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ADDENDUM PART 1

ADDENDUM, PART 2

The following are exhibits from the Rule 37 hearing. Misskelley and Baldwin had a joint hearing. Therefore, for the convenience of the Court, Misskelley and Baldwin use the same pagination in the Addendum for these exhibits, using the Baldwin brief's numbering.

INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL

Misskelley v. State, 323 Ark. 449, 915 S.W.2d 702 (1996) [*Misskelley I*], is the direct appeal in this case. *Echols and Baldwin v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), is the direct appeal of the co-defendants. All three filed Rule 37 petitions. Echols' Rule 37 petition has been litigated and the denial of relief eventually affirmed in *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003). All three also filed habeas corpus petitions which were denied by the circuit court but the denials were reversed by this Court in separate opinions on the same date, November 4, 2010. *Misskelley v. State*, 2010 Ark. 415, Not Reported in S.W.3d, 2010 WL 4366985 [*Misskelley II]* ; *Echols v. State*, 2010 Ark. 417, --- S.W.3d ----, 2010 WL 4353535; *Baldwin v. State*, 2010 Ark. 412, Not Reported in S.W.3d, 2010 WL 4354242.

II. BASIS OF SUPREME COURT JURISDICTION

(___) Check here if no basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

(1) ____ Construction of Constitution of Arkansas

(2) _X_ Death penalty, life imprisonment

(3) _X__ Extraordinary writs

(4) ____ Elections and election procedures

(5) ____ Discipline of attorneys

(6) ____ Discipline and disability of judges

(7) _X__ Previous appeal in Supreme Court

(8) ___ Appeal to the Supreme Court by law

III. NATURE OF APPEAL

(1) ____ Administrative or regulatory action

(2) _X_ Rule 37

(3) ____ Rule on Clerk

(4) ____ Interlocutory appeal

(5) ____ Usury

(6) ____ Products liability

(7) ____ Oil, gas, or mineral rights

(8) ____ Torts

(9) ____ Construction of deed or will

(10) ___ Contract

(11) _X_ Criminal

[Write a brief statement limited to the space provided describing the case on appeal, and set out the causes of action (i.e., in a civil case, tort, contract, etc., or in a criminal case, the convicted offenses, whether felony or misdemeanor, and the punishment) underlying the judgment from which the appeal is taken.]

This is an appeal from the denial of Rule 37 relief. Misskelley is serving a life sentence for one count of Murder First Degree and 20 years each for two counts of Murder Second Degree.

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT?

No

V. EXTRAORDINARY ISSUES. (Check if applicable, and discuss in PARAGRAPH 2 of the Jurisdictional Statement.)

(_X_) appeal presents issue of first impression,

(____) appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,

(_X_) appeal involves federal constitutional interpretation,

(_X_) appeal is of substantial public interest,

(__X__) appeal involves significant issue needing clarification or development of the law, or overruling of precedent.

(__X_) appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation.

VI. CONFIDENTIAL INFORMATION

1. Does the appeal involve confidential information as defined by Sections III A (11) and VII(A) of Administrative Order 19

NO.

2. If the answer is yes, does this brief then comply with Rule 4-1(d)?

NOT APPLICABLE

JURISDICTIONAL STATEMENT

1. This is an appeal from the denial of relief under Rule 37, A.R.Crim.P. The circuit court denied relief. Also included in the appeal is a challenge to the judge's refusal to recuse despite the fact that he was an announced candidate for a partisan political office at the time he heard and decided the case.

2. This matter is assigned to the Supreme Court because it involves life imprisonment, Rule 37 proceedings and a previous appeal in the Supreme Court. I also express a belief based upon a reasoned and studied professional judgment that this appeal raises the following questions of legal significance for jurisdictional purposes: an issue of first impression and an issue needing clarification of the law, that being the impact of Amendment 80's ban on partisan judicial activity on judicial recusal; federal constitutional interpretation, that being the Sixth Amendment right to effective assistance of counsel; substantial public interest, this being the "West Memphis 3" case.

POINTS ON APPEAL

I.

REVERSAL AND REMAND FOR A NEW HEARING IS REQUIRED BECAUSE THE CIRCUIT JUDGE REFUSED TO RECUSE EVEN THOUGH AT THE TIME THIS CASE WAS *SUB JUDICE* HE WAS A DECLARED CANDIDATE FOR A PARTISAN POLITICAL OFFICE. HE ALSO SHOULD HAVE RECUSED BECAUSE HE HAD FILED A JUDICIAL MISCONDUCT COMPLAINT AGAINST MISSKELLEY'S TRIAL LAWYER.

II.

COUNSEL FAILED TO PROPERLY RAISE AND PRESERVE A RULE 2.3 CLAIM.

III.

COUNSEL FAILED TO PROPERLY HANDLE THE FALSE CONFESSION ISSUE.

IV.

COUNSEL WAS INEFFECTIVE IN FAILING TO CONSULT WITH AND UTILIZE A FORENSIC PATHOLOGIST.

V.

COUNSEL FAILED TO PROPERLY CHALLENGE, CROSS EXAMINE, AND REBUT THE STATE'S FIBER EVIDENCE.

VI.

COUNSEL WAS INEFFECTIVE FOR FAILING TO PREPARE FOR AND CHALLENGE THE SEROLOGY AND DNA EVIDENCE.

VII.

COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER ARGUMENT AND/OR PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

VIII.

COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE.

IX.

COUNSEL FAILED TO IMPEACH VICTORIA HUTCHESON.

TABLE OF AUTHORITIES

Cases

Other authorities

ABSTRACT OF RULE 37

STATUS HEARING

August 20, 2008

(The following hearing was a joint status hearing for Appellant Charles Jason Baldwin, Damien Echols (CR 09-60), and Jessie Misskelley, Jr. (CR 08-1481), conducted as part of the proceedings from which this appeal is taken. The parties were represented as follows: For the State of Arkansas: Brent Davis, Kent Holt and David Raupp; for Appellant Baldwin: John Philipsborn and Blake Hendrix; for Damien Echols: Dennis Riordan, Don Horgan and Deborah Sallings; and for Jessie Misskelley: Michael Burt and Jeff Rosenzweig. The pages of this record are designated as "SHR", Status Hearing Record.

At the time of the status hearing, habeas corpus petitions were pending for Misskelley, Echols and Baldwin, while Rule 37 petitions were pending for Misskelley and Baldwin. After the hearing, Judge Burnett denied the habeas petitions and all three appealed. In 2010 this Court reversed the denial and remanded the habeas petitions for a hearing. That matter is currently pending before Judge David Laser. The Rule 37 petitions were heard, several days at a time, over the course of the following year.

THE COURT: This is billed as a scheduling or as a status hearing. Frankly, I'm of the opinion that I can't basically do anything without the defendants here. We can talk about the schedule, we can talk about matters of law, strictly, but as far as taking testimony, we can't do that. So I'm here to listen to your comments about the schedule (SHR 1305)

I'm more interested right now; I've read most of the pleadings. Good lord, y'all gave me a box full, so I'm not sure I've read everything, but I take it that all of the pleadings have been filed that are going to be filed?

MR. ROSENZWEIG: We filed by fax yesterday a motion adopting pleadings that can be filed by some of the co-defendants, and of course, we had to file in Clay County. The others are filed in Craighead County. In order to avoid just cluttering up that record, we did not specifically attach the pleadings that we were adopting. We can do that, but if everyone would agree that we don't necessarily have to attach them, that might be more efficient. But we are happy to specifically attach, in the Clay County file, those pleadings if anyone deems it necessary.

THE COURT: The Court needs to know exactly what you're talking about, Jeff, because your particular client is in a different posture than Echols. You're on a Rule 37 petition, non-capital (SHR 1306). I don't even think the Act 1780 would apply to your client. It's not applicable him at this time (SHR 1307).

MR. ROSENZWEIG: To make it clear, the pleadings that we were adopting [was] Baldwin's initial reply to the State's response to the Amended Rule 37 Petition and the motion to enlarge the Amended Rule 37 Petition. [...] and then Echols's reply is for a motion for a new trial in the DNA case (SHR 1307).

THE COURT: First of all, let me say this. I'm going to divide this into separate hearings: Misskelley and Baldwin will have a separate hearing and frankly, I believe I'd rather do that first (SHR 1307).

MR. RAUPP: Your Honor, the State's position on what we call the 1780

cases, the DNA testing cases, as to all three defendants, and as I understand the pleadings Jeff is talking about, Mr. Echols filed on August 13th what he called a reply, the State's position is that reply is essentially an amendment to his petition, which is a permissible pleading.

To my knowledge, the Court hasn't given him permission under the statute to file an additional pleading. The statute provides for a petition and response by the State, which were filed and concluded in May as to the Echols cases and then in July as to the Misskelley and Baldwin cases.

We resist the filing of any amendment to that under the statute. We think it's unnecessary and the case to be resolved on the pleadings. If, however, the Court indulges a permissive amendment, which certainly is discretionary, the State would request an opportunity to do a permissive amendment to its answer, to its response, which the statute provides for. So we'd have to resolve that. But initially, we would resist that filing and agree with the Court that the 1780 cases can be (SHR 1308) separated out and dealt with separately and together.

And I had forgotten if there are proposed amendments for post amendments in the Rule 37 cases that are replies, but the replies having been filed there. The State doesn't resist those, but we do resist in the 1780 and the DNA testing cases (SHR 1309).

MR. ROSENZWEIG: Your Honor, in that, uh, what I was referring to and I

think Mr. Raupp had referred to as well, uh, we filed, uh, Misskelly filed a, both a ten-page petition and an expanded petition for motion for permission to file the expanded petition. So the, uh, we need to obtain a ruling from the Court, uh, granting, uh, technically granting that, uh, expanded petition and allowing the expanded petition to be considered. We have a compliant ten-page petition we've also filed.

And so we ask that the Court, uh, grant our motion to file an expanded or enlarged Rule 37 petition.

THE COURT: What did you add to it?

MR. ROSENZWEIG: It was one that discussed all of the claims, instead of just listing them, because the strict draconian interpretation of Rule 37: a ten-page limit, exhibits count against the limit, uh, the only thing that may not count against the limit is the certificate of service.

So we had to, uh, we had to file, uh, something with intent, you know, within ten pages, which we did. And that is in compliance with the amended ten-page petition, but we also filed one that actually has the room to discuss all of the various claims. The Rule, if you strictly interpret it, says we can't file that without permission, so we filed contemporaneously a motion seeking the permission, uh, and we would ask that the Court grant that motion.

THE COURT: You have replied to it?

MR. RAUPP: We have replied and resisted that motion, uh, in the Misskelley case. That was filed initially with Misskelley's, uh, Misskelley filed a ten-page petition, and the additional room was an additional two hundred and sixty-six pages.

It was rather expansive and i think as the Court knows, the Arkansas Supreme Court has consistently upheld the ten-page limit, particularly in non-capital cases, as an appropriate limit on the availability of a pleading to explain to the Court.

So we do resist the expanded petition in Misskelley, and then in Baldwin as well. Baldwin asked for an expanded petition only in early August, uh, and what we, what our response is to the ten-page, the properly filed ten-page petitions, is in the pleadings explains that on their faces they can be denied because they are so conclusory, because they purport to raise upwards of scores of ineffective assistance claims.

But we would anticipate that the Court will permit particular discrete claims to be raised, and we would anticipate after a hearing that the post-hearing briefing by both parties will address a few discrete claims.

But we would resist the filing of the two hundred and sixty-six page petition and instead, ask that the Court simply require counsel in Misskelley and Baldwin to reduce their claims to something in the nature of those that can be adequately

stated.

And ten pages, as the rule requires it, as the Arkansas Supreme Court has consistently upheld is appropriate.

THE COURT: Jeff, what did you add that's new, is what I asked earlier?

MR. ROSENZWEIG: Judge, what we did is discussed, we discussed the ...

THE COURT: ... but you didn't any new points, any new claims?

MR. ROSENZWEIG: Well, we, I mean, we added some from the original pro se Misskelley thing that had been filed back years ago, uh, and that there are some things that had, in the course of our investigation, we developed.

Now the problem is that as, as you might tell, if we, if we are able to write two hundred and fifty pages to give the Court appropriate guidance to what some of the issues are, we're only going to reduce it to ten pages to reduce it down to a few syllables, uh, per claim.

And, and that's what we had to do. And so, you know, we can, we can write a few syllables to shoe-horn it into ten pages, but if the Court wishes a discussion, uh, the Arkansas Supreme court has been generally, generally, but not exclusively restrict, you restrictive to ten pages, bu ton any number of occasions, it hasn't been an issue because a trial has permitted the expanded petition.

And therefore, there's, uh, you know, the pendant is an appealing issue.

THE COURT: All right, I think in this case I'm going to allow you to file it

and then you can file a response to it and then we'll have, uh, make sure we've got everything that you wnat in the record in the record. All right.

MOTION FOR RECUSAL

MR. ROSENZWEIG: Okay. With some trepidation, I take up another motion that we had filed, and that was the motion for your, your recusal, Your Honor.

THE COURT: Well, that's denied.

MR. ROSENZWEIG: And, uh, uh, if I could, uh, if I could respectfully inquire of the Court whether or not, uh, uh, because part of the motion was based on Your Honor's future political plans after you leave the court.

THE COURT: Well, that's something that's two years away. I don't retire until December and, and anything I might choose to do later is probably up in the air. I don't know. Speculation. So that has nothing whatsoever to do with this matter. All right. Yes sir?

MR. RIORDAN: Your Honor, Dennis Riordan, for Echols. Could I address the State's motion on the question of what we've framed as a reply brief and what they've framed as an amendment to the 1780 petition? Your Honor, my suggestion would be this. The State, in its opposition to our motion for a new trial under the DNA and new science statutes, has taken a position (SHR 1313) that the Court can and should simply deny that petition at this point. That there is nothing, either

dealing directly with DNA or anything else such as new scientific evidence on animal predation, that the Court need take evidence on because, either if one assumes all of the evidence is true, it isn't sufficient to grant the petition, or alternatively, that it is not cognizable within the DNA statute. We all agree that we've got issues of first impression before the Court on the scope of the DNA statute, whatever we consider, what we've filed are a reply and amendment to the petition, I think that they've discussed that as State authority. We have provided the Court with State authority and responses to their interpretation of the petition. I think it's just going to be very helpful in a question of first impression and important case for the Court to consider that. So if we classify it as an amendment to our petition, we certainly don't object to the State replying to that, and we think that it will be very helpful to have all of that before the Court (SHR 1314).

The other thing that I would say, Your Honor, is that, because the State is taking the position that you needn't hear any evidence as to Echols, and that it's either unnecessary, because thinking it's true, it's inadequate or it's not cognizable, I would think that what we may need, want to do is have the State file our answer and have the Court rule on the scope of the statute before we commence an evidentiary hearing, simply because if the Court accepts the State's position, we're done. And any hearing that the Court would hold if it were at the end of that to conclude that that evidence didn't need to be taken would be a waste of the Court's

time. So, I would submit that the Court should permit the filling and permit an answer and then, hopefully, issue an opinion or a ruling, which either, if it takes the State's position, denies the DNA petition, or says, "I'll hear evidence directly related to DNA, but nothing else; I'll hear evidence related to DNA and animal predation, but not this issue, dealing with new information on juror misconduct by the foreman," it would, I think, be enormously helpful (SHR 1315) if we had a ruling before the hearing commenced, Your Honor.

THE COURT: Well, I plan to give you a written order on what I'll hear and what I won't hear. Do you want to respond any further? What my feeling is, whatever pleadings I've got, I'm going to accept. So if you need to file a response, then how much time do you need?

MR. RAUPP: I would ask for 30 days. We filed our answer to the petition on May 30th, and this amendment came in last Wednesday, August 13th, so it's about seven days.

THE COURT: I don't guess I've seen that. Last Wednesday?

MR. RAUPP: I think that's correct. It was filed August 12th, maybe? (SHR 1316)

MR. RIORDAN: That's correct, Your Honor (SHR 1316).

THE COURT: So I've got more? I've got two boxes full of pleadings back there.

MR. RIORDAN: It was file stamped by the court on the 13th (SHR 934).

MR. RAUPP: But given that, it was about 70 days out, and if we could have about half that much time, and of course, if we could accommodate the Court, it will be in sooner (SHR 1317). But we would certainly hope to have about 30 days.

THE COURT: The problem is with giving you 30 days - I've got two capital murder cases that I've had to sandwich in the docket to finish before December 31st. It would be almost impossible to schedule. I was thinking about giving you ten or 15 days, and even that would push the schedule, if it's September 8th.

MR. RAUPP: We'll accommodate the Court.

THE COURT: Well, all right, let's do that and then I don't want any more pleadings filed, period. Ten days, will that get us to where we can start whatever it is we're going to do on September 8th, because after I receive that, I need probably a week, I guess, or however many days that gives me before the 8th to give you a letter opinion on what I'll hear and what I won't hear, or if I adopt your theories in the last response that you read, then there won't be any need for a hearing, period (SHR 935)

MR. RAUPP: The State would be happy to provide a precedent to that effect.

