhere that did not hemorrhage or bleed were post mortem. In reviewing the actual photographs used at trial, I can see certain punctate or puncture wounds. These wounds were not the subject of microscopic slides. The trial photos show punctate wounds around the lips and nose. There is no bleeding from them. They are postmortem. (BMHR 1933). Having heard Dr. Perretti’s opinion testimony about injuries consistent with sexual assault, it is my opinion that there is absolutely no evidence of such injuries here. He is simply

speculating. I have never run across the kind of opinions Dr. Perretti gave in this trial in the literature, or in my experience. (BMHR 1935-1936). I would “one hundred per-cent disagree with making the diagnosis of forced fellatio on this evidence.” (BMHR 1936). I opine that there is no evidence of sexual assault in the anal area, or around the ears. I explain that Dr. Peretti’s account of ear injuries in forced fellatio of children was incorrect. I state I have not seen it in my experience or in the literature. (BMHR 1935-36). There were a lot of pathologists who could have evaluated these opinions at the time of these trials

I disagree with the testimony and opinions about the significance of injuries to the ears, as well as that opinion testimony that there are any defensive wounds on Michael Moore near his hands, or elsewhere. (BMHR 1937-1938).

Dr. DiMaio agreed with me that there was no evidence of sexual assault on the basis of the findings of anal dilation. We had thought that Dr. Peretti, who had heard our views on the subject, was going to provide us his further thoughts on the subject, but he never did. (BMHR 1939-1940).

The photographs of Steve Branch shown to Dr. Peretti at trial do not indicate to me any cutting wounds made with a knife. (BMHR 1940-41). My opinion is that these are injuries inflicted by postmortem animal activity. In considering the testimony from the Misskelley trial at RT 841, I agree that there are gouging

wounds here with the skin pulled away together with some irregular puncture wounds, but these are not bleeding injuries, and unless they were caused by someone sitting there with a weapon and ‘constantly puncturing’, these irregular wounds are some kind of animal activity. (BMHR 1942-43). The same observation can be made about the scrape wounds on his ear, and in that area of the body. The redness on Mr. Branch’s cheek as seen on the photos is not caused by hemorrhage or bleeding. Something has rubbed off the skin, and it has dried and turned brownish. (BMHR 1943-44).

There are no injuries to the ears, or to the anus, of Mr. Moore or Mr. Branch that are consistent with forced sexual activity of the type described by Dr. Peretti. (BMHR 1945). And these are postmortem injuries. (BMHR 1946).

The discoloration of the penis which Dr. Peretti had testified could have occurred during oral sex looked more like some kind of animal activity. The kind of “banding” you see here is not characteristic of oral sex, and to say otherwise is pure speculation. (BMHR 1947). There should have been a microscopic section taken and there was none.

With respect to Mr. Byers, the kind of discoloration that you see here is not characteristic of a fresh hemorrhage. It looks like a postmortem injury, perhaps caused by snails - snails inflict that kind of injury. Other abrasions might have

been caused by a very small fingernail, but more likely by the scraping of animals. (BMHR 1949-1950).

There are no injuries shown in the photos of Mr. Byers that are suggestive of sexual assault. With respect to testimony given by Dr. Peretti concerning the appearance of injuries around the anus and genital area of Mr. Byers, I disagree with the opinions stated. First, I believe that the appearance of the anus was normal. Second, the absence of bleeding in the genital area causes me to opine that the wounds there were post-mortem. There is no cutting. They are likely from animal activity. They are not serrations from a knife. (BMHR 1951).

There were no stab wounds or cutting wounds inflicted prior to death in the genital area. The area in question is “very vascular,” and that there is no bleeding at all in the area, and the edges of the wound are irregular. None of the injuries I see are wounds caused by an instrument while the victim was alive. (BMHR 1952). I also disagree with the testimony given that what you see here are some wounds resulting from the twisting of a knife when the victim was moving.

I was asked to review the report concerning the autopsy of Mr. Branch, which indicates that there was a tissue slide made of the injury on Steve Branch’s penis. I had not remembered that. But the report states that the tissue slide showed no hemorrhage. (BMHR 1954-55).

None of the microscopic slides of tissue taken from the anal area of the 3 boys showed the kind of hemorrhaging that you would expect to see if there had been forced sexual activity, such as penile insertion, while the victims were alive. (BMHR 1955).

I also disagree with the testimony that there are injuries here consistent with what you see with rape victims. You don't see these sorts of superficial abrasions where the victim is raped while still alive. You would see black and blue marks. (BMHR 1957).

I also disagree with Dr. Peretti's testimony that the injuries to Mr. Byer's mouth and ears were similar to those of the other children and are "normally" seen in children who are forced to perform oral sex. Also, if there had been oral sex, they should have been able to find evidence of it through mouth swabs and swabs taken of the back of the larynx. (BMHR 1959-60).

In my opinion, this case absolutely warranted the involvement of an independent forensic pathology evaluation at the time. (BMHR 1960).

During the noon recess, the father of one of the victims, Mr. Byers told me that the bodies were found in an area that had some snapping turtles in it. I also am aware that there were animal hairs removed from the bodies that were later examined by the Crime Lab. (BMHR 1961-62).

I recall that during the May 2007 meeting the subject of turtle bites had been brought up, but Dr. Peretti had opined that he did not believe that there were turtle bites as he had raised turtles. (BMHR 1963).

DIRECT EXAMINATION BY JOHN PHILIPSBORN

I have reviewed testimony given by Dr. Peretti at a post conviction hearing in which he testified that he had passed the examination in forensic pathology. He apparently did not pass the anatomic pathology portion of the examination, and thus was not board-certified. (BMHR 1964-65).

The meeting in Little Rock that I referenced included two pathologists and two odontologists consulting with the defense, as well as Dr. Peretti, other Crime Lab staff, and other persons. (BMHR 1965-66).

Any opinion testimony that Dr. Peretti has given in either the first or the second of the trials that there was evidence of sexual assault on any of the remains of the three boys is incorrect in my opinion. Also, Dr. Peretti never distinguished correctly between pre-mortem, peri-mortem, and post-mortem injuries. (BMHR 1966-1967).

Had the children been alive, conscious and struggling against their restraints, one would have expected bruising and hemorrhage under the skin. Only Mr. Moore has some hemorrhage in the tissue under ligatures, which means that his heart was

beating when the ligatures were put on, though the lack of hemorrhage around the wrists suggests that he was not struggling. (BMHR 1968-1969).

There is no forensic evidence that supports an anecdote that an individual bit off the testicles of one of the victims and sucked out his blood. (BMHR 1969-1970).

There is no evidence that supports a statement that an individual had observed the three children being stabbed. I opine that none of the boys was stabbed. There is some evidence that supports a scenario involving a small number of blows with a blunt instrument that resulted in head injuries. There is no evidence that they were beaten with fists. (BMHR 1970-1971).

There were no injuries consistent with the victims having been injured by a survival knife consistent with the one displayed in the Baldwin trial, which is Exhibit 48 NN in this hearing. (BMHR 1972).

There was no evidence of forced fellatio or of anal sex of any kind. (BMHR 1972-1973).

There were continuing education courses provided to criminal defense lawyers in 1993 that covered forensic pathology. There were also board-certified forensic pathologists the defense could have consulted with in 1993. There were also some authoritative texts like those produced by Spitz and Fisher, Bernard

Knight, and others that were available to review. There would have been some journal articles about drowning. (BMHR 1973-1974).

Assuming that the same photographs were used in the Misskelley and Baldwin trials, my testimony and opinions about the pathology related opinions given in Misskelley's trial would have also applied to Baldwin's trial. (BMHR 1975).

CROSS EXAMINATION BY KENT HOLT

I have no disagreement with the autopsy protocols used, or with the reports produced. My disagreements are with the interpretation of the injuries. (BMHR 1978).

Drowning hastened the death in this case, and there were also other life threatening injuries. (BMHR 1978). If the drowning had not occurred, these individuals may have survived.

I do not agree with an opinion rendered by another pathologist named Terry Haddix that postmortem animal predation injuries on Steve Branch's face may have been superimposed on ante-mortem injuries. It's possible, but I think it's more likely that all of these injuries occurred after death. (BMHR 1982-1983).

I believe there were ante-mortem injuries to the head, brain and skull of each of the three boys. There might be a question of whether there was a dragging type

injury to the face of one of the boys that could have been pre-mortem, but I believe it was post-mortem. (BMHR 1984-1985).

REDIRECT EXAMINATION BY MICHAEL BURT

I think that Dr. Peretti did a proper job of documenting the injuries. I think he did a partial job of taking tissue samples. (BMHR 1989).

I did review the 2007 report by Dr. Terry Haddix that you are showing me. I agree with several of her opinions. I am aware that Dr. Haddix, Dr. Spitz, Dr. DiMaio, Dr. Souviron, Dr. Wood and I all agree about postmortem animal depredation. My disagreement with Dr. Haddix is over the possibility of there being some ante-mortem injuries to Mr. Branch's cheek. (BMHR 1993).

[End of Testimony BMHR 1996]

JOHN MARK BYERS

DIRECT EXAMINATION BY MICHAEL BURT

[Vol. 8: (BMHR 1996-1999)].

I told Dr. Baden out in the hallway that I could tell when the children had been playing out in the woods, because they put turtles they found into the pool. The smaller ones would likely have been found by my son Chris and his buddies. They would be six to eight inches in diameter. The larger ones would be twelve inches in diameter and larger. I would dump the turtles into the nearby drain.

Whenever I would see the turtles in my pool, I would ask the kids where they got them, and they would tell me that they had been playing in the Robin Hood area, and that's where they had found them. (BMHR 1997-1998). I lived a couple of blocks from Robin Hood Hills at that time.

Some of these were red eared sliders, and others were logger head or alligator turtles. (BMHR 1998:13-17).

Chris Byers was my adopted son. Michael Moore lived right across the street. Steve Branch lived over on the next street. (BMHR 1998).

[Session of August 11 ends, and session of August 12, 2009 begins at (BMHR 1999]

DR. RICHARD SOUVIRON

DIRECT EXAMINATION BY MICHAEL BURT

I am a dentist who has specialized in the field of forensic dentistry as a forensic odontologist. I do all of the work for the Miami-Dade Medical Examiner's office. (BMHR 2001). I assist in the identification of deceaseds in plane crash and other disaster situations. I also review pattern injuries. I am a practicing dentist as well. (BMHR 2002).

In addition, I consult with law enforcement officers throughout the State of Florida, in cases around the country, as well as in Canada and the Bahamas. I have

also consulted with criminal defense lawyers. I would say that most of my work is done for law enforcement - about 70 to 75 percent.

I attended dental school at Emory University in Atlanta, and received my dental degree from there. Since, I have taken in forensic dentistry at the University of Texas, at Bellevue in New York, in Connecticut, and the Medical Examiner's in Miami-Dade. My primary means of training is hands on work. (BMHR 2005).

I have often worked on cases involving drownings. I have worked on thousands of cases since I started doing forensic odontology in 1967.

For many years I was the forensic odontologist at the Miami-Dade Medical Examiner's office. In the 1980s, I started training other people. There is now a deputy chief odontologist. Both of us are board certified. (BMHR 2007). We have at least 30 other individuals who have trained with them. (BMHR 2007).

To get certified as a forensic odontologist one has to take a three-day examination in addition to four to five years work with a medical examination. The organization that certifies forensic odontologists is the American Board of Odontology. I have been the President of the American Board of Forensic Odontology, and served on the Ethics Committee as well. I have taught forensic dentistry at the University of Miami Medical School. (BMHR 2010). I regularly

lecture to law enforcement groups. I have also published in the field of forensic dentistry, including a 2009 book called *Dental Autopsy*.

One of the book chapters I have is on animal bite marks, and another is on how bite marks and pattern injuries can mimic one another. (BMHR 2012). I have also authored a section in Dr. Spitz's book.

In 1993 there were persons in the field who were writing on forensic odontology. My CV lists the jurisdictions that I have qualified in, though I don't think that it lists Arkansas, and I have qualified here before. I did some work for the FBI in Arkansas, and worked on another case. I have qualified in a number of other jurisdictions as well. (BMHR 2014).

I had dealt with animal bite marks on a number of occasions before I was contacted about this case. I was first contacted in this case in 2006. He was eventually contacted by attorney Horgan from San Francisco. He sent me a letter—Exhibit 60. I was sent approximately 1500 photographs (BMHR 2017), the autopsy reports, from other law enforcement reports. Today, there is a protocol for documenting bite marks. In 1993, I did it by taking my own photographs. I would make notes. I would assess the pattern, whether it is a human bite mark or not.

In this case, I was confused about Dr. Peretti's explanation, given in 1999, of what he did at the time. At the time of the autopsy, he called in a dentist

because he thought there were bite marks. He then said that none were found, so that he did nothing. But where you see a pattern injury, you should work it up. (BMHR 2022). The fact that didn't happen, that there was no documentation of what had apparently been thought to be possible bite marks, meant that Dr. Dougan, the dental consultant was not following protocol.

There are a number of injuries that can be made by animals, and I have brought a number of exemplars along. This included exemplars of dog; shark; dog activity that looks like something else; knife wounds that are erroneously identified because the actual mechanism of injury was a dog (BMHR 2028).

I brought along an exemplar from my collection which I believe resembles the injuries to Chris Byers—you can see these pattern injuries from the paw marks. (BMHR 2030-2032). It had been suspected that a serrated knife had inflicted the injuries, but the odontologist who had reviewed the findings in the case was of the view that in fact it was a dog, which is what was demonstrated. It is common to see injuries caused by dogs in the genital area. (BMHR 2032).

I can also show you this Mississippi case in which it had been suspected that there were human bite marks, but it turned out that the marks had been inflicted by big red ants. (BMHR 2033). I also testified in another Mississippi case about bites that were identified as human, but I said they weren't. We were able to show that

the body, which was found in a swampy area, had been eaten at by crayfish. (BMHR 2037-38).

I have looked at the record of this case, and have reviewed the testimony of officers at the scene in this case who described their walking through the water. Based on my review of the testimony, and of the map of the area, I would not have expected to see actual wildlife in the ditch where the bodies were found after Detective Ridge had walked in the ditch. (BMHR 2042-2043).