THE COURT: I mean, if I do that, then there won't need to be any further

hearings on Echols. Now in Misskelley, it's a different matter, and Baldwin (SHR 1318).

(SHR 1320) THE COURT: All right, that will be all right. I invite all of you to draft a preliminary order, if you care to, if you want to, because it's always helpful. It'll make my time speed up. And I invite each of you to do that.

THE COURT: Is there anything else we need to discuss? (SHR 1320)

MR. HENDRIX: Judge, Blake Hendrix on behalf of petitioner Baldwin, the same stuff, we don't want to paper up the Court any more. I've got here a request to ask that Baldwin will be able to adopt Echols's reply, because it has the same legal issues. It's a total of two paragraphs of additional reading, but it's permissive, and we didn't want to be presumptuous.

THE COURT: All right, I'll let you do that (SHR 1320) You need to understand whatever ruling I make in Echols probably also applies to those adopted pleadings.

MR. HENDRIX: Absolutely (SHR 1321).

THE COURT: So the filings would be in either, in Baldwin's case and Echols', in Craighead County, and in Misskelley, in Clay County.

MR. HENDRIX: So we only need to file in one place?

THE COURT: One place (SHR 1321).

MR. HENDRIX: Great (SHR 1321). Judge, on Baldwin's motion to enlarge, that's just a simple matter of trying not to get caught in that catch-22 when you've got a complicated case and the ten days, so we'll be happy to go either way the Court wants us to go.

THE COURT: Well, I'm not going to restrict you to the ten pages. I've already told Jeff that, and I'll, I'll allow you to amplify your brief.

MR. HENDRIX: And then this is sort of the next to the last thing is on, I think the State is resisting this. We've got all of those exhibits that are filed in the 1780, under the 1780 petition, and to be sure and have a complete record in Rule 37, we can either adopt them by reference, or do we need to just absolutely re-file all of those exhibits as part of the Rule 37, and I think the State has taken a position on it, haven't you, David?

MR. RAUPP: Yes, Your Honor. We've resisted on the basis that it's an expanded petition over the ten pages. And I don't have - in light of the Court's ruling in Misskelley's case, I anticipate that you will grant Mr. Hendrix's motion to essentially have those exhibits be part of his ten-page petition.

THE COURT: Yes, I'll do that.

MR. RAUPP: And given that, we have the exhibits (SHR 1322) filed in Craighead County as to the 1780 case. I don't need them filed again. I don't know if the Court wants to enter an order in the 37 case.

THE COURT: The only reason I'm allowing the expanded petition is so we'll have all of the issues in the record and all of the matters will be wrapped up for a higher court to look at whatever we do. So all of it will there.

MR. HENDRIX: We're going broke on copying expenses, too (SHR 1323).

THE COURT: Well, yeah, there's no need to keep duplicating that. That will be fine. And you're going to respond to that?

MR. RAUPP: In both Baldwin and Misskelley's Rule 37, the State will reserve a response to a post-hearing pleading and the proposed order (SHR 1323).

THE COURT: Right.

MR. RAUPP: And as to the 1780 cases...

THE COURT: ...I'm inviting you to do the same thing in that.

MR. RAUPP: And we're going to reply in ten days with a proposed order, a reply and then a proposed order, as to all three cases. (SHR 1324) And I will file a separate pleading in each of those three cases, because I think their cases are proceeding under the names of each one.

THE COURT: All right, Mr. Riordan, if you want to submit a proposed precedent, I need that simultaneously.

MR. RIORDAN: Very good, Your Honor, and I again, to save paper, we might propose an order that just says that we are incorporating in our 1780 petition certain exhibits filed by co-defendants. We have copies here, but if we propose an

order and the Court would just say yes, they're incorporated by reference, we've saved the clerk's office another six inches of file.

THE COURT: Yes, let's do that. There's no point in having multiple filings of the same thing (SHR 1324).

MR. HENDRIX: And Judge, just for the record, Baldwin does need to join in the recusal motion, understanding the Court's ruling.

THE COURT: I'm going to deny that motion.

MR. HENDRIX: I'm assuming this argument is not going to persuade you to go otherwise. THE COURT: I'm going to deny that motion.

MR. HENDRIX: Sure. Understood.

MR. RAUPP: Your Honor, the State would have just one more question. Anticipating that the losing party in either case, or the person losing might prosecute an appeal, it does occur to the State that the record will have to be prepared separately by the Clay County Circuit Court?

THE COURT: Yes.

MR. RAUPP: And the Craighead County Circuit Court, so it would be useful to have the separate exhibits actually filed and pleadings actually filed. We don't have a problem with them adopting, in the sense they adopted arguments, but I think it's appropriate to style pleading and filing.

MR. ROSENZWEIG: That will be fine.

THE COURT: Jeff, that would relate to your client only, because Baldwin is here anyway (SHR 1325).

MR. ROSENZWEIG: That will be fine. We will do that, Your Honor, and that won't be a problem.

MR. PHILIPSBORN: Your Honor, John Philipsborn, Baldwin's co-counsel. (SHR 1326) Just to clarify something that I may have misunderstood, I thought when the Court was first discussing what it wanted us to discuss this morning, it indicated that the 1780 statutes would not reach the non-capital cases, but then we have been discussing the issues as though it does, and our view is that it does. But just so the record is clear... (SHR 1327)

THE COURT: ...no, I allowed you to file that and to raise those issues, but I think I've indicated that if I follow the State's theory on it, that's going to terminate those issues in Baldwin and Misskelley, as well.

MR. PHILIPSBORN: Okay.

THE COURT: I'm not saying that that's what I'm going to do, because I haven't digested it all yet, but y'all raise all kinds of stuff that is kind of interesting. No, it is a part of your pleading at this time.

MR. PHILIPSBORN: I appreciate it. Thank you (SHR 1327)

THE COURT: ... well, I think we can hear it here. Does the State have any

opinion on whether to do Baldwin and Misskelly simultaneously? That's kind of the way I would rather do it...

MR. ROSENZWEIG: ... I didn't mean to interrupt, Your Honor, and my counsel, Mr. Burt, has some scheduling issues and all of us have scheduling issues, including the Court. And so as long as we are here, we probably need to get that resolved.

Mr. Burt has some, I wasn't here for the April hearing, so I'm second-hand on a lot of what the Court said, and Mr. Burt was here. And so we need to figure out so we don't have to file a motion later on.

THE COURT: Well, my thought on it would be to schedule Misskelley and Baldwin for September the 8th and hopefully, we can finish in a week, because we've got a full week; that would be the 8th through the 13th (SHR 1328).

(SHR 1329) MR. BURT: I had planned to be here on October 1st, because that's when I was told the day was that the Court was going to take up Misskelley.

And now the Court has indicated September 8th, so there is a scheduling problem there.

MR. DAVIS: Judge, when the Court asked did we think it would be appropriate for the two to go together, it's the State's position based on the responses that have filed that in terms of the Act 1780 petition that are filed by all three defendants, that the Court can rule as a matter of law, and if, depending upon

what the Court's decision is in regard to that, if we are then left with Rule 37 hearings regarding the two other co-defendants, because with a ruling of that nature, that eliminates defendant Echols from any further proceedings.

Then if it's merely Rule 37 hearings regarding the two defendants, I can't see any benefit to conducting those simultaneously, because, I mean, (SHR 1329) in a two hundred and sixty-seven page petition, there have been hundreds of issues raised.

I think actually I'm optimistic that the Court will narrow those issues down when it comes time for the actual proceeding, but in any event, the more pertinent issues will be the performance or effectiveness of the two defense teams involved in representing the clients at trial.

And I don't see where combining the two together is going to achieve much in the way of benefit, because the questions that are pertinent...

THE COURT: ... I'm just raising for economy of time, I mean... (SHR 1330)

THE COURT: All right. That's Misskelley. And then Baldwin, any matters that need to be heard by the Court will be on September the 8th, that week of the 8th through the 12th.

Frankly, gentlemen, the Court can rule as a matter of law on all of the issues. I can decide that an evidentiary hearing is not even necessary. So you can view it

from that standpoint as well.

I'm not likely to do that, but I could. So when (SHR 1332) you draft your precedents, consider that as an option that the Court has.

MR. PHILIPSBORN: Your Honor?

THE COURT: Yes, sir?

MR. PHILIPSBORN: On the Baldwin matter, John Philipsborn, on the scheduling issue, Mr. Burt said he and I are actually both involved in the same multiple defendant homicide case; I had thought that you had actually talked about scheduling this sequentially, so I thought the week of September 8th had been reserved for Echols, if there was going to be an Echols matter.

My question to the Court, because I think our, the evidence in our case, if the Court grants us a hearing, is going to be pretty compact.

THE COURT: I'm sure of that.

MR. PHILIPSBORN: But I hear the Court in that regard. Would the Court consider allowing us to be scheduled right after Misskelley?

THE COURT: That would be fine. And I have a problem with, I think I've got a murder case tentatively set for September 15th, that I wasn't aware of, but we were going to move that anyway. The Paragould case, and I've got a pre-trial on the 15th, but I have, we could start, I guess, on - I can (SHR 1333) give you one day; the part of the 15th and the 16th and then skip to September the 24th and then

go through the 29th. That's the best I can do.

Wednesday, yeah, we can go the 24th and finish that week. That would be three days, but we might have to do it like that. We'll tentatively set it for then.

MR. PHILIPSBORN: Thank you. I appreciate it, Your Honor.

THE COURT: The next time court meets, the defendants are going to have to be here, because I'm uncomfortable in doing anything but scheduling without them being present.

MR. DAVIS: Judge, one thing that just crossed my mind; Dave kind of mentioned it. One thing I did think we agreed on was that any 1780 proceedings on the new scientific evidence would be consolidated, since basically the pleadings in regard to that are pretty much similar regarding all of the defendants (SHR 1334).

THE COURT: Well, they're identical (SHR 1335).

MR. DAVIS: And so if when we talk about whether the Court would take up the issues involving Echols early on, on the 8th of September, and fill in that first few weeks with that, assuming those issues were still on the table after the Court makes its ruling. If the Court decides that we're having hearings on that issue, then those hearings will not just apply to Echols, they'll apply to all three defendants. And so that doesn't cure the problem of having scheduling conflicts with the 8th through the 24th of September, because it's not just going to be

dealing with defendant Echols, it will be dealing with all three defendants, should the Court determine that it can't rule as a matter of law (SHR 1335).

THE COURT: Jeff, your conflict was for who? Who had the conflict with September 8th?

MR. ROSENZWEIG: Any conflicts I have are solvable. Mr. Burt is the one with the more difficult conflict.

MR. PHILIPSBORN: And I have that same conflict, Your Honor.

THE COURT: Well, I thought we dealt with those.

MR. PHILIPSBORN: We did just now as Mr. Davis is pointing out that if . . . (SHR 1335)

THE COURT: Well, he's probably right. The issues are identical. Basically, you all adopted what they have filed. So on the 1780 matters, they're the same.

MR. PHILIPSBORN: I agree, Your Honor.

THE COURT: I'm going to block out the dates and those days will be available and then depending upon everyone's schedule, let's just see what we can present at that time. And depending upon how I ultimately decide, too.

There may be issues that will remain that need to be, we need to have hearings on. So that time is available and we'll do whatever we have to do at that time. Okay? So you need to keep your schedules flexible (SHR 1336).

THE COURT: (SHR 1337) And again, I'm going to be looking for proposed precedents on the 1780 rulings and the Rule 37 rulings, too.

MR. ROSENZWEIG: Looking for them before the hearings, or after the hearings?

THE COURT: On the Rule 37, after the hearings. But on the 1780, I thought we were going to schedule that for the next ten days. Anything else?

MR. DAVIS: Well, there's a couple of things that, and Dave may correct me if I'm wrong, as I probably will be on the law, but I know the Court had indicated that there was some concern about any rulings that could be made on the pleadings if the defendants weren't present. And we have looked at the statutes, specifically the particular statutory provisions under Rule 37, and under the 16-112-200, new scientific evidence, and the Court can make rulings and as a matter of law, enter orders as a matter of law on pleadings without the necessity of the defendants being present.

THE COURT: I know I can do that, but I can't take testimony.

MR. DAVIS: Correct. I think it would be appropriate in that regard (SHR. 1337).

MR. RIORDAN: (SHR 1347:22) Just a final thing for clarification, Your Honor. As I understand it, the State will be filing an answer to what's deemed an

amended petition, we called it our reply brief, by the 30th (SHR 1347), and by that time you'd also like from us essentially a proposed... (SHR 1348)

THE COURT: ...a proposed precedent, for a finding.

MR. RIORDAN: And Your Honor, there is a pending question on sealing a declaration before the Court, and we'll address that in our proposed order, as well.

THE COURT: I'm sorry. I didn't follow you on that.

MR. RIORDAN: Well, we're in an unusual situation, Your Honor, in which a declaration has been filed with this Court that none of the parties has seen, and has been filed by a Little Rock lawyer on behalf of another lawyer that deals with arguably privileged conversations between that lawyer and the jury foreman in this case. And we have addressed the question of privilege. The lawyer filed it under seal; he did not give it to either of the parties; he wanted the ruling from the (SHR 1348) Court on the question of privilege before any of the parties saw it. So we will address the question of unsealing that in the proposed order.

THE COURT: Well, where did he file that? I haven't seen it.

MR. RIORDAN: It is filed in this Court, Your Honor. It's highly unusual; it's a situation in which a lawyer was retained by the jury foreman in this case. The jury foreman had conversations...

THE COURT: ...I saw some pleadings to that effect, but I haven't seen any sealed pleadings. I saw your pleadings.

MR. RIORDAN: Well, our information, the filing actually took place May 30th in the Baldwin case, a sealed envelope was filed by a Little Rock attorney containing an affidavit from another Little Rock attorney, and it was filed in the Baldwin case. And as you've seen, we have sent various things in our pleadings.

THE COURT: Yes.

MR. RIORDAN: Various things about that declaration. But I will work with the Court's office and confirm that that sealed declaration is in fact before (SHR 1349) the Court. And we'll address the unsealing of it in our proposed order by the 30th.

THE COURT: Okay.

MR. RAUPP: Your Honor, the State hasn't seen that either, and obviously would like to see it. Mr. Echols's counsel has taken the position that privilege doesn't apply, so I presume they're going to ask that it be unsealed despite not seeing it, they've gone on at length to explain what it, I guess, what they hope it represents.

THE COURT: Well, then that's what I read; your pleading.

MR. RAUPP: But it would be helpful to the State before the 30th that that be unsealed, if we're to respond to the allegations. And I take it that you're going move that it be unsealed?

MR. RIORDAN: Well, there's actually a motion pending in the Baldwin

case (SHR 1350) that the Court unseal it under a protective order, so that the parties could at least see it and address it, and according to them, the Court could unseal it under a protective order before it rules on the question of privilege, so the State would have a meaningful opportunity to address the privilege question.

THE COURT: (SHR 1350) Well, yeah, I don't have any problem with that. I mean, I'd have to look at it to rule whether it was a privilege question or not, anyway. So y'all might as well get the benefit of it. So it's supposedly in the Baldwin case?

MR. RIORDAN: It is filed on May 30th, and that is the ideal thing; both parties get it under a protective order and they can certainly address the privilege question as a straight question of law, I think.

MR. RAUPP: Thank you.

THE COURT: All right, we'll do that. Is there anything else?

MR. PHILIPSBORN: Your Honor, the last thing, and I appreciate the Court's indulgence and patience. There is pending before the Court and has been for some period of time, in the context of the 1780 cases, a motion for some additional testing, and I gather that it would be appropriate to the parties to address that in the precedent that they offer, because obviously, if the Court's going to deny the hearing and basically rule on the pleadings, I think we put the relevant facts before the Court and the Court could address that issue as well, but I didn't

want it left hanging (SHR 1351).

THE COURT: What additional testing are you referring to? (SHR 1352)

MR. PHILIPSBORN: Your Honor, there were two classes of evidence that we agree to disagree about. This is in the conversations that I had with Mr. Davis; the re-testing of some fiber evidence and some testing of some specific hair evidence. And so that issue was put before the Court and the State has opposed the re-testing and it has been dealt with in the pleadings.

THE COURT: It seems like I remember y'all raising that the last time we were here.

MR. PHILIPSBORN: Yes, sir.

MR. BURT: Judge, there's one last issue which is an evidentiary issue, and we'd be glad to brief this for the Court. But I wanted to go on record as stating an objection to an exhibit that the State has attached to its response to the petition in Misskelley's DNA motion. And that is an exhibit in which the State has designated as Exhibit "E," which is a transcript (SHR 1352) of, apparently, a post-trial interrogation of Mr. Misskelley. I don't know if the Court has that in front of it.

THE COURT: It doesn't look like I have it here.

MR. BURT: I have it. This is our file, Your Honor. At the outset of this interview, Mr. Davis informs Mr. Misskelley that the statement that he is about to

give will not be used against him in any proceeding whatsoever, in the future. And essentially gives him use immunity for the statement he is about to make. And it's our position that a statement given under those circumstances cannot be used in any proceeding, including this one, and that the Court ought not to consider that in making any rulings that it might make in regard to the motions that are before the Court.

THE COURT: Is that objection in your pleadings?

MR. BURT: No, it's not, and that's why I'm raising it at this point. We're adopting the pleadings of Mr. Echols, and this issue pertains to Mr. Misskelley (SHR 1353). We've not filed a separate pleading, but will be glad to brief the issue, because there is some law on this. But I just wanted, at this point, to go on record as stating that objection, and with the Court's permission, we file a brief as to the issue.

THE COURT: All right. Do you need to file a reply to that?

MR. RAUPP: I would, just briefly, the State's position is with immunity granted and authorized by the Court in case with consistent to the Arkansas statute which provides only for the use immunity, and while described in any transaction, the immunity granted would have to have been consistent with Arkansas law used in a criminal proceeding. This is no longer a criminal proceeding; it's a civil proceeding.

THE COURT: It's a civil proceeding.

MR. ROSENZWEIG: Except, Your Honor, that the courts have also held that representations made by a prosecutor are equitability enforceable.

THE COURT: Well, brief it for me.

MR. ROSENZWEIG: I will (SHR 1354).

MR. PHILIPSBORN: Your Honor, that same objection would also pertain to Baldwin, because the same item has been proffered in Baldwin's case.

THE COURT: Okay. All right. Is there anything else? (SHR 1355)

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 EXAMATION 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 Derning.

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. Derning 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 malinger. 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 that 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. Derning 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. Derning 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. Derning 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 Sturner, 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 gential 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.

RECROSS EXAMINATION BY KENT HOLT

I never had the opportunity to talk to Dr. Peretti or to Dr. Sturner 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 1996-1969].

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 am 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)

<u>DIRECT EXAMINATION BY MICHAEL BURT</u>

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 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 opinons 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 Detectve 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 like 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 EXAMINATON 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 shoe 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 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 agreethat 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 medecine 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 Helpern 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 antemoretem 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 check 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 leeched out in the water - perimortem might also be correct. (BMHR 2887)

CROSS EXAMINATIONBY 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 got 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 autposies. (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 is 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)

ABSTRACT OF MISSKELLEY TRIAL IN CLAY COUNTY

ABSTRACT OF PRETRIAL PROCEEDINGS

ARGUMENT AS TO STATE'S MOTION FOR DISCOVERY

MR. FOGLEMAN: The State has filed motions for discovery. In regard to Misskelley, we are requesting blood, saliva, head hair, body hair, pubic hair, fingerprints and footprints. (R 511)

MR. STIDHAM: We object on the basis of the Fourth Amendment provisions and also amendments of the Arkansas Constitution. The basis for our objection basically is that the taking of these samples is an unnecessary and unreasonable intrusion (R 515) to the body of the defendant. (R 516)

THE COURT: To take hair snippings, fingernail scrapings, blood samples, fingerprints, footprints, saliva, involve only a minor intrusion into to person and, therefore, are not subject to the constitutional objections that you raise. I will grant the State's discovery motion. (R 516)

ARGUMENTS AS TO DEFENDANT'S MOTION TO TAKE DISCOVERY DEPOSITIONS OF INTERROGATING OFFICERS

MR. STIDHAM: I have filed a motion to take discovery of interrogating officers. (R 756) We have found some authority in Indiana as well as a U.S.

Supreme Court case which is Wardius vs. Oregon. The Wardius case provides that discovery is a two-way street, that the defendant should have the same rights to conduct discovery and investigate that the State enjoys. (R 757) The Court in Wardius held that, "in the absence of a strong showing of State interest to the contrary, discovery must be a two-way street. The State may not insist that the trial be run as a search for the truth so far as the defense witnesses are concerned while maintaining poker game secrecy for its own witnesses." We should be entitled to do the same that the State has the right to do, and we cannot prepare for an adequate defense if we do not (R 758) have an opportunity to discuss this with the officers under oath. The Indiana courts have recognized that this is a substantial right of the defendant and that they routinely grant defendants authority to conduct depositions of the officers. (R 759)

We should have the same rights to interview witnesses that they do. (R 803) They have the right to subpena witnesses, question them under oath and have a court reporter there. We do not have that power and it inhibits our ability to represent our client. (R 804) Mr. Misskelley was interrogated by the officers for approximately twelve (12) hours, yet the transcript is nowhere near twelve (12) hours long. We should be entitled under due process, equal protection and other constitutional requirements and safeguards attributed to the defendant to talk to

these officers to find out what happened in this other time frame. (R 805) A civil defendant has the right to conduct depositions. Someone who is facing the death penalty should be afforded the same opportunity to depose the witnesses against them. (R 806) There is the Wardius case, a United States Supreme Court case and also there's case law from Indiana and there is one case that is identical factually to the case at bar. (R 809)

THE COURT: Give me your briefs, and I will rule on it.

ABSTRACTOR'S NOTE: The court denied the defendants motion to conduct depositions of the interrogating officers by written order, said Order being previously abstracted herein and found in the record herein at R 316.

ARGUMENT AS TO DEFENDANT'S MOTION TO TRANSFER TO JUVENILE COURT

MR. STIDHAM: I assume the State is going to want to introduce testimony about past juvenile history and due to the fact that media are here in Court today we would request that the Court impose the same restrictions that it did in Jonesboro and hold this hearing from camera.

MR. FOGLEMAN: You totally excluded everybody (R 831) from the courtroom while the evidence was being put on.

THE COURT: I probably shouldn't have done it.

MR. FOGLEMAN: But once it was done, I'm afraid if we did it for one and not the other, I don't know what it would do.

THE COURT: Why don't we go as far as we can and if a sensitive issue comes up, I'll exclude them. (R 832)

MR. STIDHAM: We are asking the Court to transfer Mr. Misskelley's case to Juvenile Court pursuant to statute A.C.A. 9-27-318. We intend to introduce evidence today reflecting on the seriousness of the offense, whether violence was employed by the juvenile in the commission of the offense, whether there's a repetitive pattern of adjudicated offenses which would determine that the juvenile is beyond rehabilitation, (R 833) and also we are going to introduce evidence about Mr. Misskelley's prior history, his character traits and his mental maturity and ask the Court to transfer the cases to Juvenile Court.

MR FOGLEMAN: Your Honor, if part of this hearing is to be held open, I think the whole thing needs to be open.

MR. STIDHAM: Your Honor, with the press here, I don't want them printing his prior juvenile history --

THE COURT: Let's go on and do it all and if we get to a point where you thing it's going to be a problem, then raise it and I'll see what I can do. (R 834)

MR. STIDHAM: Your honor, what about the media reporting on these incidences -- we could have an in-camera --

THE COURT: -- if you win, you don't have to worry about it.

MR. STIDHAM: If we do not win this motion, I am going to be real concerned about it.

THE COURT: Bring it up again and I'll see what I can do.

WILLIAM WILKINS

DIRECT EXAMINATION OF DOCTOR WILLIAM WILKINS

My name is William E. Wilkins. (R 835) I am a psychologist and I practice in Jonesboro. I have a Bachelor's Degree in psychology from the State University of New York, a Master's Degree in research methods from Bucknell University and a Ph.D. in psychology from Cornell University.

I taught for a number of years at the State University of New York. I taught for the University of Houston. I have been director of health at mental health centers. I have worked in the mental health section of a reform school. I also ran a mental health section for the Native American tribes in Utah, Idaho and Nevada. I was clinical director at George Jackson hospital and I have been in private practice in Jonesboro for five years.

I have written fifteen or twenty articles, most recently on false confessions. I have over twenty years experience as a licensed psychologist. (R 836)

I have had past hospital affiliations with Saint Bernard's Regional Medical Center in Jonesboro, Greenleaf Hospital in Jonesboro and other hospital throughout the United States. I have had an opportunity to meet the defendant Jessie Lloyd Misskelley, Junior. I have spent about 10 or 11 hours with Mr. Misskelley. (R 837) I gathered a large variety of information on Mr. Misskelley, eight or nine hundred pages of his school records and previous psychological evaluations. In addition, I interviewed him and conducted the following tests: WAIS-R, MMPI-2, Wechsler Memory Scale, Bender Gestalt, House/Tree/Person, REY Auditory Verbal Learning Test, a Rorschach, and some tests by Lawrence Kolberg measuring moral development. I also conducted some tests on Mr. Misskelley by Goldschmidt and Bently which measured his cognitive thinking levels.

I also meet with Mr. Misskelley's father and stepmother. Jessie's biological mother left the family unit when Jessie was about four (4) years of age. Jessie had no further contact with her until about a year and a half ago and at this point she is reasonably marginal in her action system with him. (R 838)

This abandonment had a psychological impact on Mr. Misskelley as did Jessie's father's alcohol problem. Jessie described to me that at times when he was a small child he was left with various baby-sitters, one of whom regularly put his head in the toilet and flushed it on numerous occasions.

Jessie received recommendations from the school to receive counseling because of his school problems, academic problems, and behavior problems and at no time was any consistent follow-up ever done with that. At the time that the crime was committed, Jessie's parents were separated, (R 839) his stepmother and father have since rejoined but over the years there have been separations and a wide variety of stepbrothers, half brothers and family systems that just would consistently rotate and change with a lot of moving from place to place.

It was recommended by school counselors that Jessie receive counseling but he did not receive any of that counseling other than one or two sessions at the mental health center in West Memphis. In his previous mental evaluations he was diagnosed as being mentally retarded. He has a brother who has been diagnosed as mentally retarded. (R 840)

I conducted a standard IQ test for adults. Jessie has a full scale IQ of 72, with a verbal IQ of 70, performance of 75. These IQ results were consistent with previous testing done on Mr. Misskelley. (R 841) His IQ scores place him in the

low border line range of intellectual functioning. Average intelligence level one hundred with a normal range between 84 and 116. Jessie has reached maximum level of about the second or third grade. Jessie has never passed the Arkansas minimum standards tests. (R 842)

Jessie Misskelley constructs reality on about the same system that a six or seven year old child. (R 844)

Jessie Misskelley has a very child like conception of what is morally right and wrong. Because Jessie Misskelley is unable to read well I read the Minnesota Multi-Phasic Personality Test to him. Jessie has a very small elevation on three of the clinical scales. He has a severe inferiority complex, (R 849) and severe insecurities. He lives in kind of a schizoid world. He is not out of contact with reality but he cannot cope, does not understand the world very well. He lives in his own little world lots of times because he does not understand the outside world. When Jessie is under stress he rapidly reverts into fantasy and daydreaming, and at times he can not tell the difference between fantasy and reality. I diagnosed Mr. Misskelley with an adjustment disorder with depressed mood. That diagnosis is temporary given the circumstances that he is under. Mr. Misskelley has a history of psychoactive substance abuse. He has used marijuana and huffed gasoline. He

has also experimented with white crosses and other kinds of drugs. This diagnosis mostly says that he has multiple experiences with a variety of drugs. (R 850)

Jessie's axis two diagnosis is borderline intellectual functioning. That relates to his IQ level. This is not likely to change. I also diagnosed Jessie as having a developmental disorder. Jessie has some reading dysfunctions, academic dysfunctions and some personality trait dysfunctions, primarily schizotypal, antisocial and dependent. (R 851)

Jessie Misskelley has difficulty remembering both long- term and short-term. He has deficits in judgment. I asked him, if you were walking down the street and found an envelope that was already addressed and sealed with a new stamp on it, what would you do with it? Jessie's response was, "Well, I'd pick it up and see who it belonged to and if I knew them, I'd tried to go find them. If I didn't know where they were, I probably would take it back and put it where it was." When Jessie is under stress, because of his child-like perception of reality, he reverts back to kind of constructing reality as he chooses it. What adults would see as probably fantasy. (R 852)

With Jessie marginal intellectual ability he would have a tough time planning anything that would last for more than five or ten minutes. He is not capable of putting together long-term complicated plans. With regards to mental

maturity, I would place Jessie Misskelley at the level of a child between five and eight or five and nine. With regard to the possibility of rehabilitation, this is a complicated issue. He is not going to get any more intelligent. However, in terms of his adjustment disorders, his personality outbursts, those are quite amenable to treatment particularly at his age. (R 853)

CROSS EXAMINATION OF DOCTOR WILLIAM E. WILKINS

MR. FOGLEMAN: You indicate in your report that Jessie Misskelley had some minor criminal offense problems.

MR. STIDHAM: Your Honor, I am going to object to that.

THE COURT: Let's not go into that at this time.

MR. FOGLEMAN: Your Honor, I don't know how else --

THE COURT: Ask him if he took them into consideration? (R 856)

MR. FOGLEMAN: I want to ask him a question about that.

MR. STIDHAM: Your Honor, I strongly object and would argue that is not admissible, certainly not in this setting. Again we are talking about issues that I raised earlier at the bench and I would like to approach the bench again and talk about those.

MR. STIDHAM: We are entitled to have a ruling on the admissibility of prior offenses. I know this is a hearing for transfer to --

THE COURT: Wait a minute. I'm not making any ruling that any prior offenses are admissible. In fact the strong probability is that they are not. For the purposes of this hearing, they are relevant.

MR. STIDHAM: I agree, your Honor, and we would ask that we have a closed hearing with regard to those issues.

THE COURT: I did that the other time, and I was probably wrong in doing that so I'm going to overrule your motion.

MR. STIDHAM: We are entitled to the same rights that Mr. Baldwin has, and we're also entitled to a (R 857) fair and impartial jury trial, and if this stuff is published tomorrow, we're not going to get that right.

THE COURT: You cannot stop the media from printing whatever they choose. I hope that they use proper restraints.

MR. STIDHAM: My experience in the past is there has been no restrains, your Honor. That's why the statement was on the front page.

THE COURT: I overrule your motion. And in doing so I'm reversing the ruling I made in Jonesboro, and I recognize that, and I think I probably was in error to close that hearing. I don't think it was any harmful error, however. If anybody, the State should have been the one objecting, but go ahead. (R 858)

CROSS EXAMINATION OF DR WILLIAM WILKINS CONTINUES:

Jessie had some minor legal difficulties with the law including breaking of a window and some other relatively minor juvenile offenses. I did not check with the juvenile authorities to see what offenses he had but Mr. Stidham had someof the juvenile records and I did check those. (R 859) Jessie did have a variety of conflict problems at school withaggressive outbursts. Sometimes he hit other kids and sometimes he left the class room and had conflicts with his teacher. Jessie has mild psychotic characteristics which indicated the need for him to demonstrate his masculinity. Hehas had aggressive tendencies. (R 860)

He had a mild elevation in an F scale on MMPI-2 which could be viewed as an attempt at malingering. (R 861)

In April of this year Jessie was placed on probation in Juvenile Court for third degree battery on a thirteen year old girl. He also appeared in Juvenile Court in January of this year and was found to be a delinquent on a charge of Criminal Mischief in the first degree where he broke some windows on a railroad car. I am not aware of the dates in so much as I am aware of the difficulties. (R 862)

Mr. Misskelley is not mentally retarded. He is competent to proceed in these proceedings. He understands the traditional legal notion of right and wrong. He was seventeen years old at the time of the offense. He was eighteen when I tested

him. (R 863) His intelligence capacity is borderline, he does not function in society well, he functioned marginally.

I diagnosed under axis two, number three, "Personality disorder NOS with schizotypal, antisocial and dependent characteristics." There is a paranoid personality disorder, antisocial personality disorder, schizotypal and others, (R 864) and each one of them has a set of criteria that makes you one of those. He did not have a sufficient number of symptoms in any one of the distinct categories to be one of those, but he did have a couple of characteristics of the antisocial, a couple of the schizotypal and a couple of the dependent. His personality is in kind of a mixed package. He has a tendency to slide into fantasy at times or to have difficulty separating fantasy at times. He also has a tendency to be fairly withdrawn from many intimate social interaction systems. (R 865)

MR. STIDHAM: No objection to the Court taking into consideration the same photographs as were considered at the hearing on Jason Baldwin. However, we point out that while we vehemently oppose the reliability of the statement that Mr. Misskelley made on June third, we would point out that in the statement itself does not say anything about any violence employed by Mr. Misskelley. One of the factors in the statute is whether or not there was violence employed by this particular juvenile, not whether the other two did that but whether he did.

MR. FOGLEMAN: I don't have any objection to the Court taking judicial notice that Jessie said he didn't do any of the cutting.

THE COURT: I will consider his statement. As I recall the only involvement he indicated he directly participated in was that he ran down and restrained one of the victims that was escaping.

MR. STIDHAM: We do not stipulate that made him an accomplice.