The area seems to be to be where you might expect to find some degree of wild life there. (BMHR 2043). I don't know where the bodies were when they were set on by animals. In my opinion, there was a combination of animals involved. I would say turtles would have been likely, as would have a coon or a dog. (BMHR 2048-49).

Looking at the injury to the right shoulder of this young man, in autopsy 329, you see parallel lines consistent with claw marks. There was a question about whether this was done by the Rambo knife. I prepared an acetate tracing of the knife using a one to one measurement, and did the same with respect to the injury. When you place the acetate of the knife over the injury, you can see that it doesn't fit. This is a common technique that we use in odontology to compare a known to an unknown. (BMHR 2051). This is Exhibit 62.

In answer to the Judge's question, it may be possible that one of the cuts on the body in the area of the scrapes I was talking about could have been made by a knife, but the scratch marks were not, because you can't get them to match up with the knife. (BMHR 2056-7). I can't tell you what kind of an animal exactly. I have read a book on the *Amphibians and Reptiles of Arkansas*. I also consulted a book called *Arkansas Mammals*. There are a lot of possible candidates for inflicting these injuries. My first choice would be a turtle or maybe a turtle and a crayfish. There are a number of animals in the books I reviewed that eat dead animals, and that might have been involved. I am aware of two affidavits covering the presence of wild dogs in the area.

Looking again at photos of Mr. Moore, autopsy number 329, I am of the opinion that those are animals. I see some blunt force trauma, but other areas of animal activity. (BMHR 2061).

Mr. Branch had injuries to his face that look like dogs licked the area. I have seen injuries like that. I also see some injuries that were triangular, like they were made by a turtle. This is post-mortem mutilation. There is no way that a knife could have caused those injuries. (BMHR 2064).

You are showing me what was identified as a human bite mark by Dr. David, and I agree with other doctors who have testified that this is not a human

bite mark. But I don't understand Dr. Perretti's identification of indications of bite marks on the cheek, and his lack of consideration of these as animal bite marks. The areas of what Dr. Perretti describes as gouge marks are animal activity. (BMHR 2068). You can see irregular borders of the wounds. There are little half mooned shapes. These are classic bite marks.

The wounds to the genital area are also post mortem animal bite marks. The de-gloving of the penis is characteristic of an animal bite mark. (BMHR 2070). That would have been recognized in 1993. Today, you would have swabbed the area for DNA, and human saliva.

The other thing to consider if you assume that these are knife wounds is that there would likely have been some injury to the bones. I don't think that they looked at the bones. (BMHR 2072-73). I used an acetate of the knife on these marks near the genital injury, and they could not have been made by this knife. (BMHR 2073).

I strongly disagree with Dr. Perretti's testimony in the Misskelley case that 'a knife' or in Baldwin/Echols 'a particular knife' caused the injuries I am reviewing. I think that someone with the kind of training I have would have testified in 1993/4 as I am testifying now. These days, there is a recommendation that experts in our area be certified every five years.

We attempted to share our findings with Dr. Perretti. We met with him. Dr. Di Maeo was there, I think Dr. Baden was there. Dr. Perretti was congenial. He said he was going to go back in his records to review cases over the last ten years that involved animal mutilation. I don't know that he ever did. (BMHR 2078). I reviewed Dr. Perretti's letter from after this meeting. It is Exhibit 48. I agree with him that there are no human bite marks. But then he says that there are no bite marks, including animal bite marks, which contradicts what he wrote.

There are several books that were available in 1993 that cover animal bite marks, including Dr. Helpern's book (Exhibit 64); Dr. Spitz's book and Dr. Adelson's book, all of which were available back at the time of trial. (BMHR 2082).

DIRECT EXAMINATION BY JOHN PHILIPSBORN

There were protocols used by Medical Examiners offices in 1993 where pattern injuries were concerned. There was also pertinent literature that could have been reviewed at that time. There was actually an inquiry in Canada about deaths said to have been caused by sharp objects like scissors that turned out to be animal bites. One of the persons present at the meeting with Dr. Perretti was an odontologist from Canada who was a part of that inquiry. He gave Dr. Perretti a copy of his book on forensic odontology.

I am now looking at a series of photos which have been marked Exhibit 48. Looking at photo 48 T, Mr. Branch, I see nothing but animal mutilation on his left cheek. Photo 48 CC shows some claw marks. 48 MM is the genital area where I see the de-gloving injury, there is animal predation. I don't see anything that indicates that the victim's heart was beating or that there was blood pressure. (BMHR 2092).

Looking at the photo that was said to show a line around one of the victims' penises, which was exhibit 64B at trial, I don't see anything that looks like human teeth marks there. (BMHR. 2094).

CROSS EXAMINATION BY KENT HOLT

I have seen testimony from other experts who addressed the human bite mark issue in another proceeding. I did not get the testimony of Dr. David. He is a friend of mine, but in this case, he was flat wrong.

I have opined that the injuries on Mr. Branch's face, the injuries to Mr. Byers' genital area, and the area of Mr. Moore's right shoulder all have animal injuries on them (BMHR 2097-8).

I do want to know all I can about a case, particularly about where the bodies were found. I am interested in what the officers on the scene saw. I would want to have gone through all of the information. I think that I only have some of the

information about the scene. I addressed the issue of the Rambo knife, the grapefruit and those matters.

I agree with Dr. Haddix who discussed animal mutilation sur-imposed on pre-existing injuries. There were drag marks. Blood attracted the animals. There was also urine.

I see evidence of turtle bites, areas that are likely to have been licked by a dog, which would have attracted turtles. I don't have a degree in zoology, by I do dentistry on zoo animals, and I have much more expertise on animal teeth than the average dentist. (BMHR 2105).

The testimony that someone bit off the scrotum and penis as part of a satanic ritual was outrageous. (BMHR 2109).

Animals could have been attracted to an area that had been wounded by a knife.

REDIRECT EXAMINATION BY JOHN PHILIPSBORN

I see nothing in the photos of Mr. Byers that indicate that his scrotum and testes were bitten off by a human.

The proceedings on August 12, 2009 were concluded. BMHR 2124. The testimony resumed the next day, August 13, 2009

DR. JANICE OPHOVEN

DIRECT EXAMINATION BY JOHN PHILIPSBORN

I am a forensic pathologist with special training in pediatrics and pediatric pathology. My focus has been on pediatric pathology. (BMHR 2125). I am aware that in 1993 and 1994 there were physicians who, like me, had specialty training and specialty emphasis in the field of pediatric pathology. There had been board certification available for training in pediatric pathology for some years as of that point in time. A number of well-known children's hospitals had pediatric pathologists. (BMHR 2125).

I went to school at the University of Minnesota, and completed my medical training there. This was in the late 1960's. I encouraged the University to assist me in constructing a training program in pediatric pathology. By the mid-1970's, I was able to study in a combined program of pediatrics and pathology. I did a Fellowship at the Hennepin County Medical Examiner's Office in 1980 to complete all my training. I began practicing in 1981.

I undertook training as a pathologist as well as a forensic pathologist. I also obtained training as a pediatrician, and I practiced in a Children's Hospital for about ten years, running the laboratory, with the focus on pediatric pathology. *[End of Volume 8. Begin Volume 9. Volume 9 begins at BMHR 2130.]*

Pediatric pathologists perform autopsies, and also interpret laboratory

results. There are a number of issues specific to the pathology of children that call for specialization. I sat for the boards in forensic and anatomical pathology. I did not sit for the boards in pediatric pathology because I had been out of training more than ten years at the point at which those boards would have been available, but I maintained professional relationships, memberships in pertinent organizations, continuing education, and teaching in the field of pediatric forensic science and sexual abuse since 1981.

After I completed my training at the Hennepin County Medical Examiner's Office, I continued as a Deputy Medical Examiner dealing mainly with child fatalities. I trained residents from the Hennepin County Medical Center on issues of pediatric pathology.

Since that time, I maintained an informal relationship with Medical Examiners around Minnesota. (BMHR 2133).

Hennepin County covers the twin cities of St. Paul and Minneapolis. It covers seven different counties.

I have consulted for a number of offices and agencies involved in the investigation of child abuse. Included in that has been my familiarization with the issues of child sexual assaults and sexual injuries, which are manifested very differently in children than in adults. (BMHR 2134-35).

I have consulted with both law enforcement agencies and with criminal defense counsel. For the first 15 to 20 years of my practice my work was primarily for law enforcement and for agencies prosecuting childhood injuries and fatalities. In the last ten years, I have been involved increasingly with defense work. I do still get calls to review cases for prosecutors and law enforcement. (BMHR 2135).

I have been involved in the writing of text books on pediatric pathology, including one on *Pediatric Forensic Pathology*. They cover what is intended in the field. I have also been invited to write chapters for a series on head trauma and children. I have been asked to discuss and lecture on both sexual homicide as well as abusive trauma in children. (BMHR 2136). [*Dr. Ophoven was offered as an expert in forensic pathology with a special emphasis in pediatric pathology without objection. BMHR 2137*]

In my work on this case I reviewed transcripts and testimony, investigative materials, crime scene analysis and diagrams; trace evidence materials; voluminous photographs, autopsy reports and the like. I have reviewed testimony concerning the cause and manner of death by Dr. Peretti. (BMHR 2137).

As far as I am concerned, there were standards applicable to the post-mortem examination of eight-year olds, whose deaths were being investigated in relation to some form of sexual abuse. There were standards of practice for

pediatric pathology that any physician who is trained and understands the nature of the practice would know. You get to know that kind of information as you are becoming qualified as a forensic pathologist and as you prepare for the board certification. There is no specific recipe that attends an autopsy, but you need to be aware of the unique or unusual circumstances. If you have not been exposed to them, you ask for advice. That was an established standard in 1993.

It may be that a pathologist is able to do an autopsy and collect the evidence, but may not be in a position to render opinions based on the unique nature of the case. (BMHR 2139).

The recommendation of consultation with others was well known in the medical field as of 1993.

I have reviewed the reports on the deaths of Mr. Moore, Mr. Branch, and Mr. Byers. The reports did not include a number of things that I would have expected. They looked to have been prepared according to a fairly basic template. The connection between the conclusions and actual findings are often not evident. (BMHR 2140).

By 1993 and 1994, there was a general consensus in the field that you needed to take tissue samples where there was a suspicion of a death of a child involving a sexual assault or sexual abuse. In this case, the tissue sampling was

limited.

I am of the opinion that the testimony offered by Dr. Peretti linking the findings that he made to opinions about forced fellatio or some kind of anal penetration of the victims was not within generally accepted professional norms in that he did not link the data available and the opinions rendered.

My reasoning for testifying this way is that the findings of sexual abuse, penetration, and injury are very concrete. They depend in part on understanding the context and the conditions under which the body was found. In my opinion, Dr. Peretti's testimony was predominantly speculative. The testimony regarding fellatio and forced oral sex was speculative. With respect to anal dilation, the photographs show very normal anal anatomy. Anal dilation is not something considered abnormal during an autopsy. There is no apparent abnormality of the anal skin.

My concern was that what was communicated to the jury is highly speculative. (BMHR 2142-43).

I agree with the beginning of Dr. Peretti's testimony from the Echols/Baldwin trial that a post-mortem examination is done in a context. If you have even a basic suspicion of a sexual assault, for example, you would work up the case and collect potential evidence of this. Listening to the testimony that Dr.

Peretti gave about the findings in the case of Mr. Moore, particularly around the mouth, and looking at the photographic evidence, there is nothing that would raise as inflammatory a thing as forced oral sex. I view the testimony as a violation of professional responsibility.

With respect to the testimony that Dr. Peretti gave concerning the reddening or congestion of the mucosa which is the internal lining of the anus, I also viewed the testimony given as shocking. The suggestion that there could have been evidence of sexual abuse is the problem. There is not a shred of evidence that there is any damage to the anus and rectum, so suggesting evidence of sexual penetration is improper. (BMHR 2148).

Similarly, the photographs that are being displayed which reference State exhibits 64B and 65B showing the undersurface of the penis of Mr. Branch, and specifically where Dr. Peretti said that you see this kind of injury when an object like a belt is wound tightly around the penis of a child, or where young children have oral sex, is not scientifically valid. Dr. Peretti's testimony first of all references what I think was a post-mortem alteration. It does not look like a sexual injury at all. (BMHR 2150).

With respect to the injuries to Christopher Byers and photographs shown at trial that were described as a close-up of where the penis and scrotal sac and testes

should be, in my opinion the response that agreed that this was an area of mutilation was wrong. This is not a close scientific question. This injury did not result from the use of a sharp tool. If you look at the area depicted, you can see that the tissue has been torn. It has not been removed through the use of a sharp object. You can also see little puncture wounds where there is no blood. You can see a number of punctate wounds. Looking at other exhibits that show the close-up of the area as it was shown during the course of the trial, the way the testimony at trial came out the area is described as showing indications of organs that have been carved out, and have cutting and gouging wounds. If you look, you see scalloped edges. This has been torn off. This is pretty basic pathology. (BMHR 2153).

You can see that there has been some pulling away of the tissue. It has been torn out. There is no blood in the tissue area and you can see that this is clearly post-mortem. The testimony at trial that there was no evidence of animal activity or insect bites is wrong. This is evidence of animal activity. (BMHR 2154).

It's a basic tenet of forensic pathology that you go to the scene in a case, particularly one where there are serious implications. I am aware that in his testimony Dr. Peretti has said that since he has been in the State of Arkansas nobody has ever called him to go to a crime scene. (BMHR 2155).

I am also aware that Dr. Peretti testified that he was not present when the

remains of the three boys were taken out of the area of the drainage ditch and removed from the scene. It is important to see the bodies in the situation and the actual place where they are found. It is a fairly common practice for a Medical Examiner to be summoned in those situations.

I am also aware of Dr. Peretti's testimony when he was cross-examined by the lawyer for Mr. Baldwin, and asked about the mouth injuries and how consistent they are with the injuries you see in children who have been forced to perform oral sex. In my opinion, there is no professional literature that would have supported the testimony given by Dr. Peretti on this issue. First, there is no pattern of injury here that indicates some form of sexual injury. Second, there is no evidence associated with patterns of fellatio such as bruises to the palate, or bruises to the back of the throat. The pattern of injuries has nothing to do with oral sex. (BMHR 2157). The statement that these sorts of injuries were not present because the teeth were clenched makes no sense.