MR. FOGLEMAN: We can make a part of the record on this hearing the hearing that was held on Jason Baldwin as far as the proof I put on. (R 868)

MR. STIDHAM: We stipulate that this was a violent crime. However, in his statement he does not make any mention of him personally using or deploying any violence.

THE COURT: Other than restraining one of them. (R 869)

JERRY DRIVER

DIRECT EXAMINATION OF JERRY DRIVER

My name is Jerry Driver and I'm the chief juvenile officer in Crittenden County, Arkansas. As part of my duties as chief juvenile officer I have in my possession records involving juveniles in Crittenden County. (R 870)

In performance of my duties I have come into contact with the defendant, Jessie Lloyd Misskelley, Junior. I am familiar with his appearances in the

Crittenden County Juvenile Court. His first appearance was in May of 1987, it was a FINS petition. The next occasion was in August of 1988 for theft of property. Mr. Misskelley received probation. His next appearance was in December of 1992 where he was charged with battery and violation of probation. (R 871) He received additional probation and he was ordered to obtain a G.E.D. The battery involved a thirteen (13) year old girl. I show a total of four (4) Court appearances in Juvenile Court. (R 872)

CROSS EXAMINATION OF
JERRY DRIVER BY MR. STIDHAM:

Mr. Misskelley's disposition on each of these juvenile offenses was probation. The Court did not feel at the time of the dispositions that it would be appropriate to send him to training school. Mr. Misskelley has never been to the training school. (R 874)

BRYN RIDGE

DIRECT EXAMINATION OF OFFICER BRYN RIDGE BY MR. FOGLEMAN:

My name is Bryn Ridge and I'm a detective for the West Memphis Police Department. I participated in the investigation of the three murder victims on May the 5th, 1993. I was present when the three victims were discovered. The bodies were found in a wooded area known as Robin Hood which is on the northern limits of West Memphis between a residential neighborhood and the expressway,

Interstate 40. The bodies were found in a water filled ditch that contained approximately two and a half feet of water. (R 875)

The victims bodies were naked and they were bound with their shoe strings. All the victims showed wounds to the head, face and there were lacerations and contusions. There was bleeding from the nose and ear of the first victim and there was cuts to the side of the face of the second victim. (R 876) These cuts were serious and were five to five and a half inches long which exposed part of what I call the

jawbone. One of the victims penis had been removed and there was pick marks all over the bodies. This particular victim had hundreds of stab wounds in his genital area. (R 877)

(STATE'S EXHIBIT SIX DEPICTING INJURIES TO THE BODIES OF THE VICTIMS ARE RECEIVED FOR PURPOSES OF THIS HEARING)

ADDITIONAL ARGUMENTS WITH REGARD TO DEFENDANTS MOTION TO TRANSFER TO JUVENILE COURT

M R . STIDHAM: The factors set forth in the statute with regard to transfer to Juvenile Court provide three sets of factors that the Court is (R 878) to determine on whether or not the case should be transferred to Juvenile Court.

The first one is the seriousness of the alleged offense and whether or not

violence was employed. The alleged offense is a serious offense. However, the contents of this alleged statement state there was no violence employed by this juvenile in this case.

The second set of factors is a repetitive pattern of adjudicated offenses which would determine his abilities to rehabilitate. There was four juvenile adjudications, all of which resulted in probationary sentences. Never was he sentenced to the training school. They (R 879) were not serious enough that they demanded anything other than probation. Jessie Misskelley did not receive the counseling that he needed. The system failed miserably in providing these services. He has never had a chance to rehabilitate because nothing has ever been tried.

The third set of factors, the prior history, character traits, mental maturity and other factors related to rehabilitation. Mr. Misskelley is operating at a low borderline range of intellectual functioning. He has a very low IQ. His mother abandoned him at age four which caused him a significant amount of stress. He has been diagnosed several times as being mentally retarded, came from a dysfunctional family, and he was in urgent need of individual or family counseling that he never received. He reads and writes at a third grade level. His moral judgment is that of a five to seven-year-old.

Mr. Misskelley lacks the intellectual wherewithal to develop a complicated criminal act, and he lacks the (R 880) psychological characteristics we would assume would be part of a premeditated complicated criminal activity.

MR. FOGLEMAN: The first factor to be considered is the seriousness of the offense and whether violence was employed by the juvenile in commission of the offense. This is a serious offense. The defendant, in his statement, says he did not do anything other than run down one of the boys and capture him and bring him back. Because he says it does not make it so.

Secondly, the Court is to look at whether the offense is a part of a repetitive pattern of adjudicated offenses which would lead to a determination that the juvenile is beyond rehabilitation. (R 881) We do have a series of adjudicated offenses, delinquent offenses, that this juvenile has committed leading up to this offense. Dr. Wilkins finds that he has got an antisocial personality, that he has characteristics of his personality which would indicate an aggressive person. In the past he has had aggressive outbursts. He has been a heavy gas huffer. He smokes marijuana, drank a large amount of alcohol. He's got a life- long problem with getting very angry. That he's got mild psychotic characteristics. There is some evidence of malingering and finally again that he has this antisocial personality

characteristic exhibited by his aggressive nature. This case should not be transferred to Juvenile Court. (R 882)

THE COURT: I do not have to find evidence of on all factor's listed in the statute. There is no question whatsoever that it is a most serious crime, that is clear and convincing evidence to this Court that the accused juvenile should be tried as an adult.

The defendant Misskelley has a juvenile history involving assault and battery on another juvenile. Dr. Wilkins' testimony also indicated there was some proclivity or chance based upon the character traits that Misskelley demonstrated to him that aggressive behavior could occur again.

It is unclear to the Court, although I have a strong belief and suspicion from what I have heard and seen, that there's little or no prospect of rehabilitation and would so find.

An additional factor that the Court can consider is that he was seventeen years of age at the time of the offense, that also weighs heavily that he should answer as an adult for any criminal charge brought against him. (R 884)

Therefore, I find that he is to answer to the Circuit Court as an adult. (R 885)

HEARING ON MOTION TO SUPPRESS

JERRY DRIVER

DIRECT EXAMINATION OF OFFICER JERRY DRIVER BY MR. FOGLEMAN

My name is Jerry Driver and I'm the chief juvenile officer for (R 943) Crittenden County, Arkansas. In the course of my duties of the chief I have had occasion to come into contact with the defendant, Jessie Misskelley, Junior. I have with me today a juvenile file that is relevant to Jessie Misskelley, Junior. On an unrelated matter, on March 31, 1993, I advised Mr. Misskelley of his rights. (R 944) I read him a rights statement and asked him if he understood each one. I had him read them over, initial the rights and sign a statement that he wished to talk to me. Also his father signed it. State's Exhibit One (1) is the rights form that was signed on March 31, 1993. (R 945) After I read each right to him, I asked him if he understood that particular right, and he indicated that he did. (R 946)

I did not employ any force, promise, threat, or coercion when I advised him of his rights on March 31, 1993. I also had an occasion to advise Mr. Misskelley Junior of his rights on October 28, 1992. (R 947) I used the same type of form and followed the same procedure advising him of each of his rights. He indicated to me that he understood his rights and he read over it before he signed it. His father signed it. (R 948) It appeared that he did he read over the form. He did not

ask any questions. His father did not have any questions. He given an opportunity to read it in each case.

CROSS EXAMINATION OF OFFICER JERRY DRIVER BY MR STIDHAM:

Mr. Misskelley's signature on that form was not in cursive. This did not bother me because he indicated to me that he could read and right. I asked him if he had any questions about the form and we went over each one of them. He said that he had no questions and that he understood it. He appeared to be read it and then signed it. We always have the parents sign the rights waiver form in juvenile intake. (R 950)

GHERIC BRUCE

DIRECT EXAMINATION OF GHERIC BRUCE

My name is Gheric Bruce in 1988 I was employed with the East Arkansas Juvenile Services in Marion, Arkansas. I was the intake officer, probation officer, and parole officer. During my employment I came into contact with Jessie Misskelley Junior. State's Exhibit three is a rights form which I went over with the defendant. I advised him that he had the right to remain silent and I read the form to him. (R 951) Before I asked him to sign, I also asked if he understood. He told me that he understood his rights and he signed the form. I did not use any force,

promises, threats or coercion to get him to sign the form. His father was present when I advised him of his rights. (R 952)

JOHN MURRAY

DIRECT EXAMINATION OF JOHN MURRAY BY MR. FOGLEMAN

My name is John Murray and I am an investigator with the Crittenden County Sheriff's Department. In an unrelated matter on the 23rd day of October, 1992, I advised him of his rights by reading him a rights form and having him place the word "yes" next to each right. He indicated to me that he understood each right. I did not use any force, promises, threats or coercion to get him to place his initials on the form. (R 954)

CROSS EXAMINATION OF JOHN MURRAY BY MR. STIDHAM

I am familiar with Jessie Misskelley Junior and I know that he is slow. I asked him whether or not he understood each one of the rights and I asked him to tell me if he did not understand. It was my opinion that he understood. Jessie's signature is printed instead of being handwritten but this did not bother me. Each time I've talked to him in the past and whenever he has signed, he always printed. Mr. Misskelley never made any attempt to invoke any of his constitutional rights. (R 956) Jessie Misskelley Junior's father did not sign the rights waiver form. (R 957)

MIKE ALLEN

DIRECT EXAMINATION OF OFFICER MIKE ALLEN BY MR. FOGLEMAN

My name is Mike Allen and I'm a detective sergeant with the West Memphis Police Department. During our morning meeting on June 3rd I was advised by Inspector Gitchell (R 958) that Jessie Misskelley Junior was one of the people that we needed to talk to in reference to this investigation. As I knew Jessie Misskelley Senior I was assigned to contact Jessie Misskelley Junior and bring him to the station. I drove to Highland Trailer Park and went to the residence of Jessie Misskelley, Sr. A lady by the name of Lee Rush came to the door and told me that Jessie Misskelley Jr was not there. (R 958) She told me that Jessie Misskelley Sr. was at work. I drove to Jim's Diesel Service and contacted Jessie Misskelley Sr. and asked him about the whereabout of Jessie Misskelley Junior. (R 959)

Jessie Misskelley Sr. went and picked up Jessie Misskelley Junior and brought him back. At that time I asked Jessie Misskelley Junior if he would come with me to the police department because I needed to talk to him in reference to this case. Mr. Misskelley Junior's response was sure he would go. I then accompanied to the police department. He was placed in the front seat and was not handcuffed. Upon arriving at the police department I filled out a standard subject description form (R 960) and talked with him. The subject description form was

filled out around ten that morning. I filled out this form from information which I obtained from Jessie Misskelley Junior. While I was filling out the form, Detective Bryn Ridge was present. I did not advise Jessie Misskelley Junior of his rights at that point. He was not a suspect at that time. (R 961)

After talking to him for about an hour, I advised him of his rights. Detective Bryn Ridge was present when I advised him of his rights. State's Exhibit Nine is the rights form that was used. (R 962) I verbally advised him of his rights and went over the rights form with him. He indicated that he understood each right. I did not use any force, promises, threats or coercion either to get him to sign the form. Later we talked to him about taking a polygraph exam. (R 963) We took notes, he was not a suspect at that time, we were talking to him about another individual that was a suspect at that time. We advised him of his rights at about 11:00. I advised him of his rights because several things that he denied something another person had told us. We asked him if he would take a polygraph exam and he said yes. (R 964) Officer Durham, the West Memphis polygraph examiner, informed that I needed to get permission from Misskelley Sr. before the polygraph exam could be given because the State law. Jessie and I went to find his father to get his permission for the polygraph. He rode in the front seat with me and he was not handcuffed. We found Jessie Misskelley Sr. at about 10 minutes after 11:00.

(R 965) I talked to Misskelley Sr. about the polygraph, then Jessie Sr. signed the form. I did not use any force, promises, threats or coercion to get Mr. Misskelley Sr. to sign the form. (R 967)

CROSS EXAMINATION OF OFFICER MIKE ALLEN
BY MR. STIDHAM

Each morning during the investigation of these homicides the detectives meet at the West Memphis Police Department to discuss what we were doing that particular day. Jessie's name was brought up by a person that said he was associated with Damien Echols. (R 969) Damien Echols was a suspect in the very beginning in this case. Echols was a suspect on June 3, 1993. I was told that Damien Echols and Jessie Misskelley were members of a satanic cult. It had been brought up at the meeting that these murders were a satanic cult killing. (R 970) I told to talk to Misskelley and find out if he had any knowledge about Damien Echols. (R 971) I advised Jessie Senior that I needed to talk to Jessie Junior with regard to this homicide investigation and about some so called friends of his that lived in the Lake Shore area. (R 972) A couple a weeks or so prior to June 3, 1993, Jessie Misskelley Junior had given me some information about someone he though might be involved in the homicides, a Tracey Laxton. There was someone else present when I spoke to Jessie Misskelley Senior at Jim's Repair Shop and he was trying to listen to what Jessie Senior and I were talking about. I

would assume it was Jim McNease, the owner of the shop. (R 972) Mr. McNease kept trying to hear what we were talking about. I do not know whether he overheard. I do not remember any mention about the thirty thousand dollar ($30,000.00) reward that was available. I do not recall whether McNease and Misskelley Senior and I discussed that. Jessie Sr. and McNease may have asked me what the reward was (R 973) or something to that effect, but I do not particularly remember that part of the conversation. When I obtained Jessie Senior's signature on the polygraph release, later in the morning, I do not remember talking about the reward money. The Misskelley's may have asked me what the reward was. (R 973) I do not remember that part of the conversation. I do not recall Jessie Junior saying, "If I get that thirty thousand dollars ($30,000.00), I am going to buy my daddy and new truck." I did not read Jessie Misskelley Junior his rights until about an hour after I had questioned him at the police department. I did advise him of his rights prior to asking him whether or not he wanted to take a polygraph exam. When I went out to the repair shop that morning to pick Jessie Junior up there was never a discussion about his rights. At that time he was not a suspect. (R 974) He was just a possible witness or someone that might have had some information. In response to your question as to what exactly did I tell Jessie Junior when I arrived at the shop, I asked him if he would

mind coming to the police department to answer some questions about some boys that lived out at Lake Shore. I did not talk about his rights at that point, he was not a suspect at that time. He voluntarily agreed to accompany me to the police department. The subject of his rights never came up. I knew Jessie Senior prior to June 3, 1993, but I did notknow Jessie Junior except that I knew who he was. (R 975)

In my opinion, Jessie Misskelley Junior could understand everything I was telling him and he was responding back and did not appear to be slow. (R 976)

I asked Jessie about Damien and he told me that he had heard a rumor that Damien and a subject by the name of Robert Burch had committed the homicides. (R 978) At this particular time he was not a suspect. (R 979) At 11:00 a.m. on June 3, 1993, Jessie Misskelley Junior was not a suspect. (R 980) At that time I was not question Jessie Misskelley Junior in the line of a suspect but that as of a potential witness. (R 982)

The department had been told from another source that Jessie was a friend or whatever of Damien Echols. This source said Jessie had attended some kind of satanic ceremony with Damien Echols. (R 983) I did not talk to Misskelley Senior about Jessie Misskelley Junior's constitutional rights, his right to remain silent, or his other Miranda warnings. I did not get Jessie Senior's signature on the rights

waiver form while I was obtaining his signature on the polygraph form. I did not at that time obtain information from his father other than to give me permission to talk to Jessie Junior. His Miranda warnings were not discussed with his father. (R 985)

I had been advised that I did not have to obtain parents signature on the rights waiver form on a case of this type. Jessie stated that the week of the homicide he had worked that Tuesday, Wednesday and Thursday (R 986) and that onMay the 5th, he got off work at 5:00 p.m. After I completed my notes, I did not participate in the interrogation of Jessie Misskelley Junior anymore. Jessie toldme that he had never been to Robin Hood Hills before. (R987)

We had information that he had been at some satanic worshipping ceremony after the murders with Damien Echols. Jessie stated that he was not in any such group. We set up the polygraph test to determine whether the information he was giving us was the truth. (R 988)

I helped determine the questions to be asked on the polygraph test. My notes reflect only highlights of things that Misskelley told me. They reflect some of things that I felt were important. (R 989) I did not write down everything. I do not remember word for word everything that we talked about. I did not record the interview because he was not a suspect at that time and we were trying to find out

if he had any knowledge of Damien Echols or of this homicide. We have the capabilities to record interrogations and had our conversation gotten to the point where he said, "I know all about it," I would have tape recorded it. (R 990)

On June 3, 1993, I did not make any attempt to call Mr. Dee's or verify the fact that Misskelley was working on May 5, 1993, the date of the homicides. His story was not checked on that day, but was checked on later. (R 994)

REDIRECT EXAMINATION OF OFFICER MIKE ALLEN

BY MR. FOGLEMAN:

I did not bring up the subject of the thirty thousand dollar ($30,000.00) reward with either the defendant or his father.

RECROSS EXAMINATION OF OFFICER MIKE ALLEN BY MR. STIDHAM

I did not bring up anything up about the thirty thousand dollar ($30,000.00) reward. However, it is possible that the Misskelleys did bring that subject up on that day. (R 995) If someone would have asked me, I probably would have told them what the reward was. (R 996)

ABSTRACTOR'S NOTE: At R 997 the prosecution offered into evidence copies of the defendant's past juvenile adjudications. Defendant objected based upon relevancy. Said objection was overruled at R 998.

BILL DURHAM

DIRECT EXAMINATION OF OFFICER BILL DURHAM
BY MR. FOGLEMAN:

My name is Bill Durham, detective, West Memphis Police Department. (R 998) I talked to the defendant at 11:15. I advised him of his rights by means of an Advice of Rights form outlining his rights. He appeared to read the form. I also explained what each of the rights meant. He initialed each of the rights individually and then signed a waiver of rights. State's Exhibit eleven (11) is a photocopy of the rights form signed by Jessie Misskelley Junior on June 3, 1993, at 11:30 a.m. (R 999) I did not use any force, promises, threats, or coercions to get him to place his initials by each of his rights. (R 1000)

The consent for the polygraph with Jessie Misskelley Junior had already been signed by his father. I went over this polygraph release form with him and explained some of the words I thought he might have a problem with. He said he understood. He signed. I did not use any force, promises, threats or coercion to get him to sign the form or to take the polygraph test. The defendant was with me for approximately an hour for the polygraph exam. (R 1001) During the course of my involvement with the defendant I did not use any force, promises, threats or coercion. After the completion of the polygraph examination, I asked Jessie Misskelley Junior to sign his polygraph sheet, which he did. I advised him of the test results. I attempted to conduct a post test interview, but he refused to answer

any questions. When I told him the results, he remained silent and slumped down in the chair with his head turned toward the opposite wall and he refused to answer any more questions. (R 1002)

When I saw he was not going to respond to my questions, I left my office, advised Inspector Gitchell and Officer Ridge of the polygraph test results and explained to them that Misskelley would not talk to me and perhaps someone should try to question him.

CROSS EXAMINATION OF OFFICER BILL DURHAM
BY MR. STIDHAM

There were three (3) charts done on the polygraph test administered to Misskelley. Each chart would last approximately two (2) minutes. I asked a series of ten (10) questions, and I must wait a minimum of ten (10) seconds between the subject's answer before I ask the next question. There were six (6) minutes of the charts total for the entire polygraph examination. The other fifty-four (54) minutes was spent going over the advise of rights form with him, and I spent at least twenty (20) minutes with him explaining how the test works, the conduct of the test and what I expected him to do as far as cooperation of the test itself. (R 1004)

In my opinion Mr. Misskelley was being deceptive to the relevant questions dealing with his involvement in this homicide. My report only reflects the relevant questions dealing with the matter at hand. The other questions on the polygraph

exam were used for different purposes. They do not deal with the matter at hand per se. In the pre-test interview I explained to Jessie Misskelley what a polygraph test was. (R 1010) After I informed Mr. Misskelley that he had flunked the polygraph exam he slumped in his chair, turned to his right, faced the opposite wall and made no response. In my opinion Mr. Misskelley was lying in his responses to the other questions as well. (R 1011) He was being truthful in the very first question only. (R 1012)

It important to mix in control questions with relevant questions. If you ask relevant question directly in a row, then you are not running a zone of comparison polygraph test. You are doing a peak of tension test. It does not matter whether the questions were related. At the time I ran this test Jessie Misskelley Junior was not a suspect. We thought he was probably a reluctant witness. The purpose of the test was to basically see if he had information that might be helpful to us in the investigation of this matter and questions dealing with his involvement or knowledge or questions to determine whether he was involved in the murder itself. (R 1012) Had he been a suspect, I would have asked a different series of questions that would have been more specific and more direct. I graduated from the Zahn Institute of Polygraph in Miami, Florida in December of 1981. I became licensed in the state of Tennessee in early 1982 through the Memphis Police Department.

Had I determined that Misskelley had been telling the truth and was not being deceptive on the questions, it would not have been my place to turn someone loose or incarcerate them. (R 1015)

BRYN RIDGE

DIRECT EXAMINATION OF DETECTIVE BRYN RIDGE
BY MR. FOGLEMAN:

My name is Detective Bryn Ridge of the West Memphis Police Department. I was present when Detective Allen advised Misskelley of his rights and I signed the form as a witness. Detective Allen read the form to Misskelley. (R 1017) The defendant indicated that he understood these rights. I did not use any force, promises, threats or coercion to get him to place his initials by each of these rights. (R 1018) It was determine that we would request a polygraph examination. After the polygraph examination was completed, myself and Inspector Gitchell did the interrogation. When he said he had received a phone call, that seemed to be important to the case to me. That is when I left the room. I was gone from the room for about a minute and Inspector Gitchell came out of the room and we decided we would tape the entire conversation from that point forward. (R 1020) This was at about 2:20 p.m. the tape was concluded at 3:18 p.m. During the entire time of the tape, there was no force, promises, threats or coercion used to get the defendant to say anything. CROSS EXAMINATION OF

DETECTIVE BRYN RIDGE

BY MR. STIDHAM:

We did not tape record the entire interview with Misskelley. (R 1023) Misskelley's name came up in the investigation as having been possibly an acquaintance of Damien Echols. It was further discussed that he may be part of a satanic group. Another witness had told us that she had seen Damien and Jessie at an occult meeting in Terrell, Arkansas. (R 1024) That witness took us to a spot at Terrell but we did not find any artifacts or other things involving satanism. No one else has been identified who might have been present at this meeting. On June 3, 1993, Jessie Misskelley Junior was not a suspect in these homicides. (R 1025) We did not have probable cause to pick him up and arrest him, he wasn't picked up to be arrested. We had determined that he may have been an acquaintance of Damien Echols and may have been involved in satanic activities. The purpose of bringing Misskelley down to the police station was to ask him about Damien Echols and where he was on May 5 and to find out if he had any information about the homicides. (R 1026)

Prior to the polygraph Misskelley told me that he believed that Damien was responsible for the homicides. This was not that unusual because there were rumors going around West Memphis on June 3 that Damien was involved.

Misskelley denied that he had been to an occult meeting with Damien Echols. The polygraph test was just an investigative tool in order to help make a determination as to whether the interview would continue. (R 1027) Before the polygraph test, Misskelley told me that he was roofing on the day of the murders. I believed him when he told me that. (R 1028) I informed Officer Durham of some of the points of the interview. He formulated the questions for the polygraph test, I did not. (R 1029) My notes reflect that Officer Durham came out of the polygraph test and told me that Mr. Misskelley was lying his ass off. I am aware of the fact that a juvenile cannot waive his Miranda rights unless the parent signs the consent form. (R 1030)

MR. FOGLEMAN: Your honor, I've got to object. In all due respect to Detective Ridge, he's mistaken on that. The Supreme Court has ruled to the contrary on that and these questions about the law are not proper.

THE COURT: It is not important what he asks the Officer about the law on the polygraph. I'm the only one who needs to worry about that anyway.

MR. STIDHAM: Judge, I'm not asking him about the laws on the polygraphs. I'm asking him whether or not a juvenile -- in order for a juvenile to waive his Miranda rights -- whether or not his parents have to consent and sign a waiver. He said he was aware of that.

THE COURT: They don't if it is a felony charge and they are between the ages of fourteen and eighteen.

MR. STIDHAM: With all due respect to the Court, how do you know what the crime is when your talking to juvenile.

THE COURT: If you are investigating a capital murder, I would think an investigator would know.

MR. STIDHAM: If I'm investigating a Juvenile for throwing rocks --

THE COURT: It would be a good idea to get his momma to sign.

MR. STIDHAM: If I am investigating a murder I don't have to worry about that. (R 1031)

THE COURT: That basically is right. I thing that has come up in a couple of other cases.

MR. FOGLEMAN: Your Honor, the one I'm referring to is Boyd vs State, 313 Ark. 171.

THE COURT: There's also a statute that requires you to have a parental consent on the fingerprints of a juvenile. We went through that same thing right here in this court on a similar case sometime ago.

MR. STIDHAM: Your Honor, it is our contention to interpret the statute as not requiring the parents' consent and written waiver in a felony case is a violation

of equal protection. How can we afford juveniles the protection of this important safeguard when they are doing something not so bad, but when they do something bad, we don't worry about it?

THE COURT: Why don't you raise that as one of your arguments? It is not very persuasive with me.

CONTINUATION OF OFFICER BRYN RIDGE: I probably would have questioned Misskelley further had officer Durham informed me that Misskelley was not being deceptive in the polygraph examination. We have had several post polygraph examination interviews. If I determined that he was not a suspect before the polygraph, and he passed the polygraph, there still might have been reason to hold him. (R 1033)

I did not attempt to write down and preserve every question that I asked and every answer that was given by Misskelley. (R 1034) I did not write down that Jessie told me that the boys were killed at noon, because it is on the tape. That was the first time he told me what time it happened. The discrepancy as to time was not questioned at the time of the first statement by Misskelley, it was questioned later by Inspector Gitchell, (R 1036) during the second taped session. The time frames were not discussed with him prior to the tape recorder being turned on.

Misskelley told us prior to the tape recording part of the interrogation that there were several people in this occult. We tracked some of these people down and talked to them and they denied being members. (R 1037) We've never been able to confirm that any of these people were in this cult. (R 1038) In his recorded statement Jessie said that he, Damien and Jason walked to Robin Hood Woods at 9:00 in the morning. Everyone knows that is not what happened. The boys were in school that day. The victims were accounted for in school up until about 2:45 or 3 p.m. I knew that Misskelley's time frame was incorrect we he stated it. It did not occur to me at that point that I was getting a false confession. Later on in the tape Jessie told me that

the boys skip school. I knew that was wrong. (R 1038) That statement alerted me that something was wrong.

MR. STIDHAM: Later on I believe in the statement he's telling you this stuff occurred at noon and the next question youask you ask him is, "Tell me what else happened that night," and Jessie immediately says it happened at night. Thenon page 12 Jessie says, "My dad woke me up this morning", and you say, "Well, your time period may not be exactly right in what your saying," and Jessie says, "Right". Thenyou go on to say, "I have gotten some real confusion withthe times your

telling me. Now this 9:00 in the evening callyou got." Now Jessie says, "All these stuff happened at night."

OFFICER RIDGE: Yes, sir.

MR. STIDHAM: What did you do to make him change hismind?

OFFICER RIDGE: I didn't do anything.

MR. STIDHAM: You suggested to him it was at night, did you not?

OFFICER RIDGE: I don't think I did. No, sir.

(R 1039) CONTINUING WITH CROSS EXAMINATION OF OFFICER RIDGE:

Misskelley told Detective Gitchell and I that he had received a telephone call from Jason and he heard Damien in the back ground. That was after Inspector Gitchell and I showed Misskelley a picture of one of the victims' body. This was also after we drew a diagram of a circle and put Misskelley, Damien and Jason in that circle. The sequences of those events were the diagram, then the photograph of the body, and then I left the room. (R 1040)

Gitchell showed the photograph to him. Jessie's reaction was to fixate on this picture. He kept looking at it. We were asking him questions and he was not answering, he just kept looking at the photograph. Gitchell was the one who drew the diagram on the piece of paper. The purpose of the diagram was to show that who ever committed this murder is inside the circle. Misskelley was asked "Are

you going to be a witness or defendant or where are you going to be at in this circle? We want to know who was in the circle?" (R 1041) The dots on the outside of the circle represented witnesses, police, and who ever was not involved in the murders who may have had information. We were asking Jessie where he wanted to be on the diagram. We asked him whether he was in the circle or outside the circle. (R 1042)

After Misskelley was shown the picture of the body and the diagram we asked him continuing questions such as what do you know about this, do you know anything about this, it just continued. I asked Misskelley if he would take a polygraph concerning his new statement and he responded that he would have to think that over. (R 1043)

The diagram is not mentioned in my notes because everything is not written down in my notes. After I left the room, Jessie informed Gitchell that he was present during the murders. We decided to record everything after that. Jessie never asked to go home and he never asked us to call his father. (R 1044) His father was up there later on that afternoon and I am not certain what time it was. I am not sure whether he asked to see his son. At this point I considered him under arrest. (R 1045) I knew at the end of the first tape that there was several things about the information that Misskelley had given us that was wrong. We did not try

to clear this information up while the tape was on the first time, because there are times you take what you can get. When you have got a person talking, you let him talk. When you start contradicting them, they stop talking. (R 1048) This is the information he came forward with. Portions of that information proved to be correct. (R 1049)

We had tape recorders available to take a recorded statement. We had video cameras, but we were not capable of video recording the interrogation. We did not have the equipment set up. At the time of the statement I did not think Jessie was of limited intelligence. He seems like any other seventeen-year-old in as far as my judgment. I had to explain to him what a penis was because that is not a term that is normally used by everybody. A seventeen-year old should know what a penis is. He was pointing at his penis and saying he was cut on the bottom. We were trying to clarifying what it is he was talking about. (R 1051)

In the recorded statement Jessie was asked if he would be willing to go to the crime scene and let him point things out to us. We did not do that because of time. We did not give him a confirmation polygraph test. I can not tell you why. We were busy that night. I thought it was very important for us to get arrests done and searches done.

I know that portions of the statement are false. No attempt was made at that time to look into Jessie's alibi. When Jason Baldwin's parents talked to me June 4, 1993, I told them we would check into Jason's alibi and determine if it was true. I may have said, "All we want to do is talk to Jason and if he tells us where he was and his alibi checks out, he's a free man." (R 1053) [Officer Ridge's hand written notes are admitted as Defense exhibit 3.]

I am not familiar with portion of the Police Officer's Bill of Rights that requires that anytime the police officer is interrogated that only one officer can interrogate him at one time, or the provision that states anytime a police officer is interrogated the entire interrogation has to be recorded from beginning to end.

MR. FOGLEMAN: Your Honor, I object --

THE COURT: What has that got to do with anything is what I want to know. (R 1054)

MR. FOGLEMAN: Even if that were applicable, it wouldn't make any difference, your Honor. That is a voluntary statute. That does not apply to every police officer. It depends upon whether the municipality or the law enforcement like the county government wants to adopt that or not.

MR. STIDHAM: Judge, it shows that police officers know enough to get a statute passed that protects themselves from each other and it shows it is a violation

of the equal protection clause of the United States Constitution that police officers have a right to have the entire interrogation process recorded.

THE COURT: I don't want to hear anymore. It is totally inapplicable to this situation. You can argue that all you want. (R 1055)

CONTINUING CROSS EXAMINATION OF OFFICER BRYN RIDGE:

I was not in the building when Jessie Misskelley's polygraph test was administered, I had gone to lunch. (R 1055)

REDIRECT EXAMINATION OF OFFICER BRYN RIDGE
BY MR. FOGLEMAN:

I did ultimately talk to Misskelley's employer and determined that Jessie was wrong when he told us that he was working that day. (R 1057) Misskelley told us that he had gotten a phone call from Jason and that he had gotten a telephone call at night. He said, "I went home about noon. Then they called me at 9:00 that night. They called me." (R 1058)

GARY GITCHELL

DIRECT EXAMINATION OF INSPECTOR GARY GITCHELL
BY MR. FOGLEMAN:

My name is Gary Gitchell and I am the Inspector for the West Memphis Police Department Criminal Investigation Division. Ridge and I interviewed Misskelley. During the interview I did not use any force, promises, threats, or

coercion to get the defendant to do anything or make any statement. When we first began interviewing him, that portion of the interview was not taped. (R 1059) We did not know what would come out of the interview. The reason for us bringing him in was that we thought he could give us some assistance in the case. During the course of the interview, I walked out of the room for a moment to get a picture and a cassette recorder and a tape that I put into the recorder. I first wanted to show him this picture just to see what kind of response I would get. The picture I am referring to is State's Exhibit Twelve depicting one of the victims' body. (R 1060) Upon viewing the photograph, Misskelley immediately went back into the chair, and he just grasped the picture and kept holding it. He would not let go of the picture. This occurred perhaps an hour and a half or two hours after we began the interview. (R 1061)

After I showed him the picture, I played this portion of the tape for him.

MR. STIDHAM: I'm concerned about why we didn't get a copy of this in the discovery or any reference to it.

MR. FOGLEMAN: Well, as far as a copy of it, you have got a transcript of the tape.

MR. STIDHAM: Transcript of the tape?

MR. FOGLEMAN: Of the whole tape.

(The witness then plays that portion of the tape.)