The testimony about injuries to the ear being characteristic of oral sex with children is absolutely inappropriate. I saw no evidence that any of these children were grabbed by an ear or held by an ear. (BMHR 2158-59).

There were no injuries consistent with any of these three young boys being forced to perform oral sex.

The only pattern to the injuries was a pattern of vermin predation. I didn't see any pattern associated with a serrated knife or with a tool of any kind. (BMHR 2159).

I disagree with Dr. Peretti's testimony in the Echols/Baldwin trial that a weapon such as a sharp knife was involved. There is no evidence consistent with that finding. (BMHR 2160).

Looking at one of the close-up photos of Mr. Byers, which is Exhibit 48MM in this hearing, my view is that there are teeth marks, puncture lacerations, torn tissue, and possibly claw marks. These are clearly not human in origin.

With respect to Mr. Branch, my view is that the injuries to the cheek or to the face where there are perforations, gouges and lacerations is like the photo of the predation to the genitals. This is not related to some form of sexual crime. These appear to be post-mortem, at least from the photos. (BMHR 2162-63).

The photos of Mr. Branch in the 48 series show the same kind of damage from different angles.

I have looked at the photographs of Mr. Byers, ME331, and there is no indication of the use of a sharp object. The marks that were pointed out in photograph 48LL are claw marks.

The knife depicted in 48NN was not involved in anything that happened

with these three boys. (BMHR 2165).

There have been a number of publications about common (and uncommon) mistakes that are made in the diagnostic process and in post-mortem review where mistakes are made because of a failure of adequate training and experience. The Goudge Commission Report involved cases in Ontario where a particular theory of pathology which was flawed was applied in a number of cases, including a pediatric case where a woman was charged with murder for having killed her baby when it was determined that the child had been mauled to death by a dog.

Looking at this case, I cannot understand how thoughtful consideration and differential diagnosis would have led to the conclusion that these children had been sexually assaulted, or subject to sharp force trauma. (BMHR 2169-70). Observable injuries to the lip would not have been the hallmark of sexual assault, and at the time of these cases there was information available on how to properly diagnose sexual injury in children.

The appropriate methodology that one should use when suspecting or diagnosing a sexual penetration of the mouth is whether any of the elements typically seen in sexual abuse are present. You have to have a pattern of injury that is scientifically verifiable and consistent with sexual abuse. (BMHR 2171-72). There is none of that in this case.

Second, if you have the presence of ejaculate in a child where ejaculate shouldn't be, then you have evidence of sexual contact. The third sign of sexual activity is the presence of a form of sexually transmitted disease. All of these things are relatively straightforward. If you do not have any of these things in a given case, then the forensic pathologist does not have anything to contribute on the question of sexual activity. (BMHR 2172).

It is not unusual in my profession to be asked to provide a source of opinion. Sometimes it is based on experience, and sometimes on specific literature. One needs to know the definition of sexual injury, and what is known about predation injuries, drowning and so forth. (BMHR 2173).

I do not recall Dr. Peretti being asked any questions about what literature he was relying on to render his opinions about sexual assault, or even what experience he was basing his reference on in stating his opinions about injuries to ears and mouths and sexual assault.

If I had announced to a meeting of fellow professionals that I would be reviewing and producing information on cases involving remains recovered from water to assess signs of predation, I would have provided the sources of my opinions. (BMHR 2176)

DIRECT EXAMINATION BY MICHAEL BURT

There are multiple organizations that set forth standards that are pertinent to the work of the forensic pathologist. We practice medicine. Our basic tenet is to do no harm and to make sure our ethical principals as physicians are adhered to. (BMHR 2178)

For Dr. Peretti to have testified that injuries to the ear and lips signify oral sex is not an appropriate way to testify. A pathologist like any other doctor offers a differential diagnosis. One needs to have suitably narrowed the analysis to be able to express an opinion, or to state that one does not know.

Refusing to answer a question yes or no, or allowing the unsubstantiated suggestion that a certain state of affairs exists, is not ethical. I was taught that forensic pathologists wield too much influence on a jury to opine about matters on which there is no scientific evidence. For example, on the question of the evidence of sexual assault, the answer would be yes or no, based on the physical evidence. Even if you are presented with a confession, however dubious, as in your hypothetical, the role of the forensic pathologist is to determine whether there is evidence of sexual assault. Using a statement by an accused as the basis for a pathologist's opinion is inappropriate. (BMHR 2183-84). While I ask for all available information as a pathologist, including statements of that kind, I do not base my opinion on what a witness says. I match what the witness says to what I

found at autopsy and then give an opinion. (BMHR 2184).

Going back to the photographs of the anal orifice, the photograph you are showing me is normal. There is nothing that suggests this child has been sodomized. As to Exhibit 71C, a photograph of Mr. Byers' genital and buttock area, there is nothing shown here that supports the testimony that there was capillary dilation, or cutting wounds. (BMHR 2186). Similarly, with respect to the testimony of Dr. Peretti concerning Mr. Moore, the kind of trauma to a child's mouth that is seen here is not consistent with fellatio. (BMHR 2188-89).

CROSS EXAMINATION BY KENT HOLT

In the past five years I have done around 200 autopsies. In the past two years I have done fewer than a hundred, including three or four autopsies on children. (BMHR 2193-94). I am a member of the Society of Pediatric Pathology, as well as of the National Association of Medical Examiners.

I have taken a number of courses, including courses at the Body Farm in Tennessee (which works with the FBI) that deal with animal predation. I have worked with law enforcement organizations on cases in which predation was suspected. I keep up with the literature on this topic. (BMHR 2194-95).

I have not consulted with any of the other pathologists in this case, though I may have seen some of their reports. If Dr. Baden indicated that the manner of

homicide was blunt force injury to the head and drowning, I would agree with that. (BMHR 2196-97). In my view, there were pre-mortem skull fractures. The remainder of the injuries to the boys' bodies in my view were entirely post-mortem. (BMHR 2197-98).

Limiting my testimony to questions of sexual violence or mutilation, I see no evidence of pre-mortem injury.

If I were trying to assess what kind of animal was involved and I were with a crime laboratory, I would suggest that evidence be collected to help assess that, or I would consult with people who might know the answer. I can say, looking at some of the injuries here, that they are claw marks. (BMHR 2202).

In my view, you need to differentiate between the way a forensic pathologist would look at evidence of sexual assault, and the way a court might do so. For me either there is an injury or there is not; either there is ejaculate or there's not; either there is a sexually transmitted disease or not. Circumstantial evidence that is legal is a matter for the courts, not for me. (BMHR 2205).

I believe I have been paid something in the neighborhood of \$3000 for my work on this case. I have been involved in the case since 2006. My office will be charging for my testimony. I charge between \$300 and \$400 an hour. (BMHR 2210).

I did work on a case involving a person named Jeremy Marshall. I signed the case off as a natural cause of death, and 18 years later the mother came forward and said she had suffocated her child. (BMHR 2211).

REDIRECT EXAMINATION BY JOHN PHILIPSBORN

I agree that you always want to try to get the best information you can about a case, and as indicated on cross-examination, there are times when additional information helps refine an opinion. Additional information from colleagues might cause me to change my interpretation.

Looking at the remains of Mr. Byers (ME331), I see no evidence in the area of the removal of genitalia that this child's heart was still beating at that time. (BMHR 2215-16).

During further examination today I did opine that the timing of the placement of ligatures is of significance. Part of the concern, as the FBI puts it, is to differentiate between a staged event and an actual legitimate crime scene. One of the questions that I would seek to address is whether there was an indication that a person was dead at the time ligatures were applied. There is no way to verify scientifically, based on the evidence here, that the ligatures were placed on either a conscious person or a person who was alive. (BMHR 2218-19). [*Dr. Ophoven was*

excused at BMHR 2222].

ANGELA GAIL GRINELL

DIRECT EXAMINATION BY BLAKE HENDRIX

My name is Angela Gail Grinell, I am Jason Baldwin's mother. Jason's biological father is Charles Larry Baldwin. We were divorced and I later married Terry Ray Grinell when Jason was about four. (BMHR 2223).

Jason is my oldest child. The next is Larry Matthew, and my third son is Terry Grinell. Terry Grinell passed away.

In 1993 we were living at the Lakeshore Trailer Park. That is located between West Memphis and Marion. (BMHR 2224). My three boys lived with me. Terry Grinell was living in the house off and on. On May 5 and 6, 1993, my three boys and I were living in our trailer, as was Dennis Dent. (BMHR 2225-6). He was around at that time, though I later asked him to leave.

Jason was 16 at the time. He was going to Marion High School. He would ride the bus to school, as would my second son Matthew. Jason and Matthew rode the same bus. Terry was between 8 and 9 and would have gone to elementary school. (BMHR 2227-8).

Jason was not the kind of kid who skipped school.

When he was not at school he would play Nintendo. He liked to go fishing. He had a TV in his room. We had a VCR. At the time Jason was really small, barely my height. He was not the kind of kid who would get into fights or pick on people.

I knew of nothing that would have indicated that my son was involved or interested in witchcraft or satanism. (BMHR 2229).

Jason did not have a car at the time. I was trying to get him one, but he did not have one.

At the time I was working in Memphis at a business called Customized Transportation, Inc. I had been working there for a number of years. It was a trucking company. (BMHR 2230-31).

I would always call my boys from work.

In 1993, I was working between 3 p.m. and 11 p.m. It would usually take me about 30 minutes to get home. May 5 and 6 of 1993 were in the middle of the week. My boys would usually get home from school after I had left to go to work. I would check in with them by phone. (BMHR 2232-33). I would call and talk to my kids and ask them how they were doing.

When I got home I would check on my kids. I normally left dinner for them and all they had to do was heat it up in the microwave. Jason's job was to make

sure that the younger ones got fed. The boys were always in bed when I got home. (BMHR 2234-35).

After I got home, I would prepare myself some dinner and watch TV for a while. It would take me a while to wind down from work. I would usually fall asleep on the couch at about 3 or 4 in the morning. (BMHR 2235-36). I did have another place to sleep, but I would fall asleep on the couch two to three days a week.

Jason would get up at 6 to 6:30 in the morning. He had to be at school by 8. He would help his younger brothers get ready. (BMHR 2236-37).

We had some heavy construction plastic that had been stapled over our windows, so the only way to get in and out of the trailer was through the doors. Jason would not go anywhere. He did not go out at night. For them to do that, they would have to sneak by me after I came home from work. (BMHR 2239).

I remember the day they found those three boys dead. I know that Jason had gone to school on May 5 of 1993, the day before, because I got his school records. The police had told me that if I got his school records they would let him go. He was a punctual student. He did not miss school. I remember I went to the principal's office and I said I needed my son's school records. (BMHR 2240-41).

Jason was arrested one night and I went the next day. I went back to the

school the day after he was arrested. (BMHR 2242-43).

The records show that Jason was in school on May 6, 1993 as well. I remember I called the Chief of Police the night of the arrest and he's the one who told me that if I brought Jason's school records they would let him go. (BMHR 2243-44). I talked to the officer and I brought him the school records.

After they didn't let him go, I tried to find out where Jason had been those days. I talked to my uncle, and my uncle said that Jason had come over and mowed his lawn in West Memphis. My uncle's name was Hubert. Jason had also gone to Walmart and played some video games. My uncle's name is Hubert Bartoush. Also, he had been with Ken Watkins, I think, playing video games. (BMHR 2245-46).

I had also talked to Dennis Dent, who said that Jason was home on the night of May 5, 1993. I remember that I had called home that night and I confirmed that he was at home. I do not remember exactly whether I talked to him or not. (BMHR 2245-46).

I never found any bloody clothing at my house. (BMHR 2247).

Jason did not change after the killings. I remember that we were worried after those children died. We were all hoping that someone would be caught. I never dreamed that they would arrest Jason for this crime. Before he was arrested,

I had told him to watch his younger brothers because nobody knew who had done it. (BMHR 2248).

I had no reason to suspect that Jason was involved. He said he didn't know anything about it. He did not even know the people who were killed.

Jason, Damien, and Jessie were not all friends. At one point they had been friends, but at some point there had been some problems with t-shirts, and then Jessie had tried to steal a necklace of Jason's. In May of 1993, Jessie was not one of Jason's friends. He didn't come by to our house, except once right before the murders he came to our house and said he had just come back from California. (BMHR 2250-51). Jason and Damien did hang out together.

When Jason got arrested, I did give the police the information about my son being in school. I remember that the night he was arrested he had gone to spend the night at Damien's house.

I also told the police about Jason playing video games at Walmart, and about his being at my uncle's place. (BMHR 2253).

I also told them about Jason baby-sitting for his younger brothers. (BMHR 2254).

After Jason was appointed lawyers I did meet with Paul Ford a lot of times. I did not meet with Robin Wadley much. I told them about Uncle Hubert and the

mowing of the lawn. Hubert gave them a statement. I also think I told them about Jason playing video games. I gave them names of witnesses. I also talked to them about my calling the house. I told them exactly what happened that night. (BMHR 2256-57).

I was never called as a witness in the case. I have no idea what was presented in my son's trial, I was never allowed in the courtroom. (BMHR 2259).

This whole event placed a lot of stress on me. It caused me emotional problems. I ended up losing my job, and I had a lot of distress and anxiety. I needed medication, and I had to go to the hospital. But at the time of Jason's arrest I had a good job and I was a very good employee, and then things fell apart. It was so traumatizing for me to see my son like that. (BMHR 2262).

CROSS EXAMINATION BY KENT HOLT

I did meet with my son's lawyers. I told them what I knew about the situation. I told them about my son's whereabouts as far as I knew them.
[Testimony of Angela Gail Grinell ends at BMHR 2264].

NANCY PEMBERTON

DIRECT EXAMINATION BY MICHAEL BURT

I am a licensed investigator and a licensed lawyer. I have been working on the Misskelley case since 2004. I went to Dan Stidham's office and obtained his

files and had them shipped. The files were shipped to California. I believe that there were 17 boxes.

State's Exhibit 6 is an index that my office prepared of the Dan Stidham trial boxes. There were actually 14 such boxes. There was a post-conviction box. (BMHR 2269-70).

I am aware that at one point you and Mr. Philipsborn obtained lab notes. I went through the Dan Stidham file to see if I could locate them. I was never able to locate lab notes of that kind in the Dan Stidham file. (BMHR 2271-72).