CONTINUING DIRECT EXAMINATION OF INSPECTOR GITCHELL
BY MR. FOGLEMAN: The tape says, "Nobody knows what happened but me". After I played that short portion of the tape, the defendant immediately said, "I want out. I want to tell you everything." Detective Ridge left the room shortly after that to get a recording device. Jessie then mentioned that he was in the woods and that he started crying in the woods. This was not the day of the murders, but this was a couple of weeks afterwards. (R 1064)

Misskelley then told us that he was present when the murders occur. There were no force, promises, threats or coercion used to get Misskelley to say this. We then advised him of his rights a third time and begin the tape. (R 1065) The taped interview ended at 3:18 p.m. Subsequently I went back and obtained some further information from the defendant. It was about 5:00 p.m. when the second statement was made. I was going back and forth to clear up some questions from the original interview. (R 1066)

(THE COURT THEN LISTENED TO A PORTION OF THE FIRST RECORDED STATEMENT OF THE DEFENDANT AND THE ENTIRE TAPE OF THE SECOND STATEMENT OF THE DEFENDANT)

FIRST STATEMENT OF JESSIE MISSKELLEY, JR. 6-3-93

[ABSTRACTOR'S NOTE: Appellant contended at the Suppression hearing,

and at trial, that the statements he made to the West Memphis Police Department on June 3, 1993, were false and involuntary, as demonstrated by the leading nature of the police questioning and the fact that the appellant did not provide a narrative of the events. Appellant has abstracted these statements below, pursuant to Rule 4-2 (a)(6) of the Rules of Supreme Court. Appellant submits that the overall view of these statements affect the credibility of the statements, and as such, cannot be adequately abstracted in words. Pursuant to this Court's ruling in Bank of Ozark v. Isaacs, 263 Ark. 113, 563 S.W. 2d 707 (1978), Appellant hereby attaches a photostatic copy of said statements at page 479 of his Abstract so that the Court may obtain a clear overview of said statements.]

My name is Jessie Misskelley, Jr. On May 5, 1993, I received a phone call from Jason Baldwin early in the morning. He called me and asked if I wanted to go to West Memphis with him, and I told him no, that I had to work and stuff. He then told me that he had to go to West Memphis with Damien Echols. They went to West Memphis and I went with them. Yes, it was about 9:00 a.m.

We walked to Robin Hood Woods behind Blue Beacon Truck Wash. When I was there I saw Damien hit this one boy real bad, and then he started screwing them and stuff. Michael Moore was the boy that Damien hit. No, (looking at newspaper photos of boys provided by police) I mean Chris Byers. Damien hit him

in the head with his fists and bruised him up real bad. Then Jason turned around and hit Steven Branch.

Then the other boy, Michael Moore, took off running, so I chased him and grabbed him until Damien and Jason got there, and then I left. When all three boys were back together, I was standing up there by the service road. I was in the woods when

Damien hit the first boy. All three boys were tied, they had there clothes off whenthey were tied. Damien and Jason took their clothes off after they beat them up. After they took their clothes off, theytied up their hands and then they (Damien and Jason) started screwing them and stuff, cutting them and stuff. I sawthis, then I took off running, and went home. They called me later and asked me why I didn't stay, I told them I justcouldn't. I couldn't stand to see what they were doing tothem.

I saw Jason cut one of the little boys with a knife. He cut one of them in the face and another one at the bottom.

Yes, I mean in the groin area. Yes, I know what a penis is,
that is where he was cut at. Yes, (looking at police photo
of the Byers boy) that's the boy that was cut at the bottom.

I seen Jason cutting him real close to his penis, I seen some blood, and that's when I took off. Yes, I was close to the creek at that point.

It was noon when the boys were killed. The boys skipped school that day. They were going to catch their bus and stuff, and then they were on their bikes.

Damien had been watching the little boys before the day they were killed. Damien had a group picture of the boys in their houses. I seen this one picture at a Cult meeting.

Yes, the little boys skipped school that day. Damien and them left before I did, I met them down there and stuff early in the morning. I got there about nine in the morning.

I left and went home about noon, and they called me about nine that night. They asked me why I left so early and stuff, and I told them I couldn't stay there and watch that no more. Jason was the one that called me. I could hear Damien hollering in the background saying, we done it, what are we going to do if somebody saw us?

I was there until they tied them up, then I left. They laid the knife down beside them and I saw them tie them up. That's when I left. The boys were unconscious. After I left, they done more to the boys. They started screwing them again.

When I saw them, Jason was sticking his thing in one little boys mouth, and Damien was screwing one of them up the ass and stuff.

Yes, only their hands were tied, they couldn't run off because they were beat up so bad they could hardly move.

Yes, Damien did hit the first one with a big old stick.Yes, Jason's knife was about six inches long, and it was a folding knife. No, Damien did not have a knife or a briefcase that day. I did see them with a briefcase before out at Lakeshore. Yes, I saw that picture in the briefcase, I think when we had that Cult.

I have been in that Cult for about three months. We go out and kill dogs and stuff, and then we carry girls out there to have sex. We have an orgy. We usually skin the dogs and make a bon fire and then eat the dogs, the meat off their legs. If you don't eat the meat, you don't get in the Cult. There was never any violence at the meetings.

The day the boys were killed, we were playing in the water. The boys didn't get into the water. Damien seen them and he hollered for them to come over there.

I don't think I would have no problem out of it. (Going to the scene to point out where these things took place) I didn't hit or rape any of these boys. I didn't kill any of the boys. I (pointing to the police picture) saw the Byers get killed. Damien choked him real bad with a big old stick.

Yes, he choked him until he was like dead. I don't know if the other boys were actually killed while I was there or not. On the way home, I was running. I got sick and threw up.

I didn't get close to the boys, and did not have any blood on my clothes. Jason was wearing blue jeans and army like boots. Jason was wearing a "Metallica" shirt. Damien had on black pants, boots and a black shirt. Jason's blue jeans had holes in the knees. I was wearing my Adidas tennis shoes and a white tee shirt.

I was home about thirty minutes or an hour when I got the phone call from Jason. Jason and Damien have not talked to me since this happened. Damien did not know about the guy I seen behind the Goodyear place, that I told the police about.

I think they (Damien and Jason) are sick, they out to be put away for awhile. I didn't come forward with this information because I was scared.

SECOND STATEMENT OF JESSIE MISSKELLEY, JR. 6-3-93

I would say it was about five, or six when the little boys came up to the woods. I didn't have my watch on at the time. Yes, I told you earlier it was seven or eight. It was starting to get dark. Damien and Jason and I got there about six.

I was wearing a white shirt with a basketball deal on it. I had some Adidas tennis shoes. Buddy Lucas has these shoes now.

Damien tied the boys up and Jason helped him. They used a brown rope to tie up the boys.

The Byers and the Branch were raped by Damien and Jason. Damien raped the "Byers" and Jason raped the Branch. Damien and Jason had oral sex with the boys, Branch and Byers.

They kept the boys quite by putting their hands over their mouths, and sticking Damien's shirt in their mouths. They also stuck their things in their mouths. I didn't see Damien or Jason suck the little boys things. No, I didn't see them pinch the little boys penis. Yes, they were putting their things in the two boys mouths and holding them by their ears.

VOIR DIRE OF OFFICER GITCHELL, BY MR. STIDHAM:

There is not a gap in the tape, the sound you hear is (R 1069) the tape being turned off. I turned it off and walked out of the room. I walked back and forth in the room because I was conferring with Mr. Fogleman then returning. The tape was turned off every time I went outside the room. I was outside the room probably just minutes. (R 1070)

CROSS EXAMINATION OF INSPECTOR GARY GITCHELL

BY MR. STIDHAM:

I did not show Mr. Misskelley any other photograph then the one I mentioned previously in direct examination. (R 1071) I am not positive exactly what time we began recording the second tape I think it was about 5:00 p.m. I did

not talk with him until I went back in on the second tape to ask some specific questions after conferring with the prosecutor. That is the only time I went back to talk to him. After those questions were answered, I never went back and talked to him again. Sometime after 3:18 p.m., I meet with John Fogleman, the Prosecuting Attorney. (R 1072) Each time that I turned the tape recorder off during the second interview I went outside the room and talked to Mr. Fogleman. Mr. Fogleman may have told me that there were some questions that we needed to get cleared up. This was at about 5:00 p.m. (R 1074) There are three gaps in the second tape. In the first taped interview, I was not really shocked when Jessie told me that the boys were tied up with a brown rope. We found them tied with shoe strings. It did bother me that Misskelley got this information wrong, but they could have been tied another way before they were tied that way. (R 1075) When Misskelley told me that they were tied up with a brown rope I did not show any concern in my voice, I glossed over it like it was no big deal. (R 1076) There is a picture of the victims with there names underneath their photographs on the wall in the office. Jessie pointed out on this picture which victims he was referring to. That is my writing on the top of the picture. (R 1076)

(THE PHOTOGRAPH WITH THE NAMES AND PICTURES OF THE VICTIMS IS INTRODUCED INTO EVIDENCE AS DEFENDANT'S EXHIBIT NUMBER 5)

CONTINUING CROSS EXAMINATION OF INSPECTOR GARY GITCHELL

BY MR. STIDHAM:

I did not take any notes during the first taped interrogation. I wanted to concentrate on what Jessie was doing or saying. I am not sure whether I played the tape where the little boy says, "I'm the only one who knows what happened" first or showed Jessie the circle with the dots. I think the sequence was the diagram, then the picture of the body, and then the tape. After looking at the picture, and the diagram and hearing the tape Misskelley said that he wanted out. (R 1077) It was a circle with people on the inside and police outside. (R 1078) I do not believe that I put three dots in the circle and said this is you, Damien and Jason. I could have done it that way but I do not recall doing it that way. The dots on the outside of the circle indicate police officers. (THE DIAGRAM THAT INSPECTOR GITCHELL DREW DURING THE INTERROGATION OF JESSIE MISSKELLEY JUNIOR ON JUNE 3, 1993, WAS ADMITTED INTO EVIDENCE AS DEFENDANT EXHIBIT SIX)

The second taped statement starts out with me saying, "You told me earlier that this happened at 7 or 8 p.m." I believe that he told me this earlier during the first taped statement. (R 1082) I do not know exactly when it was that he and I had talked about this earlier. I was thinking it was during the time we interviewed

him. If we did not talk about it during the first taped interview then it must have been prior to the taped statement that Ridge and I did, the first taped statement. I do not know when for sure when we talked about it earlier. I am not sure whether we talked about it between the first recorded statement and the second tape recorded statement. To answer that honestly, I am not sure. (R 1083)

I did not take Jessie out to the crime scene because I was afraid the news media may see him. We did not want Jason and Damien to know what was going on. It was a security risk to us. I did not think to leave the tape recorder on at the end of the first interview and clear up the inconsistencies in his statement. (R 1085) It was not until I talked to Mr. Fogleman later, that I realized that I needed to clear up some things. (R 1086)

DEFENDANT'S MOTION FOR DIRECTED VERDICT AS TO SUPPRESSION OF THE STATEMENTS

Mr. STIDHAM: Your Honor, we'd asked the Court to suppress this statement based on testimony of the officers and feel like the state has not meet its' burden in establishing that this was a voluntary statement. There's testimony by Officer Allen that he could not remember for sure about whether or not a thirty thousand dollar reward was given. The polygraph test apparently frightened Mr. Misskelley. And showing him a picture of a body obviously frightened him. Playing a tape that he did not know anything about obviously frightened him.

Showing him this diagram and asking him to come out of the circle obviously was an offer of reward (R 1086) or leniency. And we submit that the State hasn't met its burden of proof.

THE COURT: Your motion is denied.

(PRIOR TO THE TESTIMONY OF WARREN HOLMES THE FOLLOWING CONFERENCE TOOK PLACE AT THE BENCH)

MR. DAVIS: If they are putting the polygraph expert on to go through in terms of reviewing charts and rendering an opinion as to what the charts show and - this man is also, as I understand it, at least theoretically an expert in the field of interrogation -- I don't know if that's the reason they're putting him on. But if they are putting him on to say, "These charts indicate this," we would be objecting --

THE COURT: I'm not going to allow a witness to speculate on whether or not the machine was correct or the interpretation of the readings were incorrect. That's just not an issue. It's not admissible --

MR. STIDHAM: Your Honor, it is in issue.

THE COURT: No, it's not.

MR. STIDHAM: Have you had an opportunity to review our brief in this regard?

THE COURT: Yeah, sure have. (R 1089) And it is going to be my finding that I'm not going to allow anyone to speculate on the machine's results or whether or not it applies to guilt or innocence or whether or not the person was truthful or deceitful. I will, however, allow testimony about the polygraph and whether or not that polygraph could have induced a person to make a statement that they would not have otherwise made.

But to allow one expert to refute another one on whether or not the results of the polygraph were accurate or how they interpret them when the results themselves aren't admissible under any circumstances.

MR. STIDHAM: We are talking about the voluntariness of the confession, and the issue is not so much -- Your Honor, our argument is twofold: First, that is should be offered for any purposes because it goes to the totality of the circumstances. In other words the witness, assuming that he is going to testify, that there's no indication of deception on any of the charts. He should be allowed to testify to that so the Court can determine the totality of the circumstances regarding this confession. Tanner vs State, the ALR citation, your Honor, sets that forth very, very clearly. (R 1090) And when you analyze that with Patrick vs State and Rock vs Arkansas, it becomes clear that any evidence tending to show the

innocence of the accused is admissible not only at the suppression hearing but also at the trial itself.

Your Honor, we would submit that this testimony is of vital importance to determine whether or not this statement as given by Misskelley, both statements, are voluntary and therefore admissible.

THE COURT: Tell me real short and in a concise sentence what it is you expect this expert to testify to.

MR. STIDHAM: I expect him to testify pursuant to his report which indicates that after review of the polygraph charts, there were no indications of deceptions whatsoever.

THE COURT: In other words you want him to testify in his opinion that the accused was not showing deception.

MR. STIDHAM: That's one of the things --

THE COURT: -- that's totally and completely irrelevant and inadmissible. (R 1092) My ruling is that the results of the polygraph test are not admissible evidence and therefore, no expert -- state or defense -- is going to be able to testify to the veracity of the polygraph machine because it is not accepted in this state as credible evidence and I won't accept it one way or the other. I don't care whether he says he was telling the truth or whether he says he was lying.

MR. STIDHAM: We would like to make an offer of proof regarding this and also for economy reasons we would (R 1092) like to make an offer of proof as to what he would testify at the actual trial itself and submit a transcript of that --

THE COURT: I'm not barring his testimony. He may have something --

MR. STIDHAM: -- that will be barred.

MR. CROW: As to our arguments I would request that the Court make my brief I wrote as part of the record.

THE COURT: It is part of the file.

MR. CROW: All those issues were raised, and I do not want to waive any issues that may have been argued in this brief exchange. All those issues were raised, and I don't want to waive any issues that may have been argued in this brief exchange.

WARREN HOLMES

DIRECT EXAMINATION OF WARREN HOLMES
BY MR. STIDHAM:

My name is Warren D. Holmes. (R 1093) I am a polygraph examiner, I am a graduate of the Keller Polygraph Institute in Chicago, graduated there in 1955. I was with the Miami Police Department from 1950 to 1963. I left as a detective sergeant in charge of the Lie Detection Bureau to open up my own business. I am

a charter and life member of the American Polygraph Association, a charter and life member of the Florida Polygraph Association, a former president of the Florida Polygraph Association, a former president of the Academy of Scientific Interrogation, which is the predecessor name to the American Polygraph Association.

I was a consultant to the United States Senate on Assassinations. I lecture putting on interrogational seminars for the F.B.I., the C.I.A. and other government agencies. I have lectured ten years at the Canadian Police College on homicide interrogations and investigations. I lecture each year at the Department of Public Safety of Texas, the Texas Rangers, and I conduct interrogational seminars throughout the United States, ten to fifteen a year. I conducted polygraph examinations on the assassination of President John F. Kennedy and the assassination of Doctor Martin Luther King. (R 1094) I also worked on the Watergate investigation, and also worked on the William Kennedy Smith case. I have been qualified as an expert on the subject of polygraph examinations many times primarily in the State of Florida. I have been qualified as an expert in the area of police interrogation techniques many times. I have worked on many cases involving false confessions. I have administered polygraph examinations to a little over twelve hundred people who were suspected of the act of murder. I have taken

hundreds of murder confessions. (R 1095)

I have taken several false confessions. (R 1096) There are things that an interrogator should look for when receiving a confession from a suspect that might indicate that the suspect is falsely confessing. The first thing that they should look for is if the confessor does not tell you anything that you do not already know. (R 1097) Secondly, what they say to you during the confession does not jive with the crime scene analysis or the physical evidence or any investigation that has been done up to that point.

Number three, if they don't relate it in a narrative form. What happens just preceding a confession is a factor of resignation that comes over the individual, he then expunges all of these thoughts from his head, and he enters into an emotional release in a narrative form. You do not have to question him because he wants to get it off his chest. What you see is that relief and remorse at the moment of the confession and their emotions match their words. They relive some of the sensations at the time of the crime, they can lead you to the fruits of the crime or they can lead you to the weapons. And, if the confession is really valid, they will offer some incidental detail which lends credibility to their story.

Maybe they'll say, "At the time we were doing this some man was walking his dog off in the distance," or, "Just at the precise moment I was doing this there

was an automobile accident," and later you will find out that actually occurred. You look for those incidental details they can offer. If it is a valid confession you can make a supposition and you are wrong, they will tell you that you're wrong. They'll answer every question directly. You don't have to correct them if there is a contradiction in what they have to say. You do not have to lead them in any way. (R 1098) What they say makes sense. If these factors are not present, their are serious misgivings as to the validity of the confession.

After about the fourth hour of an interrogation, you have got to be very careful that the person just does not enter into this resignation and just say anything. You can not tell the defendant key details of the crime. You must be able to weigh whether or not what he tells you is commensurate with the case facts as you know them. I am talking about corroboration of the confession. You have got to have something that only the guilty person would know outside the investigators. (R 1099)

I have had an opportunity to examine the statements of Jessie Misskelley Junior to the West Memphis Police Department on June 3, 1993. I have identified several of those factors we have just discussed that raise concern in my opinion. I am concerned that he is wrong on two major points, the time factor and what the boys were tied up with. Misskelley has either uttered a totally false confession, or

he has contrived a confession with false information that he intends to recant at a later time. I do believe he has done the latter, due to his IQ level, he is not that duplicitous. I do not like that he does not contribute any conversation during the crime to the boys. I do not like that he does not express any feelings about the crime, how he felt at the time, how he feels now. I do not like the fact that he is giving wrong information about the ligature which should absolutely stand out in his mind, and I do not like the time factor. Despite his IQ level, he should know the difference between 9:00 in the morning and 5:00 p.m. and he should know the difference between a rope and shoelaces. (R 1100)

A polygraph examination can contribute to a false confession. With some people it is a last hope, they think if they pass the test the officers will let them go. When they are told that the test indicates they are lying, their will is beaten, and they just give in. It is very important that the polygraph examination be conducted properly. It is particularly important when you are dealing with people with certain personality structures. You get somebody of a low IQ and highly susceptible in personality structure who is concerned only with the immediate situation of getting home rather than the long term consequences of what he has to say. They always think that they can straighten it out at a later date. They do not realize what they are doing. They become an agent of their own victimization.

MR. STIDHAM: Your Honor, at this time I would like to ask again that Mr. Holmes be allowed to be qualified as an expert in the area of polygraph examinations and he be allowed to testify with regard to his conclusions about the test that was given to Jessie Misskelley by Officer Durham.

(R 1101) If the Court is not going to consider that in the totality of circumstances with regard --

THE COURT: I am going to let him testify in this hearing, but unless my mind is drastically changed by something other than what I've seen or heard so far, the results of the polygraph are not admissible by a witness for the defense or a witness for the State. It is simply not credible evidence. The device is extremely fallible, particularly with people who are of borderline mentality as to whether or not they may even be able to completely lie or they may be completely truthful. The machine is just simply not that sophisticated, and it depends on an individual's interpretation. No court that I know of other than under special circumstances has allowed the results in court as far as the truthfulness of the subject. They may be admissible for other reasons but certainly not as to the validity of the test.

MR. STIDHAM: Your Honor, again our argument was two- pronged. We thought it would be admissible for the truth of the matter asserted.

THE COURT: Well, no, your whole theory is you can find some guy to

come up and say that the test was deceptive and, therefore, if the test was deceptive, that the tactics used were misleading and that it (R 1102) induced a false confession. I understand your theory. It's a pretty good one, I guess. I'm going to allow you to go ahead for this hearing.

CONTINUING DIRECT EXAMINATION OF WARREN D. HOLMES BY MR. STIDHAM:

I have had an opportunity to examine the polygraph test that was performed on Misskelley on June 3, 1993. Durham indicated he thought there was deception at the points in the graphs where the pertinent test questions were asked. I have the contrary opinion. I did not feel that at the point where the pertinent test questions were asked that the defendant was deceptive in nature. This was an ideal case for a peak of tension test where you set up a series of questions where one is the key detail, and in this case there should have been a peak of tension test regarding the way the boys were tied (R 1104) and regarding the location of the clothes. Among experienced examiners, particularly in murder cases, peak of tension tests are held in the highest esteem. (R 1105) The primary pertinent question was too generalized in nature. Once they got this alleged confession and details wrong, they should have preformed a confirmation test. This would see if he had made it. (R 1106)

If a polygraph examiner did not interpret the test results properly, this might cause the interrogator to become more assertive and produce a false confession. It is a catalyst. If the examiner goes out and says this guy is deceptive, he is involved, that gives them the enthusiasm to be more assertive. In my opinion Durham failed to properly interpret the results of the polygraph test. (R 1107)

It is important when your trying to corroborate a confession that you find things independent of the confession linking the suspect to the crime. To find something that only the killer would know, some piece of physical evidence, some witness that he has that knows that he did it or confessed to. That disturbs me about the defendant's confession. They should have taken Misskelley to the crime scene. That is the first thing you do. In this case there was some dispute as to what side of the creek he was on, where he was standing, where the banks were. That could have been resolved if he had been taken to the crime scene.

(THE REPORT OF MR. HOLMES REGARDING THE POLYGRAPH EXAMINATION GIVEN TO JESSIE MISSKELLEY ON JUNE 3, 1993, IS ADMITTED INTO EVIDENCE) (R 1108)

CROSS-EXAMINATION OF WARREN D. HOLMES BY MR. DAVIS

Yes, I have lost my objectivity in regard to this case, I do not think Misskelley is involved. The reason that I stated that I had lost my objectivity in

this case is because I had a feeling that the Judge was going to ask me if I wanted to test Misskelley, and I was going to say that I have already lost my objectivity. (R 1110) I testified earlier it is important in determining the truth of a confession that they, the confessor, sound and look like they are telling the truth. A person that is in the best position to determine that they sound like they are telling the truth, is the person taking the confession. I was not there when this confession was given. (R 1110) I have not heard the officers testify. I have received some of their investigative reports from Attorney Stidham, and I have seen the original polygraph charts. I also read a copy of the confession in formulating my opinion. I have not heard the tape of the confession where you can hear the defendants voice.

MR. STIDHAM: Your Honor, they trying to impeach him on the fact that the Court would not permit him to stay in the courtroom and listen to the testimony of the officers. I asked for permission for the experts to be allowed to remain in the courtroom, and Dr. Ofshe was the only expert who was allowed to remain in the Courtroom. (R 1111) Mr. Holmes was not allowed to stay in the Courtroom and they are now trying to impeach him on that.

THE COURT: Overruled. (R 1112)

CONTINUATION OF CROSS-EXAMINATION OF WARREN D. HOLMES

BY MR. DAVIS: My opinion regarding the polygraph examination given to Misskelley on June 3, 1993, is based on my review of the polygraph charts and reports. A polygraph is a measure of physiological responses to stimuli. It measures the symptom of the act of lying. Sometimes lying does occur when there is no physiological response. (R 1112) Durham is the one who gave the exam, but like myself he was not present when the defendant gave the confession to the other investigators. The peak of tension test is the test that should have been conducted. (R 1113)

I would expect an extremely emotional reaction once a defendant confessed. You would expect an emotional relief. (R 1115) In a valid confession they would see relief, not anxiety or frustration. When a person confesses, they get it off their chest they go into a serenity they have not experienced in a long time. They are glad it is over with and there is a tranquility and peacefulness to their demeanor that would not have precluded conducting a second polygraph examination. (R 1116)

MR. STIDHAM: Your Honor, assuming from the Court's ruling that there's a possibility that you will not allow him to testify at the jury trial which begins next week --

THE COURT: He can certainly testify to a great deal about what he testified to here today. The only problem I have is with the results, either affirmative or negative, of a polygraph exam being introduced; (R 1118) that is, whether he passed or failed. All you have got here is two people who have differing opinions on the test that was given, that have differing opinions on the test questions on a device that is not very scientific.

MR. STIDHAM: Will I be permitted to make a proffer?

THE COURT: You just did make a proffer. But the thing is, there's a number of things -- I think he could probably qualify on investigations and that part of his testimony about -- certainly his experience. That might be useful, relevant testimony. I'm more concerned about two experts getting up and saying, "This is what I found," particularly in an area that most courts view as very unscientific in the first place. So the results I'm not going to allow, but a great deal of his testimony is interesting and perhaps beneficial to you, and I would allow it so you just have to make a decision whether you need him at the trial, which I will

allow his expertise with regard to the investigative questioning techniques that were employed. (R 1119)

JESSIE MISSKELLEY SR.

DIRECT EXAMINATION OF JESSIE MISSKELLEY, SENIOR

BY MR. STIDHAM

My name is Jessie Lloyd Misskelley, Senior and I'm the defendant's father. I remember on June 3, 1993, coming into contact with Detective Mike Allen. I was at work down at the shop and Jim McNease and I met him at the door. Mike Allen told me he wanted to asked Jessie some questions about Damien Echols. I told Officer Allen that was at Vicky Hutchison's house. I went to Vicky's house and got Jessie. He got into the car with Mike Allen and they left. Officer Allen did not explain to Jessie any rights. He said he just wanted to ask him some questions. (R 1120) I do not remember Detective Mike Allen saying anything about the thirty thousand dollar reward at the shop, but my boss said he did. I left the shop after they left. Later that day I was in the wrecker going after some parts when they pulled up beside me going down Missouri Street. Officer Allen said he had been trying to find me. Officer Allen and Jessie both got out of the car laughing and joking. Allen said he wanted Jessie to take a polygraph test, and that if he got a conviction out of it Jessie would get the forty thousand dollars. Jessie said that he

was going to buy me a new truck with the forty thousand dollars. I signed the waiver for him to take the polygraph test and they left.

JAMES MCNEASE

DIRECT EXAMINATION OF JAMES McNEASE BY MR. STIDHAM:

I am Jim McNease. I own my own business here in Marion and I am also employed with the Union Pacific Railroad. I was at my place of employment on June 3 of this year. That is the day that Mike Allen came to my shop and I met him at the door. He asked to speak to Jessie Misskelley Senior. I remember Mike Allen saying something about a reward and telling Jessie Senior that if Jessie Junior testifies maybe he will get the thirty thousand dollars. Mike Allen, Jessie Senior and myself all laughed about it. (R 1122)

CROSS-EXAMINATION OF JAMES McNEASE BY MR. DAVIS:

I was the one who brought up the thirty thousand dollar reward and Officer Allen smiled and nodded his head about it. (R 1123)

ARGUMENT AS TO THE DEFENDANT'S MOTION AND AMENDED MOTION TO SUPPRESS STATEMENTS GIVEN BY THE DEFENDANT TO THE WEST MEMPHIS POLICE DEPARTMENT.

MR. STIDHAM: Your Honor, at this time we would like to rest in regard to our Motion to Suppress. Again we would submit that since we were not able to determine the facts of the case today until we have had an opportunity to discuss

this with the officers under oath, we would like to have an opportunity to brief the facts as they apply to the law (R 1124) and submit that to you by letter or fax or Federal Express and ask you to withhold your opinion with regard to the motion to suppress and the amended motion to suppress until we can get that to you in the next twenty-four hours. That would also give the State an opportunity to brief the law in that regard if they so choose and we've been at a disadvantage with regard to knowing --

MR. DAVIS: Judge, it is the State's position there's no need for briefs. It may be a serious case but as far as the issues are concerned, they are like any other confession case, whether he intelligently and knowingly waived his rights and whether it is a voluntary statement. It is the State's position that the evidence is abundantly clear that in fact it was a knowing and intelligent waiver and voluntary statement.

MR. STIDHAM: We'd like to have an opportunity to argue the facts as they pertain to the law in this case. (R 1125) MR. CROW: Your Honor, there is a separate brief that

has not been filed yet that deals with the issues that we thought would be coming out today. As it turned out, some of the issues did not come out today. I need to modify my brief before I can file it. In no event did I apply the facts to the law as I

briefed it because I did not have the facts. I didn't know what facts would come out. (R 1126)

THE COURT: I'm not telling you I won't. I'm prepared to make my ruling now. If you think you can brief it and change my mind, I'll change my mind. I'm not -- MR. STIDHAM: We'd like you to consider it --

THE COURT: -- in granite.

MR. STIDHAM: If you're going to make your ruling now --

MR. CROW: I would like to --

THE COURT: -- if either one of you want to make a short argument.

MR. STIDHAM: Your Honor, you heard testimony from Doctor Wilkins about the low IQ and all we're asking for is an opportunity to submit a brief that will argue the law with regard to admissibility of confessions the way the facts came out today. I don't know see how the State would be prejudiced by us submitting a brief to that effect.

THE COURT: I will give you until tomorrow afternoon to have the brief submitted to me.

MR. CROW: Your Honor, I would expect an objection -- I would ask the Court to take judicial notice of the IQ and mental capabilities of our client due to the previous testimony.

THE COURT: I'm well aware of that. (R 1128) I have several hearings on it. Yes. I'm aware of that and I can't throw it out of my mind when I make a decision so in that regard I will certainly consider his mental capacity which I've already ruled on. (R 1129)

(ABSTRACTOR'S NOTE: The Court accepted the brief submitted by the defendant's attorneys, and which has previously been abstracted herein and is part of the record at R 385. The Court entered an Order denying the defendant's motion and amended motion to suppress the statements which the defendant gave to the West Memphis Police Department, said Order is a part of the record herein having previously been abstracted, and is found at R 433.)

(ABSTRACTOR'S NOTE: The Defendant has previously abstracted the Defendant's Brief on Admission of Polygraph Evidence which is found in the record at R 379. The Defendant's Motion and Amended Brief on the Admission of Polygraph Evidence at trial is found in the record at R 422.)

ARGUMENT WITH REGARD TO THE ADMISSIBILITY OF POLYGRAPH

EVIDENCE AT TRIAL

MR. STIDHAM: Your Honor, the Arkansas Courts, the Federal Courts and the United States Supreme Court has held that it is vital for the defendant to be able to explain to the jury the issue of voluntariness and some of the case law that I have cited in my brief yesterday with regard to this issue is very, very compelling. Kagebein which is an Arkansas Supreme Court decision, deals with the issue we just disposed of. The Crain case, which is a United States Supreme Court case, and some of the language in that case is very powerful and if you limit the defendants right to tell the jury about the polygraph exam and the results of the exam, you are restricting his power to describe to the jury the circumstances that prompted his alleged confession and the defendant is effectively disabled from answering the one question that every juror needs answered. If the defendant is innocent, why did he previously admit his guilt. That is very compelling and right on point. (R 1141)

THE COURT: You are wanting to use third persons to testify for him. Are you wanting to put him on the stand and let him say they had overridden my voluntariness and forced me to do it, fine. It wouldn't have been admissible at trial, but the thing that bothers me is that you want to get into a contest between two (2)

polygraph examiners as to which one of them was more accurate.

MR. STIDHAM: That is for the jury to determine.

THE COURT: No, it is not because in my estimation polygraph testimony is unreliable and has never been accepted as reliable in any court other than by consent of the parties. What you are proposing to do is to have two polygraph examiners get up and quibble about who is right and who is wrong and assuming that the jury would believe your man is right, that they falsely accused him of lying and that, therefore, he made a statement. I'm willing to let you put on proof that a polygraph was administered (R 1142) and after the polygraph he was told that he failed and after that he made a statement if that's what you want to do.

MR. STIDHAM: That would be like saying our client flunked a polygraph and then he gave them a confession. Why would we want to tell them that? We need to tell them everything or nothing at all.

THE COURT: The results of the polygraph simply aren't admissible.

MR. STIDHAM: Why should the West Memphis Police Department be able to pick up a mentally handicapped kid, take him down to the West Memphis Police Department, hook him up to this machine, tell him he's lying his ass off and we cannot get up and challenge the credibility of the officer and challenge the

credibility of the test itself. That's exactly what the Court in Craine is talking about.

I believe the Minnesota decision is exactly on point. Also in the Leach case we have a very similar situation. We're talking about plea negotiations. In that case the defendant was told by the prosecuting attorney, "If you give me a statement right now, (R 1143) I won't charge you with capital murder." It is inadmissible to talk about plea negotiations in front of the jury. Yet, the Court reversed it and cited the Craine case.

THE COURT: That is promise or inducement. That is something totally different.

MR. DAVIS: Our big concern is those test results go to one of the ultimate issues that the jury is required to determine, credibility of witnesses. And it is putting it onto some scientific machine and giving them some sort of false sense of security in that this machine may be right or may be wrong, and it matches the qualifications of operators and polygraph experts when in reality it is unreliable, and it shouldn't be used for the jury to determine what witnesses are credible and which ones aren't.

MR. STIDHAM: Why should the police be allowed to use it to extract confessions, but we can't? (R 1144)

MR. FOGLEMAN: The Arkansas Supreme Court has ruled it is not permissible for some expert to get up there and say, "I believe so and so is telling the truth."

MR. STIDHAM: We're not asking for that.