JOHN PHILIPSBORN

DIRECT EXAMINATION BY MICHAEL BURT

I was involved in securing copies of the laboratory's notebooks. Counsel for Echols, Misskelley, and Baldwin met with police personnel, with Kermit Channell of the Crime Laboratory, Circuit Prosecutor Brent Davis, and other persons in a conference room at the West Memphis Police Department. We reviewed a number of binders that were identified as notes of criminalist Lisa Sakevicius. Afterwards, we went to the Arkansas Crime Laboratory. Mr. Channell had arranged to lay out all the Crime Laboratory material that he was producing, including notes from the Medical Examiner's Office and other laboratory notes. At some later point in time, my office received a box of materials from the Arkansas Crime Laboratory

identifying the materials as copies of laboratory notebooks, including hair slides and other materials that we had been shown in those two days. I arranged to have the material copied for other counsel. (BMHR 2274). *[End of session of August 13, 2009, BMHR 2275. The beginning of the session of August 14, 2009 is on the same page.]*

SALLY WARE

DIRECT EXAMINATION BY JOHN PHILIPSBORN

I am a retired teacher and current artist. I taught for 23 years at Marion High School, two years at East Tennessee State University, and several years elsewhere as well. (BMHR 2276-77).

I was at Marion High School from 1979 to 2002. I was working there full-time in 1992 and 1993. I taught high school art.

Marion High School had about 600 students there at that time. The school day was organized into 7 periods. It started at 8:05 and ran until 3:15. Each class period was 50 to 55 minutes.

I taught 6 of the 7 periods. One of the students I had in my class in the spring of 1993 was Jason Baldwin. I recognize him here in the courtroom. He was in my sixth period class, which met from around 1:20 to 2:15. I took attendance every day by calling a student's name. The attendance record was in the grade

book. If anyone had wanted to check a student's attendance, you could have gone to a teacher's book and have seen whether or not a particular class was attended. (BMHR 2279).

Jason had been in other classes of mine in the two prior years. I remember Jason as well-mannered, very polite, always respectful, nice and kind. Jason was a regular attendee of my class. I would say he was there 85 to 90 percent of the time.

I remember hearing about the killings of the three boys in West Memphis. I was in the art room at Marion High School teaching a night class. I recall a discussion about the killings that night. (BMHR 2280).

I recall that Jason continued to attend school after the killings. I remember the week in which the matters occurred. There had been an art exhibit on May 2nd, and he was in class Monday, May 3rd and throughout the week. He was there every day "without a doubt and without question." (BMHR 2281). He helped me take down the art exhibit that Monday. He was happy because he had received an award.

I never observed anything unusual about Jason's behavior after the killings. His behavior did not change in any way.

Jason continued to attend my class regularly until the end of the school year. (BMHR 2282).

I recall that the information I had received about the three boys was that they had been bound and murdered in Robin Hood Woods and that one of them had been mutilated.

I recall no reason to suspect that any of my students had been involved. At one point I recall that they made an announcement of the people who had been arrested. There was a public announcement that Jason Baldwin was one of the people arrested.

After that I was never contacted by any law enforcement personnel. I was never contacted by any of the defense lawyers either. I knew other teachers who had had contact with Jason. As far as I know, none of the other teachers had any contact with law enforcement or with the defense lawyers either. (BMHR 2285-86).

Anyone who had contacted these people could have gotten attendance records, and could have found out about Jason's behavior.

CROSS EXAMINATION BY KENT HOLT

As far as I know, Jason lived in a trailer park. His family did not have a lot of the same kinds of opportunities that my other students had. I was always impressed with him because of his manners and the way he treated other people. I never had to use any discipline with him.

I knew who he hung out with as far as my classes were concerned. I also knew that he was interested in painting and that he listened to music. (BMHR 2288).

Jason was a smart guy. He could figure things out. I was unaware that he had a Juvenile record.

JOSEPH SAMUEL DWYER

DIRECT EXAMINATION BY JOHN PHILIPSBORN

My name is Samuel Joseph Dwyer. I am 30 years old and I live in West Memphis. In 1993, I lived in the Lakeshore Trailer Park with my mother. We lived in the middle of the trailer park near a big lake. We had been living there for about four years by 1993.

I recognize Jason Baldwin who is here today as having lived in the same area two trailers down. (BMHR 2293). He lived with his mother, his step-father, and two brothers. His brothers' names were Matthew Baldwin and Terry Baldwin.

I am about two years younger than Jason. His brother Matthew was about my age and his younger brother Terry was a few years younger. (BMHR 2294).

I was friendly with both Jason and Matthew in 1993. We were pretty good friends by then. I used to go over to Jason's home. It was just like the other

trailers. It had a living room, three bedrooms, and a kitchen. There were video games set up in the far bedroom. When we went to Jason's we would play video games, and sometimes we lifted weights. Then we would go to my house and we would play basketball.

I attended Marion High School. We used to get there by bus. You would catch the bus right down the street. We were usually at the bus stop around 7:30 or so. I rode the same bus as Jason. So did his brother Matthew.

We used to get out of school at 3:15. We would ride the bus home. We would get home at about 4:00 p.m.

Jason was quiet. He used to keep to himself. He liked to draw a lot. We used to ride bikes around. I never remember our going to an area called Robin Hood Woods or Robin Hood Hills. I know where that area is. As far as I know, Jason never went there. When we would ride, we would go to a set of woods between the Lakeshore Trailer Park and the I-55 interstate. There were bike trails there. We would look at different snakes and stuff. (BMHR 2297).

I remember his mother. She was attentive.

I do remember at times that his younger brother Matthew and I would sneak out at night. I never recall Jason doing that.

Everybody knew everybody else out there. I knew that Jason used to hang

out with Carl Smith, Jeremy Smith, and his younger brother. He would also hang out with Adam Phillips. We would all hang out together. (BMHR 2299).

I remember being in school and hearing about the three boys who had been killed. It was definitely a shocking thing. I remember hearing about Jason's arrest on the radio. I was totally surprised.

I had seen Jason several times between the time the three boys got killed and when Jason was arrested. He continued to ride the bus with us.

The police never interviewed me. I'm not sure about some of the others. I know they spoke with Adam Phillips.

I was never contacted by anybody who was working for Jason's defense. I never heard of any lawyer working for Jason or anyone else working for him coming and talking to the people at Lakeshore. (BMHR 2301-02).

I did know Jessie Misskelley. He liked to ride bikes like the rest of us. His step-mother lived on the same street as Jason and I. Jason was living with his dad in Highland, and sometimes he would stay in Lakeshore. I don't recall his being there that often. I used to hang out with Jason very regularly. I don't recall Jessie being there at all.

Jason was not a guy that I thought of as being a fighter. Same with Jessie. I remember Jessie breaking up a fight. (BMHR 2303).

I knew Damien Echols. He was older than we were. He lived around the corner. Damien didn't fit in at all. All of us liked to play basketball and swim and stuff. He didn't do any of those things. He used to dress all in black.

Jason never did anything that caused me to believe that he had been involved in killing anyone. He was always the same guy. (BMHR 2304).

I remember the scuba diver who found a knife out in back in the lake. I also remember that it was Jason's mother who threw the knife in the lake. She did not want him to have any knives. She had found one and she threw it out there out of anger. I am sure that this happened before the three boys were killed.

Jason sometimes carried a pocket knife, but that was about it. All of us did. Everybody had kind of a collection, "... we kind of collected them." (BMHR 2306).

Baldwin's mother was very protective. Once his younger brother and I had snuck out and his mother found us. She was always looking after them. (BMHR 2307).

I do not recall Jessie Misskelley and Damien Echols hanging out together. Nor do I recall ever seeing Echols, Baldwin, and Misskelley together. I would see Baldwin and Echols together, but not the three of them. Nobody I know in my age group would have said they ever saw them together. (BMHR 2308).

We would often go play the video games out in front of the local Walmart in West Memphis. That would happen after school.

DIRECT EXAMINATION BY MICHAEL BURT

I don't recall any attorney for Misskelley trying to contact me. I didn't hang out with him a lot, but my impression of him was that he was a good guy. He broke up a fight once. I thought he had a sense of compassion that was incompatible with these charges.

CROSS EXAMINATION BY KENT HOLT

I think that Echols' mother lived not too far from us. I knew that Misskelley's step-mother lived in Lakeshore and that from time-to-time he would come over and stay there.

I had lived in Lakeshore since I was about 11 years old. I was 14 at the time of this incident. I did sign an affidavit indicating that I did not like Echols. He had a certain way of talking and holding himself that I didn't like. He would do things to get attention (BMHR 2314). I did not like hanging around Damien Echols and so I would not hang around with Jason Baldwin when he was with Echols. I did hang around with Baldwin at Baldwin's house though (BMHR 2316).

I acknowledge that I was aware of when they found the knife in the lake. I did not come forward to indicate that I had seen Baldwin's mother throw the knife

in the lake before that. But I can explain why that happened. We were all terrified because we were being profiled because of our rock and roll t-shirts and our long hair. Everybody thought that we were part of a cult thing. It was totally made up, but we all felt that we could have been picked out as suspects. News channels were out there trying to film us walking down the street. But I would have talked to an investigator had one come to talk to me. (BMHR 2318).

I cannot say that the knife that was thrown in the lake is the one that was retrieved by the law enforcement divers. I recall his mother having thrown the knife into the lake, and his being upset at her. I thought he might have other knives, but we all collected knives at the time.

Baldwin never talked to me about having been involved in the crime, and there was never even mention of it. We never heard about Robin Hood Hills. I know the area now, but I had never been there before. We would not go out in that area. We would go to other locations, but not as far as Robin Hood Woods. (BMHR 2320).

I saw Jason Baldwin in a fight once. He got in a fight with somebody who was younger than he was, and Jason was punched in the nose.

REDIRECT EXAMINATION BY JOHN PHILIPSBORN

Baldwin never expressed any interest in satanism or witchcraft.

RECROSS EXAMINATION BY KENT HOLT

I remember that Baldwin, like others, had a trench coat. It was a fashion thing. I know he also drew rock and roll-related drawings. He was really good at drawing. There wasn't any kind of cult or satanism talk. (BMHR 2324).

PAUL JASON DUNCAN

DIRECT EXAMINATION BY BLAKE HENDRIX

I reside in Etowah, Arkansas. (BMHR 2325). I know Jason Baldwin from having been locked up with him in the Craighead County Detention Center for about seven months. I got to the Center on July 13 of 1993 and got out around January 24 of 1994. I was there for a burglary. I eventually went to the Arkansas Department of Correction and to a boot camp. (BMHR 2326). I haven't been convicted any felonies since. I work for a company that does irrigation. I'm divorced, and have three children.

When a new guy got admitted to the Detention Center, he would be locked up for 24 to 48 hours with no one else around.(BMHR 2327) There are usually 8 to 12 juveniles in the Center at one time. There were around eight cells. People would usually be locked up two to a cell. There was a day room where people would play cards and socialize. There was a command center too, where we would be closely monitored by staff. (BMHR 2328) Jason Baldwin was there when I got

there. He was there for the whole time I was there, about 7 months. (BMHR 2328).

We got to be friends. We talked pretty much every day. Jason was quiet, polite, and not a troublemaker. I never saw him get in trouble. He was the kind of guy that it took some time to warm up to. I thought I got close to him. It took a couple of weeks before we could talk together pretty well.

Baldwin didn't talk about his case a lot. He would talk about having talked to his lawyer. He saw his mother and his lawyer while he was at the Center. Jason was saying that the stuff that was being broadcast on TV about the case was not true, that it was crazy what they were saying about his case. (BMHR 2330-1). He never confessed his involvement to me, and never said anything that made me suspicious he was involved. (BMHR 2331)

I remember Michael Carson. He was there maybe a week or two. Carson did a lot of talking. He was one of those guys who does things to be accepted. I basically tried to avoid him. I recall Carson being a bigger kid than I was at the time—a red haired guy. By the time Carson got there, Baldwin and I were getting along well. I didn't see Carson and Baldwin get close. I didn't see them interact much at all. (BMHR 2332)

There were black inmates on the Unit, but I never heard anything about any

of them becoming hostile towards Baldwin, or try to fight with him. I remember a couple of those guys by name. I never saw Baldwin have a problem with any of them, and I never saw Carson in a position where he was standing up for Baldwin against the threats of other inmates, including the African-American inmates. (BMHR 2333-4)

I was at boot camp when Jason Baldwin's case was in trial. I did not know about Carson's testimony until after the trial when I saw a video about it. I remember something about Carson saying that they had been in a cell together. I don't remember him saying something about being the muscle for Baldwin. I do remember that Carson was supposed to have testified that Baldwin confessed to him, and that he said in detail that he had emasculated one of the boys. (BMHR 2336) That sounded like a lie to me. I don't believe that Baldwin would have talked to Carson. (BMHR 2336-7) We didn't like Carson that well. I had thought that Carson was a troublemaker and Baldwin agreed. (BMHR 2337) Carson had only been in the place for a short time, and Baldwin didn't warm up to people that fast. Carson's testimony sounded false to me.

I was never approached about being a witness in Jason's trial. Nobody talked to me about being a witness until a guy named Tom Quinn came to see me. (BMHR 2338-9). I heard of Baldwin's lawyer Paul Ford, but I never saw him on

the Unit. He never talked to me. If he had, I would have told him what I'm telling you now.

Most of the time I was there, I had my own cell. Some times guys were housed with me. Carson may have been for a day or two. (BMHR 2339)

CROSS EXAMINATION BY KENT HOLT

I remember Carson, but I can't remember whether he was housed with me. I had formed my impression about him from seeing him in the Day Room. We used to play cards and watch TV there. We played Spades—Carson did too. (BMHR 2341)

I got in trouble for burglarizing cars. I did that with Jimmy Patterson. Both of us had done that kind of stuff before. We hadn't been caught until I ended up at the Detention Center. I was there until January 1994, and then eventually I paroled out. (BMHR 2342-3).

It would not change my opinion about Carson's lying if I was told that he has passed a polygraph test.

REDIRECT EXAMINATION BY BLAKE HENDRIX

I was seventeen when I was arrested on the burglary case. I remember when I was arrested because my birthday is July 12, and I got drunk that night. I ended

paying for that. (BMHR 2344-5)

JENNIFER BEARDEN

DIRECT EXAMINATION BY BLAKE HENDRIX

I am now 29 years old. I knew Damien Echols, Jason Baldwin, and Jessie Misskelley in 1993. I was living in Bartlett, Tennessee at the time. I was 12 years old and going to school at Ellendale Elementary. (BMHR 2346) Currently, I still live in Arkansas, and I am a paralegal for the Ellings Law Firm in Little Rock. I graduated from the University of Arkansas, Little Rock, with a bachelor's degree in criminal justice. I am studying to take the law school entrance examination.

I met Damien and Jason at a skating rink in West Memphis. I usually went there with Holly George. I believe I met Jason and Damien in February, 1993. From that point on we spoke almost daily by phone until they got arrested in June of 1993. (BMHR 2348). Back in 1993, we would see them at the skating rink. I remember we also saw them once at Lakeshore and once at the Esperanza Bonanza. That would happen on weekends.

We talked by phone pretty much every day. Sometimes it was Holly and me who called them. Sometimes all of us were on the phone, sometimes it was just me and Damien. They did not have my phone number. (BMHR 2349). Holly and I would talk to Jason. Sometimes Damien and I talked. I usually talked to Jason

when Holly was on the phone. Holly would talk to Damien, but usually not without me on the phone. We would initiate the calls because I never gave out my phone number. If Damien wanted to talk to me he usually called Holly. Also, Holly had three-way calling. (BMHR 2349-50).

Usually when I spoke to Damien he was at his house, though sometimes he was at Jason's. Holly talked to Jason a lot at Jason's house.

I thought that Damien was a nice guy though he was kind of vain. Jason was very nice, kind of quiet, and very sweet. I didn't see any evidence of either of them being interested in Satanism or witchcraft or anything like that.

I knew Jessie Misskelley a little bit. My sense is that Jessie did not hang out with Jason and Damien. Jessie was louder than they were. He liked to cause more trouble. (BMHR 2351). I remember there was an incident where he stole an 8-ball from the skating rink and Jason and Damien ended up being blamed for that and kicked out. I never saw them interact other than that.

Normally I used to get home from school at 3:15 or 3:30. I was supposed to be off the phone until about 9:30, though sometimes I stayed on it up to 10 PM. (BMHR 2352-3). My parents didn't know that I was talking to those guys on the phone.

I remember May 5, 1993—that was a traumatic time for me. I remember that

Holly had called me and she had gotten home and we called Damien. We had to get off the phone because Holly's Mom needed it. (BMHR 2353-4) Damien told me to call him later at Jason's. I called over to Jason's at about 4:30 or 5 pm and Jason answered. I also spoke with Damien who said that he and Jason had to go to Jason's uncle's. Later on, around 8:30 I called Damien's house. It was busy once, and the next time, I spoke with his grandmother. He was not there. I called at about 9:20 and reached Damien at his house. Jason wasn't there. Damien and I talked until about 10 p.m. There was nothing unusual about the call. (BMHR 2357). He didn't say anything about having been with Jason and Jessie.

I spoke to Damien the next day, May 6. I don't remember talking about what had happened to those three boys. After that, I ended up talking to the police about the matter. Nobody from Baldwin's defense team spoke with me. Nobody from Misskelley's defense team talked to me either, though I was on the witness list for Jessie's trial. I never testified. (BMHR 2359)

Between May 6 and the date that Damien and Jason were arrested we continued to talk by phone every day just the way we had been talking to that point. We would still see them on the weekends. I didn't recall anything unusual coming up that caused me concerns or suspicions. (BMHR 2359)

If I had been called as a witness, I would have testified truthfully, and

consistently with what I am testifying now.

I also knew Heather Cliett. Heather and I would talk by phone. Heather had a girlfriend type interest in Jason Baldwin. (BMHR 2360-61).

The Esperanza Bonanza happened in May. It was kind of a festival. The skating rink we have been talking about was called Skate World. About once a month, they would have all night skating there. I remember being at one all nighter with Damien and Jason.

As far as I know, neither Holly nor Heather was ever called as a witness either. (BMHR 2362)

CROSS EXAMINATION BY KENT HOLT

I never testified in any proceedings in this case before, either trials or hearings. I had been supposed to testify at a hearing in October of 1998, but I was never called. (BMHR 2362-63). I recall that time because it was very traumatic for me. I recall a lot about it.

The calls continued until Damien and Jason were arrested, which was about another month after the 3 boys were killed. My parents were not aware that I was talking to Damien and Jason. I was 12 years old at the time. I didn't tell them anything when Damien and Jason were arrested. I only told my parents when the police asked to talk to us. (BMHR 2364).

I used to get driven to the skating rink in West Memphis by my mother when we lived in Bartlett.

We didn't talk to them about religion, or horror movies or things like that. We had a common interest in music. We knew some people in common. We were trying to set Holly up with Jason.

Holly was 13 at the time.

I have never visited Jason Baldwin in prison, or in the jail. (BMHR 2366)

REDIRECT EXAMINATION BY BLAKE HENDRIX

I remember the phone calls on May 5, 1993 because that time had a profound impact on me. It was traumatic. I lost a lot of friends because of it. (BMHR 2366) People heard that I was supposed to be a witness at Jessie's trial. Some of my friends' parents read that, and some of my friends were forbidden to speak to me, because people were convinced they were all evil. The whole experience solidified my desire to work in the criminal justice system. (BMHR 2366-7).

I do remember being interviewed by a private investigator named Ron Lax in 1994. I gave both he and the police information about the phone calls. (BMHR 2367)

JACK LASSITER

DIRECT EXAMINATION BY JOHN PHILIPSBORN

I am a lawyer admitted to practice in the State of Arkansas in 1973. I was asked by counsel for Baldwin to review a series of files that I had been provided by counsel for Baldwin. The files had been brought to the hearing.

I clerked for the Arkansas Supreme Court after leaving law school. I then worked for the Office of the Attorney General for two and a half years, and thereafter beginning in 1977 entered private practice where I have done almost exclusively criminal defense work. (BMHR 2370) I have been a member of the Arkansas Association of Criminal Defense Lawyers, and in the mid-1980's was the Chair of the Criminal Defense Section of the Arkansas Bar Association. I was also the first Chair of the Criminal Defense Section of the Arkansas Trial Lawyers Association. I served on a Supreme Court committee on model criminal jury instructions, and am currently on the Arkansas Supreme Court's Committee for Criminal Practice. I have been the Bar Association representative to the Arkansas Crime Information Center for almost 30 years. (BMHR 2371)

My practice has included a wide variety of criminal cases in State and Federal courts. I have argued before the Arkansas Supreme Court, in the Eighth Circuit, and before the U.S. Supreme Court twice.

I have been involved in a wide range of trial work in both state and federal cases, and the preparation of the defense of criminal trials during my entire career as a criminal defense lawyer. (BMHR 2372)

I have previously qualified as an expert witness on the standards of practice applicable to criminal defense. I have done so in Craighead County. I am familiar with the standards of practice applicable to the criminal defense function in Arkansas in 1993 and 1994. The basic standard for effective representation is the one set forth in *Strickland v. Washington*. (BMHR 2373) *Strickland* references the *ABA Standards*. Back at that time, there wasn't the kind of information easily available to lawyers on the internet as there is now. You would obtain a sense of what standards of practice were based on my contact with other lawyers from around the state. (BMHR 2374)

I was also familiar with the relevant standards as applied in the early 1990's based on my involvement in *Starr v. Lockhart* , a case that involved questions of effectiveness of counsel. I was very familiar with the pertinent law at that time. (BMHR 2374) [*Whereupon the Court was asked to accept Mr. Lassister as an expert on the standards of practice applicable to the criminal defense function in 1974—and it did. BMHR 2374*]

I have reviewed attorney Paul Ford's trial file on several occasions (BMHR

2375). The file consisted of three boxes. In the boxes, I located a series of files with witness names on them containing interviews of police, files pertaining to witnesses from the crime lab and some newspaper articles. There is a large stack of suspect interviews conducted by the police department and some pleadings.

In reviewing the file, I found no photographs of the crime scene or of the postmortem examination. There were no photographs in the file. (BMHR 2376)

There were no reports from any private investigators. Specific documents from Ron Lax, investigator for Echols, were not in the Baldwin file.

There was no evidence of consultation with an independent pathologist. No evidence of consultation with an independent serologist. No evidence of consultation with a DNA expert. There were transcripts of interviews with Dr. Peretti.

In my opinion it was expected, under the standards of practice at the time of this trial, that the defense would have consulted with the State's Medical Examiner. The consultation would have included obtaining information about various findings, and evidence retrieved, during the post mortem examination process.

In reviewing the file in the matter, I also read the opening and closing statements in the case, Dr. Peretti's testimony and affidavits of a couple of forensic

pathologists concerning the mutilations that had been seen.

If defense counsel had been told, in advance of trial in this case, that there were turtle bites on one of the victims, then that counsel did not comply with *Strickland v. Washington* in failing to research and consult with experts concerning wounds to the victim, and particularly Christopher Byers. If you have a pathologist saying that the wounds are attributable to a knife, and since the source of the injuries is not readily apparent, as in this case, then counsel should have done research, and consulted with a pathologist about Dr. Peretti's findings. (BMHR 2381-82)

Having reviewed Baldwin's Exhibit 14, a handwritten note from Paul Ford, indicating a head hair in the ligatures on Christopher Byers, I can recall no photographs of Lab slides of hairs in Ford's file. In my opinion, a reasonably effective criminal defense lawyer would have followed up on the information contained in the note you just showed me and asked if the hair had been submitted for further identification and analysis. Counsel should also have asked whether the origin of the hair could be determined. (BMHR 2384)

In my review of the defense files I found a number of files containing interviews by a State investigator. There were sometimes handwritten pieces of paper with points that it appeared defense counsel was making with respect to the

witness interviews. Given the facts of the case, it was the duty of counsel, especially given information that certain witnesses had evidence concerning Baldwin's whereabouts at critical times, to determine where the client was during that period of time. If the defendant was denying his guilt, and if there were some witnesses like his mother and brother and others available as sources of information, then any competent lawyer would have collected contact information and taken steps to locate and interview witnesses. You would want to nail down the client's whereabouts with the client as best possible—what classes he was in, what teachers he had in class, who was in the class. Among other things, I noted counsel would have collected school records and would have verified what contacts the client had with teachers and the like.

I did see some information in the file about individuals who had talked to the defendants during that period of time. It would have been within counsel's duty to investigate to follow up with persons who claimed to have been on the phone with Baldwin or a co-defendant (BMHR 2388)

In the files I reviewed, I did not see defense interview notes of witnesses. I did see a memorandum from defense counsel reflecting an interview of Baldwin's mother, as well as a handwritten statement from his uncle Hubert Bartoush purporting to cover Bartoush's contact with Baldwin on the afternoon of May 5,

1993 between 4:30 and 6:30 PM. The statement is Plaintiff's Exhibit 12. I believe that there is also a police interview of Bartoush in the file. This too is information that I would have expected counsel to follow up on. (BMHR 2389) The Bartoush file from the Ford trial file is now Plaintiff's 66. It contains a statement given to Detective Ridge by Bartoush.

In addition, the file has in it a handwritten statement of Heather Cliett dated June 8, 1993 concerning her contact with Jason Baldwin about the 5th of May. A lawyer would have had a duty to follow up with this since it shows what the client was telling his girlfriend about his whereabouts, and it confirms what Bartoush said as well.

In cases involving jailhouse informants, it is the duty of criminal defense counsel to investigate the credibility of the jailhouse informant, and to find anything that can effect the informant's credibility, including institutional records, and other sources of information. This would include reviewing jail records and the like. You need to investigate inducements. (BMHR 2394-5) You need to find out what the correctional officers thought about the informant as an inmate. You could pick up the phone and find out that he is deceptive and dishonest with staff. (BMHR 2397).

In my opinion, the failure to retain or consult with an independent

pathologist, or to conduct research on his own on the injuries observed here was a breach of duty. (BMHR 2398)

It is my opinion that counsel breached the duty to investigate in a case like this, particularly where the accused was claiming his innocence and there was independent evidence of an alibi.(BMHR 2399)

DIRECT EXAMINATION BY MICHAEL BURT

It is my opinion that the failure to retain a forensic pathologist and a forensic serologist in a case like this would be applicable to Baldwin's lawyer or to any other lawyer involved in the case. (BMHR 2399)

CROSS EXAMINATION BY KENT HOLT

In my opinion you need more than a license to practice law and *Strickland* to effectively defend criminal cases in Arkansas.

In this case, I reviewed Paul Ford's file; some of the transcripts including the opening and closings; Dr. Peretti's testimony; some affidavits. I re-read some cases. I did not read the entire record of the case. (BMHR 2402). I did not read the co-counsel's file. I did not speak with Mr. Ford.

I did not review attorney Paul Ford's testimony.

Ford's having handled a prior capital murder trial would not affect my opinions about his omissions to investigate the pathology issues. (BMHR 2404).

The failure to follow up the hair evidence, if it had been delivered to the Lab would make you inquire into the results.

There were some entries in the file indicating that Ford and his co-counsel met with West Memphis police investigators. (BMHR 2408)

REDIRECT EXAMINATION BY JOHN PHILIPSBORN

I agree with the statement from the digest of *Strickland* that the reasonableness of counsel's actions may be substantially determined by the defendant's own statements. The reasonableness of engaging a pathologist or consulting one in a case like this is also premised on the prosecution's theory of the case, which here was described by the Arkansas Supreme Court as part of a Satanic ritual. (BMHR 2411).

I am aware that defense counsel could have sought to identify the source of any hair evidence found at the scene. And where the client was in school on the day the bodies were recovered and where the client showed no signs of changed behavior or demeanor, or signs of injury, you would have expected follow up interviews.

Ultimately, the decision about whether the client should testify belongs to the client. (BMHR 2414-5)

REDIRECT EXAMINATION BY MICHAEL BURT

If a case was tried on the theory of Satanic abuse as the motive, you would want to do everything you could to refute the notion that there was such a motive. (BMHR 2416)

VICTORIA HUTCHESON

DIRECT EXAMINATION BY MICHAEL BURT

I testified in the Misskelley trial, but not the Baldwin/Echols trial. I have been advised that I would be asked about statements I gave to investigator Nancy Pemberton in June, 2004. (BMHR 2418-9). You did tell me that you would be asking me about statements that I made to the effect that I lied under oath.

[This testimony was followed by a reported discussion on the statute of limitations for perjury. Counsel for Misskelley agreed that the witness was likely subject to prosecution, and asked for a grant of immunity. BMHR 2423. Bill Howard, an attorney with the Craighead County Public Defender, appeared as counsel and conferred with the witness. BMHR 2425. He indicated that under the circumstances the witness would likely decline to testify. Mr. Holt stated that the State would not provide immunity. BMHR 2425. Based on that state of the record, counsel for Baldwin moved her statement to investigator Pemberton into evidence as a statement against penal interest, and the DVD of it was marked as Exhibit 67; the transcript was marked as Exhibit 68. The transcript was then admitted. BMHR

2327. Ms. Hutcheson's mental health records were also received as Exhibit 70.

Counsel's trial file box pertinent to Ms. Hutcheson was received as well, as Exhibit 71]

NANCY PEMBERTON, RESUMED

DIRECT EXAMINATION BY MICHAEL BURT

I retrieved the previously marked Exhibit 69 from Mr. Stidham's trial file. (BMHR 2429) [*This testimony ends Volume 9 of the hearing testimony. The testimony continues in Volume 10 at BMHR 2431]*

I interviewed Ms. Hutcheson after she contacted Dan Stidham through her attorney. I had read her testimony at trial. She made statements to me indicating that she had lied in the trial. She was also telling other people that she had lied at trial. There were articles available on the internet indicating that she was saying that she had lied at trial. BMHR 2433.

I then collected some of those articles. These included an article in the Arkansas Times dated October 3, 2004, Exhibit 72, that depicted Ms. Hutcheson on the cover, and indicated that she had lied at trial.

Misskelley's trial records had some records concerning Hutcheson's background. I obtained her East Arkansas Mental Health Records—she was taking a

number of powerful anti-psychotic drugs. Misskelley's trial file had a notation that she had gone to seek emergency services at East Arkansas Mental Health in April, 1993. (BMHR 2435) Ms. Hutcheson indicated to me that she was waiting for Mr. Stidham to expose her as a liar. Hutcheson explained that while the police reached out to her, the defense never did. The police coerced her in certain ways. She said that the police and the law enforcement investigators knew of her drug usage.

VICTORIA HUTCHESON, RESUMED

DIRECT EXAMINATION BY MICHAEL BURT

The State's theory of ritual murder was used in both trials *[In the aftermath of this testimony, Mr. Hendrix moved, without objection from the State, for admission of the evidence pertinent to Ms. Hutcheson in the Baldwin hearing, on grounds that Hutcheson could have been relevant to the Baldwin defense. The Court admitted Exhibits 69 and 70 as to Baldwin. BMHR 2441]*

CROSS EXAMINATION BY KENT HOLT

I don't know whether she was on anti-psychotics in 2004.

REDIRECT EXAMINATION BY MICHAEL BURT

There is an entry about her use of medication in February of 1994. She says that she was nervous during the trial and was taking Xanax at that time. She took it

just before taking the witness stand.

[This testimony was followed by an extensive discussion about scheduling. The State requested time to bring its experts. At Mr. Burt's request, the Court ordered the State to produce its expert and other disclosures 15 days prior to October 1, when the hearing would resume. The proceedings of August 14, 2009 conclude at BMHR 2457. The session of October 1, 2009, begins on that same page]

[At the outset of the October 1, 2009 session, Mr. Holt informed the Court that during the processing of the evidence prior to trial, Lisa Sakevicius had looked at the 6 shoe laces that were the ligatures. The State had contacted Bode Technologies, the DNA Lab agreed upon by the parties during post-conviction litigation, who had been told that Echols's lawyer Mr. Horgan had instructed Bode to forward the ligatures to Micro Trace, some other Lab, which was outside the agreement and Order for DNA testing.

The Court heard the offer of proof and ordered the ligatures returned to Body Technologies. BMHR 2461. Counsel for Baldwin joined in expressing concerns about the removal of evidence from a the Court ordered Lab, and joined in the stipulation that the evidence should be returned. BMHR 2463

Counsel for Baldwin then asked for disclosure of material generated by the

State, including any witness interviews, or information bearing on witness credibility. The Court indicated that the State should be aware of its obligation to make exculpatory evidence available. BMHR 2465]

MIKE ALLEN

DIRECT EXAMINATION BY KENT HOLT

I was employed as a Sergeant in the Criminal Investigation Division in 1993. (BMHR 2466) I first heard of the disappearance of the boys on the morning of May 6. I went out and looked through several neighborhoods.

[The testimony was interrupted by Mr. Holt's observation that under the Drymon case, trial records are part of the records of a Rule 37 proceeding. The State wanted to make sure that maps of the area used in the trial were part of the current record. There was no objection from Misskelley. BMHR 2468]

These maps show the area around the interstate and Ten Mile Bayou. State's Exhibit 16 is a photograph of that area. It shows a utility pipe and the area called Robin Hood Hills or Woods. It was not a formally named area. RT 14-15. Exhibit 17 shows the retention pond, and the Blue Beacon. You can see the Interstate.

I had been searching around houses in the northeast ward, checking vacant houses, when I heard from Crittenden Search and Rescue, asking that an officer

respond. (BMHR 2475) Other agencies had also been enlisted in the search. I drove to the dead-end and and looked in this ditch and I saw a tennis shoe that had been located by Crittendon County Search and Rescue. Looking at State's Exhibits 19 and 23, you can see the area. I noticed that the bank of the ditch was scuffed up, but it didn't have a lot of leaf debris on it. (BMHR 2479) State Exhibit 22 shows the area in question, and the tress that were in it. I tried to cross the bank, and fell into the water, and climbed back on the bank. I was in the process of recovering the tennis show when I felt something in the water. The water was kind of murky there. I felt the first body. The water was somewhere between my crotch and knee area. By the time I arrived at the scene, I located no wild life. All of this would have happened at roughly 1:30 PM (BMHR 2482)

The water in there was pretty calm. It's more of a ditch, not a stream. I am marking State's Exhibit 26 with an 'X' where I found the tennis shoe. It was after that I located the body of Michael Moore. (BMHR 2485) Detective Ridge then got into the water. He located the two other bodies and walked the length of the ditch. We actually then took the bodies out of the water and placed them on the bank. Detective Ridge found some clothing that was down in the mud. (BMHR 2487)

The area was then sandbagged and drained. Screens were used on the pump hoses. State Exhibits 20 and 25 show the bottom of the creek. I didn't see any

marine life in the bottom of that ditch.

We were out there from 1:30 to about 7 or 8 at night.

The next day there was a grid search of the area. It is not a big area. You can see it depicted in State's Exhibit 17. (BMHR 2494)

CROSS EXAMINATION BY BLAKE HENDRIX

When I first got to the wooded area, I was greeted by Denver Reid from Search and Rescue and a juvenile officer named Steve Jones. Lt. Hester may have been around as well. I was the first person to cross the ditch.

Exhibits 73 and 74 are crime scene diagrams and related notes. When I fell into the water, I made a splash.

I started out in law enforcement in Johnson County for less than a year. I then went to the Crittenden County Sheriff's Office and worked there on the radio and as a jailer for about 3 years. I then became a criminal investigator in 1984. That was the year I had done to the Training Academy. (BMHR 2508). At that time, the Department had investigated approximately 10 to 12 homicides a year. I had done some prior investigations and a lot of on the job training. I cannot recall precisely my training. I had no training in homicides where bodies had been recovered from water.

I recall Detective Ridge being out there; Detective Bill Durham; Detective

Tony Anderson, who was a retired officer; Detective Burch; Lt Hester; Captain Miller. Shane Griffin was out here. There were probably about 10 people out at the scene.

Only Detective Ridge and I assisted in removing the bodies from the water. Both Captain Ridge and I were in the water when the victims were found. (BMHR 2512)

The second and third bodies were found downstream, towards Ten Mile Bayou, from the first one. The bodies were located between 2:45 and approx. 3 pm, but they were not removed right away. A decision was then made to sandbag the ditch and pump it out. Utility workers came up to help out with that. The coroner arrived at the scene just before 4, though I could not remember if the pumping had started by that time.

I would say that about 50 yards of the area was cordoned off. Detective Ridge placed the sandbags. The utility workers were throwing the bags down to him. The pump they had was a generator type pump.

I had seen turtles and other animals in ditch backs before. It might not be plausible, what with my falling in, and things, for there to have been marine life here.

I also have no idea why our diagrams label this area Turtle Hill. (BMHR

2524)

I was not aware that the Arkansas Crime Lab had identified animal hairs being at the scene.

We never came across pieces of flesh out there.

CROSS EXAMINATION BY MICHAEL BURT

I do not recall my testimony at the Misskelley trial about how the grass on the bank near the drainage ditch as being smushed down. My observation was that the area had been kind of scruffed up, but I could not distinguish between animal and human activity. (BMHR 2527)

I was unaware that the police log says that Detective Ridge was riding around the area on his three wheeler that morning.

According to the log, I located the first body at about 1:30 or 1:45 pm, though it was not removed until 2:45. From 1:45 to 2:45 Captain Ridge had been in the water moving from north to south.

I was concerned about running into snakes in the water. I don't recall seeing any snapping turtles either. BMHR 2536 At first, when I was in the water, I could not see beneath the surface. (BMHR 2537)

REDIRECT EXAMINATION BY KENT HOLT

I don't recall seeing any type of fish in the ditch. I didn't remember seeing

any when I testified in the Echols Rule 37 hearing.

It was the southeast bank that was scuffed up. (BMHR 2539)

BRYN RIDGE

DIRECT EXAMINATION BY KENT HOLT

I am currently a Captain with the West Memphis Police Department. I was employed by the Department in May of 1993. (BMHR 2540).

On the day the three boys went missing, I got to work at around 8 a.m. After receiving the information of the missing boys, I searched the area they were last known to be in, then went home and got a three-wheeler and expanded my search. I probably first searched the Robin Hood Woods at around 8 a.m. I can show you where I went on State's Exhibit 32, a map of the area. (BMHR 2543). I can identify the areas we are talking about, including the Woods, and the Blue Beacon on State's Exhibits 15 through 29, which are photographs of the area. *[The photographs were received at BMHR 2547].*

I was contacted by radio and asked to return to Robin Hood Woods. I met with Chief Allen and received information that a body had been found. (BMHR 2547). I entered the water, saw evidence such as clothing, shoes and other matters and went to the body and picked it up. The first body removed was that of Michael Moore. I then walked down the ditch towards the south and retrieved the bodies of

the other two victims. I searched the bed of the drainage ditch, hand feeling, where the bodies were found. I walked all the way down the ditch until the water was about neck height. (BMHR 2548) After that search, a segment of the drainage ditch was sandbagged and drained. The ditch at that point was about 3 ½ to 4 feet deep. (BMHR 2549)

I have been fishing and hunting all of my life. When I was searching I was concerned about snakes. I saw no kind of movement in the water and saw no wild life. I was aware that one area in this Wood was called Turtle Hill. (BMHR 2550).

The area of the bank to my left when I entered the water was smooth. There were no leaves on it. It has scuff marks. State's Exhibit 30 shows that area. (BMHR 2551)

State's Exhibits 30 and 31 show the scene as it was found. The video that is being displayed shows the scene beginning with Michael Moore's remains. You can then see the other two bodies. You can see where we piled up the sandbags. You couldn't see too far down into the water of the ditch. When I came up to Steve Branch, I looked down and could see the color of his skin. There were flies in the area. The bodies were removed and placed on the bank of the drainage ditch, it took around 20 minutes for the Coroner to get sheets and bags, and some more time before the bodies could be wrapped.

The flow of water in the drainage ditch was very slow. (BMHR 2559) Once the drainage ditch was drained, I saw no sign of aquatic life. I am familiar with wild life in the West Memphis area, and had seen snapping turtles and a calf soft shell turtle in the area prior to that. (BMHR 2561)

CROSS EXAMINATION BY JOHN PHILIPSBORN

Exhibit 75 appears to be a set of notes that I identified as having been taken by one of the officers at the scene. The notes show certain times in them, but I can't be sure when each of the bodies was found. I know that we were there beginning at around noon. (BMHR 2563)

Mike Allen, Detective Gitchell and I were discussing how the ditch should be searched. I recall no discussion of getting the Arkansas State Crime Laboratory or someone from the Medical Examiner's office to the scene before we searched the ditch. That would have been someone else's decision. (BMHR 2565-66)

When the sandbagging and pumping started there were law enforcement officers at the scene, and utility workers from the street department. We were talking back and forth. It took some time for the pump that was being used to spring into action and remain in operation. It was an engine-driven pump. Normally when you hunt, you don't have that level of activity in the area.(BMHR 2569)

I had not talked to people about the wild life that was in the area. RT 32-33. I was unaware of any follow-up done by the laboratory on animal hairs that had been recovered at the scene. I did not know that the Arkansas State Crime Laboratory had found animal hairs at the scene (BMHR 2570) and had made slides from evidence that had been taken from the scene at the time of its processing.

There was a truck stop operating in the vicinity of Robin Hood Woods, and there was another business called the Blue Beacon that was in operation 24 hours a day, 7 days a week at that time. (BMHR 2572)

CROSS EXAMINATION BY MICHAEL BURT

There were other people that I ran across who were out searching. My prior testimony was that I had seen up to 15 people searching. (BMHR 2574) Later, I went back to the scene. This would have been at around 1:30. At that point, there were two search activities that I undertook. First, I went into the water and searched by going north to south, sweeping my hands on the bottom of the ditch. Second, the ditch was drained. (BMHR 2576)

The second body that was retrieved was that of Steve Branch who I had originally called Byers. The second victim that I picked up was the one who had wounds to his face. (BMHR 2577) The wounds looked as though someone had been pecking at the skin. It looked like a knife had done it, but I don't have training

to distinguish knife wounds from animal predation. (BMHR 2578)

REDIRECT EXAMINATION BY KENT HOLT

I thought that a person had cleaned off the bank of the ditch.

Both the 76 Truck Stop and the Blue Beacon were 24 hour-a-day businesses at the time. The Voss truck stop was also a 24-hour facility near the Wood, and it was floodlit. (BMHR 2582)

DR. FRANK PERETTI

DIRECT EXAMINATION BY KENT HOLT

I am currently the associate Medical Examiner at the Arkansas Crime Laboratory. I perform autopsies there. I have been employed there for 17 years. (BMHR 2583). I was employed at the Lab in May of 1993. I conducted the autopsies on Michael Moore, Steven Branch, and Christopher Byers. I testified in two trials pertinent to the case and then a Rule 37 hearing. I graduated from medical school in 1984, did training at Brown University in anatomical pathology. I then spent some time in Florida and returned to Rhode Island for additional training. I did some specialty training in forensic pathology in the Office of the Chief Medical Examiner in Baltimore, Maryland. I then moved to Arkansas in 1992. While in Rhode Island I had first done training in hospital pathology and then did some training in forensics. I was a part-time Medical Examiner for the

State of Rhode Island. Rhode Island had few homicides, but Baltimore had considerably more. (BMHR 2584-86) In Arkansas I worked under the supervision of Dr. Sturner.

I do about 250 autopsies a year. I have seen bodies in a number of conditions, including a few bodies subject to animal predation. I have qualified to testify as an expert about 25 to 30 times a year in Arkansas. (BMHR 2587) [*Dr. Peretti was qualified as an expert at BMHR 2588*]

I am an animal lover who has bred turtles and tortoises. This is a kind of avocation for me. (BMHR 2589) I have consulted with various personnel involved in wild life in Arkansas, and have consulted with Arkansas Fish and Game about turtles. I have been involved in efforts to protect certain endangered species of turtles in Arkansas.

We had a general protocol that was used in the Arkansas Crime Lab during a post mortem examination process, including the taking of measurements, of initial photographs, taking specimens, the processing of evidence depending on the type of cases, the cleaning of the body, the external then internal examinations. (BMHR 2594) In this case, the autopsy reports are in a notebook that I have brought to court.

I have with me the autopsy reports that I produced. I recently watched for

the first time in the case the crime scene video - prior to my testimony at the instant hearing. The scene and the presence of flies in the video explains the fly larvae I found during the first autopsy. The first autopsy I reviewed was that of James Michael Moore I noted abrasions to the lips; swelling of the lips There were various injuries to the scalp. There were injuries to the ears that were consistent with what I had heard about at a lecture by Dr. Joseph Rupp many years ago on sex crimes. He said these are common in cases of sexual assault. (BMHR 2604). The bruising was similar to that found on the two other victims.

I was of the opinion that some of the injuries to the scalp and to the head were prior to death. (BMHR 2605) My view was that they were caused by blunt force trauma and showed some bleeding into the tissues. I noted skull fractures in the base of the skull. (BMHR 2608-09) There were linear abrasions on the right shoulder area. (BMHR 2611)

I also noted contusions associated with bindings. I found some signs of hemorrhage where the bindings had been placed, indicating that the child was alive at the time. (BMHR 2616) There was some superficial lacerations on the hands which I believed were defensive wounds. (BMHR 2618) There were bite marks on the tongue. There were findings characteristic of drowning. (BMHR 2620)

My view was that there was some degree of pallor caused by blood loss.

(BMHR 2621) The victim in his view may or may not have been conscious though he was alive when placed in the water. (BMHR 2622) There was also anal dilation which may be due to post mortem changes. (BMHR 2624)

Steven Branch, ME number 330-93, was also tied with ligatures and had a number of injuries, including a black eye, and a large abrasion over the right mandible. The abrasion was bell shaped. My view was that his was an injury inflicted prior to death by some implement. (BMHR 2628) There was injury to the gums caused while the victim was still alive. (BMHR 2629-30)

I had contacted Dr. Dugan, a dentist, just to make sure that a pattern injury above the right eyebrow was not a human bite mark. (BMHR 2630-1) Dr. Sturner was also brought in to look at the bodies. I wanted someone else to look at the bodies. (BMHR 2631). At some later point, during the Echols Rule 37 proceedings, Dr. Mincer also agreed there were no human bite marks here. (BMHR 2632-33)

There were contusions of the ears and injuries that I noted to be, irregular gouging wounds, cutting wounds on the left side of the face. I characterized them as gouged in that the tissue was torn and pulled. State Exhibits 34 and 35 show the pattern injury to the top of the face. State Exhibits 36 and 37 show the bell shaped injury and the injury to the ears. I did not section these injuries. There was a pattern injury that I concluded might have been a belt buckle.

There was a hemorrhage in the posterior neck muscles. (BMHR 2641)

There were some fractures toward the back of the skull where the neck joins the head. The injury occurred when Mr. Branch was alive. (BMHR 2643) In my view this was not animal caused damage. There are a lot of patterns here, and I think it's some kind of implement. (BMHR 2645)

There was no unusual injury to the anal area. But because of the the combination of the bodies being found nude and being hogtied together with some of the other injuries suggested 'at least in some part' a sexual assault. (BMHR 2647)

There were scratches on the penis. I noted a 'line of demarcation' around the penis and some injuries to the legs, including post-mortem scratches. Those could have happened by the body being dragged. (BMHR 2650)

On the back of the hands there was bruising consistent with defensive-type wounds which occurred prior to death. They looked like the wounds on his face. (BMHR 2652) *[A recess was taken from October 1 to October 2, 2009]*

[At the beginning of the October 2, 2009 session, the Court was again asked by counsel for Misskelley asked about the merging of the trial and Rule 37 records. The Court observed: "Well, I thought we agreed early on that both of them would be merged for Rule 37 purposes, if that's what you're asking ?" (BMHR 2658).

The State indicated no opposition and the Court replied: “All right”. (BMHR 2658) After discussing the length of time (up to 60 days) in which counsel would have to propose their precedents, the Court also noted: “And I guess for the record, the record in Echols and his Rule 37, all of the pleadings and documents will also apply in this case...As well as the two original trials.” Counsel for the State, Mr. Holt added: “...and Mr. Baldwin was at Mr. Echols’ trial, and there were a number of reliances on Echols’ Rule 37 proceedings as well”. (BMHR 2660) Baldwin’s counsel asked that the Order pertinent to Misskelley be applied to Baldwin, and the Court stated in pertinent part: “...yes, Sir. Sure. That’s what I meant. It would apply to all three.” (BMHR 2661) The testimony of Dr. Peretti then resumed beginning at BMHR 2664]

I found that Christopher Byers died of multiple injuries, though because of the nature of the injuries, I sought to describe them more generically so as to not release graphic information to the press. (BMHR 2665)

State Exhibit 42 is a knife that I first saw at some point at either the first or second trial. (BMHR 2666-67) I was asked to render certain opinions about it.

Mr. Byers had been bound as well and showed signs of having been in the water. There were some injuries to the nose, lips, and ears. Some superficial bite marks present on the mucosal surfaces of the cheeks. I saw no signs of animal

predation on the eyelids. (BMHR 2668-74) There were injuries to the scalp, and skull fractures to the base and back of the skull. (BMHR 2677)

The skin of the penis, the scrotal sac and testis were missing and there was a large defect in the area. (BMHR 2679) There were multiple wounds in the inner thighs. In my view all of the wounds occurred prior to death. Though I wrote that the wounds looked post-mortem, you could see hemorrhage in the tissues.

There were some injuries to the buttocks and what I described as superficial cutting wounds in parallel lines. There was some drying of the tissues. I don't know any kind of animal that would have caused this kind of pattern of wounds. (BMHR 2683) There were a number of contusions found elsewhere on the body.

I found diffuse pallor caused by the loss of blood. He had bled out. (BMHR 2691) There were ghost cells found on the penis slides. (BMHR 2692-93) These indicated the leaching of blood.

The serrated knife that you have here could have inflicted the pattern wounds on the skin. (BMHR 2695) I found that the knife shown to me by the State (State's Exhibit 42) had patterns consistent with linear gouges on the remains of Mr. Byers.

I characterize certain contusions in the thigh area as defensive wounds. RT 115-116.

Reviewing further photographs of the area of injury in the crotch area I some appear to have been inflicted prior to death, and some after death.

There were no bite marks on the body. (BMHR 2702)

I attended a meeting held at the request of post-conviction defense counsel at which forensic pathology consultants of the defense had indicated their view that there had been injuries inflicted by animals on the bodies. (BMHR 2702-3) They mentioned a number of possible animals. I requested documentation concerning the types of injuries that the defense consultants described to me, and though I obtained a book on penile injuries given to me by one of the experts from Canada.

I know turtles. I see them eat during the summer. Turtles have long claws that are razor sharp and triangular jaws. Snapping turtles tend to crush the food they eat, and then rip it. (BMHR 2705-6).

Microscopic slides of tissues taken during autopsies had been provided to the defense. (BMHR 2708)

I recall certain injuries to Steve Branch's face as having been described by at least one of the defense consultants, a dentist, as being an animal bite. I was annoyed by this, in part because I was criticized before for missing a human bite mark, and now they were saying they were animal predation. (BMHR 2710).

The injuries to Mr. Byers, to me, are "all antemortem" (BMHR 2711),

though in my view they had the appearance of being postmortem. (BMHR 2712)

I agree that I previously testified that certain wounds were consistent with the blade of the knife, and consistent with a particular knife. (BMHR 2713-13)

I disagree that there were animal caused injuries. A sharp instrument had been used. I stated that the knife is “consistent. You can’t do it with that knife.” (BMHR 2716) I could not opine whether the injuries to Mr. Branch were consistent with satanic ritual. I never tested the survival knife to see if it made the kind of pattern on a grapefruit that it would have made on human flesh. Grapefruit and skin are different in texture. (BMHR 2717)

I deny having said that the boys were sodomized. I acknowledge that I had raised the possibility of conducting a study amassing autopsies conducted by the Arkansas State Crime Lab that had never been followed up on. We elected not to do it. The computer system in my office ‘back then’ was archaic. Also the majority of bodies received at the Crime Lab would have been subject to animal predation in land-based cases. (BMHR 2718-19)

I disagree with the text of the letter that summarized conclusion of the experts described by Echols’ lawyer as working with the defense. (BMHR 2724-25)

It was my further opinion that the victims were alive before they were put in

the water.

I would have disagreed with the defense opinions in 1993 when I did the autopsies, and 1994 when I testified. *[Volume 10 of the testimony ends at BMHR 2729. Dr. Peretti is still on direct examination. The testimony continues in Volume 11, beginning at BMHR 2731]*

It is my opinion, to a reasonable degree of medical certainty that there is no physical evidence of animal predation here. (BMHR 2733) There are no turtle bites. I wrote a letter with Dr. Kokes dated May 30, 2008 (Exhibit 48). It explains my viewpoint.

CROSS EXAMINATION BY JOHN PHILIPSBORN

I have been annoyed by the questioning of my opinions. I would not change the opinions that expressed. I would not have changed what I did in connection with the case. (BMHR 2738)

I was not successful in passing the examination for board certification, and therefore am not board certified as a forensic pathologist. (BMHR 2741-2)

The policies in place in Arkansas require that the Medical Examiner obtain permission from a prosecuting attorney before releasing material and information to defense counsel. We have no problem releasing information to the defense, we just need permission from the prosecutor.

Reviewing exhibits 76 A and B, I noted that the exhibits were copies of records that I generated in this case during my contacts with Baldwin defense counsel. The crime lab would have kept records of the defense's contacts with the crime lab. If a lawyer had requested a full set of autopsy photographs that would have been documented in the file as well. (BMHR 2748-9)

The meeting that I referred to that occurred at the Arkansas Crime Lab in May of 2007 had involved Dr. DeMaio, Dr. Souviron, Dr. Baden, and a forensic odontologist from Canada, Dr. Wood, who had provided me with his book. Dr. Spitz was not present at that meeting. I knew Dr. Di Maio before the 2007 meeting. He is the author of a book on pathology. I have referenced the portion of his book that covers lividity. I had also done a little training at Miami-Dade, which is where Dr. Souviron is from.

I did not know about Dr. Souviron's overlays of the knife. Exhibit 77. This exhibit shows notations that the prosecuting agency requested transparent overlays of the knife. I didn't. The notation on the exhibit says that the prosecutor wants to know about the overlays. I don't recall that. [*Exhibit 77 was received at 2758*] I felt that the knife that I was shown by the prosecution matched up to the Byers' boy's wounds in the genital area, but I did not do the overlays. I believe it matches, though I am aware that the Court has received some photos with an overlay of the

knife. (BMHR 2762)

I did testify earlier on that we did not review the cases in our office for instances of predation because of the logistical difficulties—the computer system is old. I admit that I am the co-author of an article entitled *Incidence of Autopsy Findings In Unexpected Deaths of Children and Adolescents* in which we reported on 439 cases between 1997 and 1999 from the Arkansas Crime Laboratory. We had students who assisted us with that research. I did not have that kind of help on this case. (BMHR 2765)

I acknowledge that the meeting proposed in May of 2007 was unusual. I had never had such a meeting proposed before. I agree that competent pathologists can disagree about a case. (BMHR 2766-67). I am aware that the case has been reviewed by a number of experts including Drs. Demaio and Spitz, who have authored textbooks on forensic pathology, and Dr. Baden, Dr. Ophoven, Drs. Haddix and Souviron, Dr. Tabor. I have not talked to any other doctors about the case, notwithstanding my view that discussions of forensic pathology issues are common among fellow professionals.

I was not aware that during the Echols Rule 37 a pathologist from the New York Medical Examiner's office named Dr. Cohen, and another expert named Dr. Davis, had testified that there appeared to be animal bite marks on the left cheek of

Mr. Branch. (BMHR 2771-72)

There were autopsy diagrams and notes pertinent to each of the victims prepared during the autopsy process, thereafter, I went through the examination and dictated my report. I obtained a rough copy of the autopsy report, and then reviewed it to make sure it covered everything. The notes and diagrams that I make during the autopsy are important to understanding my observations. (BMHR 2775-6)

With respect to documentation of the autopsies, I was unaware of any record of Dr. Sturner's presence at any one of the examinations in this case, or that of Dr. Dugan. I can't tell you when Dr. Sturner saw the bodies.

I would have called Dr. Dugan to an autopsy if I thought "there was a suspicious bite mark", and in this case because "there's a lot of markings on them...." (BMHR 2780)

I often went to crime scenes in Rhode Island, but in Arkansas the procedure is different. I would have liked to have gone to this crime scene but no one asked me to go. (BMHR 2782)

I became aware that the trace evidence section had found animal hairs in this case, though I did not know what kind of animal. (BMHR 2783)

Now that you have read me testimony from Paul Ford saying that I told him

there were bites on one of the victims that could have been turtle bites from September 24, 2008, session, I am telling you that's a lie. (BMHR 2785)

I felt I included enough documentation in these cases, including the photos that other pathologists could rely on them to draw independent conclusions. Also, my notes would have been of the type that could be reviewed by a qualified and trained professional in my field of formulated independent judgment. (BMHR 2788—notes received in evidence) I was aware that no one purported to have found any of the skin or other tissues from the genital injury to the victim Byers. I also acknowledged that as of 1994 I had never seen a degloving injury involving the removal of the skin of the penis and scrotum. I also never said that this knife is the one, I said that it could have been.

CROSS EXAMINATION BY MICHAEL BURT

People in my profession can reasonably disagree. (BMHR 2793) Forensic pathologists can disagree on cause and manner of death, and the timing of injuries and the like. Equally qualified forensic pathologists can disagree on visual observation of hemorrhaging, and whether microscopic slides show hemorrhaging as well. Disagreements among such experts are up to the jurors to decide.

I dictate the reports as I am doing the autopsies. I cannot recall exactly when Dr. Dougan had come in, and I remember that Dr. Sturner was out of town on the

first day of the autopsies, May 7. I had wanted Dr. Dugan to focus on the facial injury on Steve Branch. I then directed Dr. Dugan to look for human bite marks. There was no talk about looking for animal bite marks. (BMHR 2799)

I don't know precisely what Dr. Dugan had done, or what kind of documentation had been generated. I just directed him to look on the cheek wounds (BMHR 2801) I didn't direct him to look at the bite marks that I had found inside the mouths of the kids. I don't know that Dr. Sturner looked at all of the bite marks in their mouths. He looked at the outside wounds. (BMHR 2804)

As to the injury to Steve Branch's cheek, my observations were that they were incised, gouging away wounds, looking like someone had torn away the tissue.

I acknowledge that on May 7 (1993) I had drafted a press release because of the relentless autopsies, and that I stated there that all three children had died of multiple injuries. I stated that to get the press off my back.

The Moore report had been typed and finalized on May 25, the Branch report on May 24, and the Byers report on May 28. In the Medical Examiner's file there was also a letter dated May 26 from Inspector Gitchell indicating that the West Memphis Police Dept. felt that it was not getting sufficient information from the Crime Lab. (BMHR 2812)

I agreed that I saw no trauma to the anal area of any of the three boys, and I would have expected to see some form of injury in the microscopic sections I took, but there was no evidence of injury. I was not aware that I had been tape-recorded in a conversation with Mr. Wadley, stating that the prosecutor could not represent in good faith that the boys were sodomized. (BMHR 2820) I don't know what I could do to correct a mis-impression left by the statement of a prosecutor.

I can't find a single peer-reviewed article that supports the proposition that injuries to one or both ears plus injuries to the lips suggests sexual assault, but I have had cases where females were gang raped and I saw those kinds of injuries, though there were also injuries in the oral cavity. (BMHR 2827)

I had not meant to indicate that the boys had forced oral sex. Moreover, had I been questioned based on his schematics, a defense lawyer could have demonstrated that Michael Moore had no injuries to the left ear, which was not consistent with my testimony that injuries to both ears might be consistent with sexual assault. (BMHR 2830)

According to a review of my records, it appears defense counsel Stidham had contacted me four times prior to trial. He could have pointed out that there was a note in the file saying no evidence of sodomy. (BMHR 2833) The only time that Mr. Stidham asked for my file was after the trial.

I can't explain what happened about the transparencies that the prosecutors wanted at trial concerning the knife. That was up to the Trace section. I don't recall having any conversations with the prosecutors about the knife or the transparencies. (BMHR 2835)

I also agree that shortly after the record of a contact between me and prosecutor Fogelman, there had been questions about the injuries to the victim and to Steve Branch specifically which resulted in testimony that I did not know what had caused the injuries, though it would not have been animals in my opinion. (BMHR 2836)

You have shown me a statement I made in an article on histologic evidence of blunt trauma, I agree that tissue slides should be taken from injuries where you have possible superimposed new injuries. (BMHR 2839-40)

I had begun to review the evidence presented by defense experts which I viewed in part as a personal attack on me. I agree that nobody had previously asked me about whether there had been animal bites and no one had challenged me on that point at trial.

I disagree with part of Dr. Spitz's book on differentiating pre-mortem from postmortem injuries. I do not know why there was a difference between my opinions and all of the defense experts on the hemorrhaging. I can't explain it.

(BMHR 2845)

I have never seen the overlay prepared by Dr. Souviron, and further indicated that I felt honored that it was taking six people to review my work and prove him wrong. No one gave me anything to look at it.

I disagree with the statement of the National Research Council that basic competence in forensic pathology is demonstrated by board certification. (BMHR 2854) I agree that I failed the boards.

REDIRECT EXAMINATION BY KENT HOLT

My opinion is that all of the bruising occurred prior to death. There may have been some contusions that had a sharp force overlay. I disagree that there is any evidence of animal predation. Paul Ford lied when he said I mentioned a possible animal bite to him.

RECROSS EXAMINATION BY JOHN PHILIPSBORN

There were records of only two contacts between myself and Baldwin's defense counsel.

DR. WILLIAM STURNER

DIRECT EXAMINATION BY KENT HOLT

I am a retired physician and forensic pathologist. I was active in those fields for forty years. (BMHR 2824). I retired as Chief Medical Examiner for the State of

Arkansas in the end of June, 2004.

I graduated from medical school in 1959. I had a fellowship in legal medicine and toxicology in Kentucky for a year. I then was with the Medical Examiner's office in New York for 2 ½ years. I then was in Chicago as a deputy coroner's pathologist. After that, I was in Dallas County as an Associate Medical Examiner. I then served as Chief Medical Examiner in Rhode Island for 17 years. That was followed by 13 years as Chief Medical Examiner for Arkansas. (BMHR 2825)

I trained with Dr. Michael Baden in New York when Dr. Milton Helpen was the Chief of Pathology. I also have known Dr. Vince Dimaio for many years. I knew his father when I was in Dallas. I also have been acquainted with Dr. Werner Spitz and had contributed a chapter to his most recent book. (BMHR 2866)

I worked under the tutelage of Dr. Charles Petty in Dallas at the Medical Examiner's office in Dallas. They had new facilities there I was there. I also know Dr. Bernard Knight, and have lectured with him. (BMHR 2867) I have qualified as an expert in pathology in all of the jurisdictions that I worked in. [*Dr. Sturner was qualified as an expert at BMHR 2868*]

At the time of the report that the three victims in this case had been taken to the crime lab for autopsy, I was in Memphis as an Examiner for the National

Association of Medical Examiners. My recollection is that I returned to Little Rock, and had seen the three victims on autopsy gurneys and had gone through “at least the significant injuries” on each body. (BMHR 2869-70) I don’t recall exactly what stage of the process Dr. Peretti was in at the time. I don’t know that he had anything written at that time. I did a gross assessment of the injuries on the three bodies. I don’t recall seeing the microscopic slides. I signed off on the final reports.

I did review Dr. Baden’s testimony in this case. His autopsies were properly done, in part because we both had a good teacher. We used to go to homicide scenes in New York, because environment is very important. (BMHR 2871-2). You know more at autopsy when you do that.

I dealt with the issue of animal predation when he had been in New York City. We used to get bodies that has been the subject of predation by dog and cats, and other animals as well. There were cases of rat bites. In Dallas I saw wild animal bites.

I do remember that at one point the subject of a possible human bite mark had come up in this case.

My understanding of the time line of death here is that the victims were last seen about twelve hours before their remains were found. So, they were killed

somewhere in that window.

I know that the subject matter of animal predation has come up in connection with these Rule 37 hearings. I was not at the meeting that Dr. Peretti attended with the various defense experts before this hearing. I had some contact with Dr. Baden at one point. We discussed personal matters, and then we discussed that injuries to all three boys in this case could have been animal predation, and not pre-mortem stab wounds. (BMHR 2875).

At the time, I recalled the autopsies. I knew that one of them had been signed off as death due to multiple injuries, and the other two as death by drowning. I agreed with that. (BMHR 2875) Mr. Byers did not show signs of drowning, but he had multiple skull fractures and other injuries. I had come to these conclusions based on my own observations.

You could argue the point of taking tissue samples from the wounds, like that to the face of Steve Branch, either way. It was not necessary to determine cause of death, but it might have been beneficial. It might have helped with the issue of time of death. The histology studies that we had indicated that some wounds may have been cause around time of death, and some after. (BMHR 2877)

To me, the injuries to Mr. Byer's inner thighs had some fresh blood in them, and that would qualify them as antemortem or perimortem injuries. I reviewed the

histological slides of Mr. Byers penis, and there was fresh hemorrhage, and also some ghost cells of bacteria there. The fresh blood cells are indicative of antemortem or perimortem injuries. (BMHR 2880)

The injuries to Steve Branch's face, around the mouth seemed to me to be perimortem or antemortem as well. I thought that there was evidence of more than one impact to him, given the findings at autopsy.

I think that I heard about the discussion about the possible bite mark with Dr. Dougan after the fact. My opinion was that the injury to Steven Branch's cheek came from some kind of cylinder, something that was could be used to pound. I did not view those injuries as animal predation. (BMHR 2884) The findings about his pallor were important because they reflected blood loss.

As to the injuries to Christopher Byers, I did review the testimony that they had a "serrated...quality" to them. (BMHR 2885) My opinion was that the injuries to him are not characteristic of animal predation. They look like incised, gouged, penetrating wounds. Some are antemortem wounds that may have leached out in the water - perimortem might also be correct. (BMHR 2887)

CROSS EXAMINATION BY JOHN PHILIPSBORN

I have co-authored a paper with Dr. Michael Baden. He is an excellent forensic pathologist. I know Dr. Spitz as a well-known authority in the field. The

same is true of Dr. Di Maio. I would consider all of their opinions to see where they stood in relation to my own. Experts can have differences of opinion. (BMHR 2890)

I am not familiar with Dr. Joseph Cohen, or that he had testified in the Echols Rule 37 , and that he was a New York Assistant Medical Examiner. It is my opinion that pathologists in that office would have seen cases of animal predation in his professional experience.

I do not believe that I made any notes in connection with my examination of the bodies. I did a kind of “curb-side consult” (BMHR-un-numbered page between 2891 and 2892) It was Dr. Peretti’s case.

Had I been asked to testify at trial, I would have expressed the view that it was a cylindrical tool that had left an imprint on the left cheek of Mr. Branch. I don’t recall ever being approached by a defense lawyer in the case about that subject. (BMHR 2892) My view was that the lesions on Mr. Branch’s face were of an unusual shape and I thought it was some kind of a pipe that made them.

I agree that it is helpful for a forensic pathologist to consult with a certified forensic odontologist. They are usually on staff in major offices. (BMHR 2893-4)

In my own professional experience, it has been very unusual to have seen a removal of genitalia as in Mr. Byers’ case. I might have seen only one other case in

Chicago.

I agree that it is a reasonable practice in a case for qualified forensic pathologists to review autopsy reports, histological slides, photographs of the scene and photographs of the autopsy to arrive at opinions about the case. It's done all the time. I have done private consultation. It is not uncommon in my experience for the defense to have hired its own pathologist to review a case.

In the eastern jurisdictions that I worked in, the law required a pathologist to go to the scene, and in New York we were on call to do so. There are advantages for the pathologist on a case to go to the scene prior to rendering the ultimate opinion in a case, and in a number of states it is a regular procedure. (BMHR 2896)

I don't recall having been told of the lab's identification of animal hairs as having been found on the bodies by Dr. Peretti at the time, but I have heard about it. It might have been helpful for me to know that before signing off on the autopsies. (BMHR 2897)

I have encountered some bumps as an administrator in Rhode Island, and I would have expected to be asked as a witness about my supervision issues. Also, had I been asked, I would have confirmed that at one point I stated that I performed an autopsy when it had actually been performed by someone else. (BMHR 2898)

Back on the autopsies in this case, Dr. Peretti and I thought there might

have been an element of sexual assault in the matter. To me, it was more likely there was no sexual assault. (BMHR 2899)

I agree that it is important for pathologists to be clear on what they could opine with reasonable certainty and what is merely possible. (BMHR 2900)

CROSS EXAMINATION BY MICHAEL BURT

I think I spent about an hour looking at the bodies. I performed no procedures. I don't think I looked at all of the injuries. I would not have seen all injuries, but would have looked at 'regional injuries'. I don't recall having been asked to look to see if there was any human bite mark on the bodies. (BMHR 1901) I don't recall looking to see if there were bite marks on the inside of the mouths.

I looked at the slides that were prepared and at the re-cuts. In the Moore case, I agree that there were no microscopic signs of hemorrhaging. In the Branch autopsy, there was also no sign of hemorrhaging. Only one of the five or six slides had fresh hemorrhaging, although I know that Dr. Spitz disagrees with that view. (BMHR 2906)

I was one of the authors of a publication entitled *Common Errors In Pediatric Pathology*. (BMHR 2906) I recall that we referenced a work by Dr. Janice Ophoven from 1992. (BMHR 2907). The publication addressed post

mortem issues in victims of this general age. Dr. Ophoven is an excellent pathologist.

I was never asked to critique the testimony of defense pathologists given in this hearing. I reviewed a couple of bits of their testimony. I didn't see anyone who was bent on making personal attacks on Dr. Peretti. I agree that the article of mine that you mentioned notes that you have to be careful not to misinterpret findings to be evidence of sexual assault. (BMHR 2909) I also agree that in the article I note that pathologists should employ iron staining on old and new wounds so as not to misinterpret them. (BMHR 2910) Someone who does not have pediatric forensic training may misinterpret findings. (BMHR 2911)

REDIRECT EXAMINATION BY KENT HOLT

I would have told Dr. Peretti if I had seen a particular pattern to the injuries. I did not see evidence of animal predation. (BMHR 2912)