THE COURT: That's what your man did, in a sense. He said he believed he was telling the truth when he said he didn't know anything about it.

MR. STIDHAM: All he said in his report is, "There was no indication of deception on the polygraph with regard to the questions concerning the homicides."

THE COURT: What does that mean?

MR. FOGLEMAN: It means he thought he was telling the truth. MR. STIDHAM: We are asking that you allow the expert to testify about his analysis of the case. But in the very least you should at least let him testify and show the jury thatin our opinion he passed it and, therefore, that is why hegave the confession. You could even offer a jury instruction to the effect that they are not to consider the evidence of the polygraph to prove innocence or guilt. All we're

trying to establish, Judge, (R 1145) is that was a catalyst to obtain the confession of the defendant. That is within the range of what the jury should consider. The Craine case, the Leach case, the Kagebein case all point and say--

THE COURT: Kagebein didn't have anything to do with a polygraph.

MR. STIDHAM: They didn't have anything specific to do with the polygraph, but the Tanner case did. And it specifically says that, "It is necessary in the question of voluntariness of statement made by Tanner which was submitted to the jury as to weight and credibility that three would be an explanation of what took place during the period of time the appellant was alone with the officer."

MR. DAVIS: There was never a polygraph exam given in that case. There were no results to discuss. The jury would never have been led to ask, "I wonder what the results were," because the only testimony was, "We were preparing him for a polygraph test when he confessed." So, therefore, you don't throw the skunk in the jury box and cause them to say, "I wonder what the results were."

MR. FOGLEMAN: There's also an Arkansas statute that says polygraph results are inadmissible. (R 1146)

MR. STIDHAM: When you consider the Rock and Patrick analysis that leads you back to --

THE COURT: I'm going to stick to my initial ruling that the results of the polygraph are not admissible either by the State or any defense expert. Any other purposes you can use him for like interrogation techniques. I'm going to allow you to do that.

MR. CROW: We are not going to put on evidence -- if that is the Court's ruling -- we are not going to put on evidence that he took a polygraph test and was told he flunked. Rule 37 would happen.

THE COURT: I noticed in one of the cases there that is exactly what they did. In that case the Court gave some kind of ruling about polygraph tests not being admissible, not having any -- I'm willing to do that if you want to do it from

that standpoint. MR. CROW: At this point in time we are not planning on doing that, your Honor. I think that would be tantamount to --that would cause problems.

MR. STIDHAM: You're saying if you instruct the jury to disregard this as to guilt or innocence, you'll let us testify about whether he passed or flunked?

MR. CROW: No, he'll let us put on evidence (R 1147) that he was given a test and that he was told he flunked.

THE COURT: You can give all the circumstances that go into the voluntariness of his confession.

MR. STIDHAM: Why would we want to tell them that he flunked?

THE COURT: No, I'm not saying you can tell them he flunked.

MR. CROW: We can tell them he was told he flunked.

THE COURT: Yes. Whether he did or not would be inadmissible.

`MR. STIDHAM: Why can't we just tell the jury everything and tell them the polygraph examiner told him he flunked --

THE COURT: You can tell him that. I'm going to tell thejury they are not to consider that because whether he passed or failed it is not credible evidence.

MR. STIDHAM: We'd ask for a ruling that no one talks about the polygraph.

THE COURT: That will be granted. The results of it.

MR. CROW: Or the fact that he was given one.

THE COURT: That's fine, too. (R 1148)

MR. STIDHAM: It makes no sense to tell the jury the prosecution stuff but not the defense stuff.

THE COURT: That's not what I'm saying. I'm saying you can tell them anything you want about it except the results of the polygraph. I'm not going to get into a swearing match between experts on the polygraph as to whether they passed or failed.

MR. STIDHAM: Are you ruling that --

THE COURT: I'm ruling that polygraph results by state statute and by every case law I know are inadmissible. Anything else you want to do I'm going to let you do.

MR. STIDHAM: Are you also ruling that it is not within the jury's, credence or within a jury's role to not determine the credibility (R 1149) of the confession and the credibility of the witnesses with regard to the polygraph?

THE COURT: I'm not ruling that at all. I'm ruling that the results of the polygraph, pass or fail, by either the operator for the State or the expert for the defense is not admissible. You can do anything you want --

MR. CROW: The only thing the expert for the defense could testify to is the results of the polygraph. I don't see any other way for him to testify about the polygraph exam that was given --

THE COURT: He can testify that is a tool used by officers to --

MR. STIDHAM: That would be implicating that he flunked it then.

THE COURT: As long as they don't testify to what the results were either way, I don't care what he says. So if you want to use his testimony in that regard, you can.

MR. STIDHAM: What you're saying is that the statute supersedes any of the defendant's rights --

THE COURT: I'm not saying that the statute supersedes any defendant's rights, not at all, not even close to what I'm saying. I'm saying you have got to determine what evidence you want to put in, (R 1150) and I'm not saying your expert can't testify. I'm saying there are many things he can testify to. But I'm not going to allow him to testify, "In my opinion the defendant passed the polygraph." I'm not going to allow the State's man to say, "We think he failed." If any of you bring that up, I'm going to give an instruction to the jury according to all those cases that you've briefed that the results of a polygraph are inadmissible, are inappropriate and that they shouldn't consider it. But anything short of that you want to use to show or suggest that his confession was other than voluntary, you can do.

MR. STIDHAM: You are considering the constitutional issues that we've put into our brief with regard to the Sixth Amendment and due process - you are considering those in making this ruling.

THE COURT: I hope he's getting due process now.

MR. CROW: At this point in time, we do not anticipate

-- I don't want to be foreclosed -- but we do not anticipate putting on evidence that he was given a polygraph and was informed that he flunked. With that in mind we request that they not be voir dired about polygraph, that the polygraph not be mentioned. (R 1151)

THE COURT: Let me make my ruling clear. I'm not saying that you're barred from mentioning the fact that he took a polygraph test and that by taking that polygraph test some way the officers removed his voluntariness or that they in any way affected his mental approach to his statement -- you can by inference or innuendo or however you want to do it through your expert suggest that, but the results themselves are not admissible. (R 1152)

ARGUMENT AS TO THE DEFENDANT'S MOTION IN LIMINE TO EXCLUDE PHOTOGRAPHS OF THE VICTIMS AND AUTOPSY PHOTOGRAPHS

MR. STIDHAM: Your Honor, we have also filed a Motion in Limine

asking to exclude photographs of the victims and autopsy photographs. I know that the Supreme Court has determined that those are relevant in showing wounds and things of that nature, but I would like to point out one thing that makes this case different from the others that I've researched. Our defense is that we were not there and even if you look at Misskelley's statement nowhere in the statement does he indicate that he did anything to the victims or hurt them or cut them or anything of that nature and, therefore, we should submit that (R 1175) the prejudice of showing these very horrific pictures is going to be very great and their probative value actually as to what was Misskelley's participation in this, if you choose to believe his statement, outweighs the probative value, and we would ask that no photographs of the bodies be admitted into evidence in that the Medical Examiner can describe those wounds to the jury and that would be sufficient.

THE COURT: I'm going to deny that motion. The Medical Examiner can use his photographs, use photographs taken at the scene, so long as those photographs are used to depict the type of injuries sustained, the location of the wounds, the possible weapon used. I will allow a sufficient number for the State to prove cause of death, method and motive and manner of death if necessary.

And I'm not going to rule on the picture until I

(R 1176) see them and they're submitted to me. So what you will do is tender it to the defense and then to the Court, and then I'll rule it is either admissible or not admissible. And my initial ruling is whatever is necessary for them to show the extent of the injuries I'm going to allow but not cumulative and duplicative type photographs.

ABSTRACT OF TRIAL

DANA MOORE

DIRECT EXAMINATION OF DANA MOORE

My name is Dana Moore. I live in West Memphis, Arkansas. I am the mother of Michael Moore. (R 1187) I arrived home on May 5th, 1993, about 10 minutes after Michael got home from school. I saw him riding his bike with Steve Branch. (R 1188) Later I saw Michael riding his bike with Chris Byers. (R 1189) At supper time I sent my daughter to go get Michael and bring him home for supper. When she couldn't find Michael, I went around the neighborhood looking for him. When he did not come back home later, I contacted the Police. (R 1192)

I meet with the officer at Mark Byers' house and reported that Michael was missing. (R 1193)

CROSS EXAMINATION OF DANA MOORE BY MR. STIDHAM

Michael got home from school on May 5th, 1993, at 3:00 in the afternoon. He did not skip school that day, and went to school the entire day. (R 1194)

PAM HOBBS

DIRECT EXAMINATION OF PAM HOBBS BY MR. FOGLEMAN

My name is Pam Hobbs. I am Steve Branch's mother. (R 1194) I was at work when I discovered that Steve was missing. (R 1195) My husband came and picked me up from work at 9:25 p.m. and we went and called the police. (R 1197)

CROSS EXAMINATION OF PAM HOBBS BY MR. STIDHAM

My son got home from school that day around 2:55 p.m. He did not skip school that day, and he was in school the entire day. Initially, I was very upset with the West Memphis Police Department, because I did not feel like they started searching for the boys when they should have. (R 1198)

REDIRECT EXAMINATION BY MR. FOGLEMAN

Prior to today, I did not know what specific injuries that my son had sustained. I did not hear any rumors or anything that were accurate as to what injuries the boys had. All I knew is that my son's face was messed up pretty bad. (R 1199)

MELISSA BYERS

DIRECT EXAMINATION OF MELISSA BYERS BY MR. FOGLEMAN

My name is Melissa Byers. (R 1199) On May 5, 1993, Chris went to school at Weaver Elementary. He did not skip school that day. The last time I saw Chris was on our carport at about 5:30 or 5:45 p.m. (R 1200) Prior to today I was not aware of the specific injuries that my son or the other boys had sustained. (R 1203)

CROSS EXAMINATION OF MELISSA BYERS BY MR. STIDHAM

My son did not skip school that day, and he was in school the entire day. (R 1203)

DEBRA OTINGER

DIRECT EXAMINATION OF DEBRA OTINGER BY MR. FOGLEMAN

My name is Debra O'Tinger. On May 5th, 1993, at about 6 p.m., I saw the three victims. (R 1206)

REGINA MEEK

DIRECT EXAMINATION OF REGINA MEEK BY MR. FOGLEMAN

My name is Regina Meek, and I am a police patrolman with the West

Memphis Police Department. On May 5, 1993, at around 8:00 p.m. I arrived at the residence of residence of John Mark Byers. I was advised that the last time anyone saw the boys they were headed toward the wooded area known as Robin Hood Hills. (R 1209) I drove down to the Robin hood Hills area and when I arrived it was getting dark. The weeds were extremely high and the mosquitos were tremendous. The mosquitos were so bad that every time I breathed, I breathed in mosquitos. (R 1210)

JOHN MOORE

DIRECT EXAMINATION OF JOHN MOORE BY MR. FOGLEMAN

I am John Moore and I am a patrolman with the City of West Memphis Police Department. On May 5, 1993, I was dispatched at approximately 9:25 p.m. to the Catfish Island Restaurant. After taking a report, I participated in the search for the three boys. I went into Robin Hood woods with a flashlight in search for the boys. (R 1212)

MICHAEL ALLEN

DIRECT EXAMINATION OF MICHAEL ALLEN BY MR. FOGLEMAN

My Name is Michael Allen, and I am a Detective Sergeant with the West Memphis Police Department. The morning of May 6, 1993, we had a meeting at

the detective division (R 1218) and we were informed of the missing youths. At some point during my search, I received a dispatch and was informed to go to the area at the end of West McCauley. (R 1220) Upon arriving at this location, I went into the woods known as Robin Hood Hills. I found a body in the water. I got back out of the water and another investigator showed up and called for Inspector Gitchell. The rest of the detectives came to this area and we conducted a crime scene search. (R 1222) State's Exhibit Twelve is a photograph of the first body that I'd discovered at the scene, the body of Michael Moore. (R 1225) The other two bodies were discovered down stream. (R 1226)

The bank on the Blue Beacon side of creek is a steep bank. On the other side of the creek there was a plateau or flat side. The flattened area of the bank looked clean. It appeared that it had been smooth, like watered down with a water hose. It was clean to be in that section of the woods. (R 1227) We searched the entire wooded area inch by inch. (R 1228)

CROSS EXAMINATION OF OFFICER MIKE ALLEN
BY MR. STIDHAM

When I first discovered the body, there were other people with me. Steve Jones, the Juvenile Officer, Denver Reed with the Search and Rescue, George Phillips with the West Memphis Police Department and Lieutenant Diane Hester of

the West Memphis Police Department. (R 1228) Later on that day there were some city employees out there with a pump removing water from the creek. (R 1229) I would say it is roughly two hundred (200) yards from the interstate to the bayou where the bodies were found. (R 1230)

REDIRECT EXAMINATION OF OFFICER MIKE ALLEN
BY MR. FOGLEMAN

The flattened off area that I described earlier, had very few leaves on it. It did not look like the rest of the woods looked. (R 1231)

ARGUMENT AS THE DEFENDANT'S MOTION IN LIMINE
TO EXCLUDE PHOTOGRAPHS OF THE VICTIMS

From R 1235 - 1245 the defense objected to photographs of the victims being entered into evidence.

MR. STIDHAM: Our concern is that one of the photographs of each of the victims depicting the condition of their bodies would seem to be sufficient. Duplicate photographs, which basically some of these are the same as these, and one of these is the same as have already been introduced by Officer Allen.

THE COURT: Refer to them by number. It looked to the Court as you were going through them that you are objecting to any view of the deceased bodies of any one of the three victims. All I have ruled is that you would have to object

specifically when it was raised. I wouldn't as a matter of a motion in limine preclude it. I'm assuming that the State can give a neutral reason for each photograph as a necessity in its case. If they cannot and you object, that's a different matter. So take them one at a time and we'll go through them.

MR. STIDHAM: State's Exhibit 17 depicts the victim Branch as he is removed from the water and is being placed on the bank of the creek. (R 1236) If that is the only photograph that they intend to introduce of the victim Branch -- our objection is we don't think it is proper for the State to introduce any of the pictures because their prejudicial value highly exceeds any probative value because the Medical Examiner and the officers who recovered the bodies can testify as to what the wounds in the body are. I think in a case involving children this area of prejudice is extremely magnified in it could tend to inflame the jurors and the courts have ruled that repeated photographs -- our alternative argument -- that repeated or repetitious are not proper.

Our first objection would be that it should not be allowed at all because of the prejudice, and our alternative objection in light of the fact that we anticipate your Honor would rule that it's admissible is that only one photograph of each victim be allowed.

MR. FOGLEMAN: Your Honor, as to Number 17, number one, that is a photograph of Branch. It depicts not only the condition of the body and the manner in which it's tied but also the condition of the water at the spot where he was removed. (R 1237)

MR. CROW: What is the relevance of the condition of the water?

MR. FOGLEMAN: I think it is going to go to the clean-up attempt that was made.

MR. STIDHAM: The have already introduced the photographs that show the water conditions.

THE COURT: I'm going to allow photograph 17. It shows clearly injuries to his fact, the condition of his body as it was found, basically completely nude. Looks like there's some restraints on his body around one leg and what appears to be binding on one hand and where it appears that the other hand was bound and from this photograph it looks like it was shoestrings so I think there's relevant evidence there and based upon my recollection of Misskelley's statement, some of those matters are corroborative of his statement and some are not.

MR. FOGLEMAN: As to Exhibit 17 of the victim Branch and any other photograph of the victim Branch -- and this goes to probative value being

outweighed by prejudicial effect -- we want to proffer 114, 119, 121, 131, 132, 133, 135, 136, 138 and 139 as examples of other photographs that we could have offered but which we chose not to. (R 1238)

THE COURT: These are extremely gross and gruesome photographs. I'm going to have these introduced or tagged as for identification purposes to show additional photographs of the victim Branch's condition immediately after being found and I would not allow those. So the Court is excluding these and they may be made a part of the record to establish to any appellate reviewer the fact that the Court has considered the nature of the photographs and finds that State's Exhibit 17 is certainly a reasonable photograph considering these others that are not being allowed.

MR. STIDHAM: The jury might be inflamed by the injuries which were inflicted by the others and that might prejudice Mr. Misskelley.

MR. FOGLEMAN: I think the jury can fairly conclude -- they can draw their own conclusions of whether or not Mr. Misskelley inflicted any wounds.

MR. STIDHAM: I will move on. State's Exhibit 20 depicts, I believe, the victim Moore.

MR. FOGLEMAN: That is Branch.

MR. STIDHAM: That's Branch. It depicts the victim Branch being removed from the water and again our objection would be the same as to Exhibit 17. (R 1240) THE COURT: This is a totally and completely different view and if the State maintains some relevancy, I'm going to allow it. I have seen a lot worse than that.

MR. STIDHAM: Exhibit 22 depicts the victim Moore. We would make the same objection to it.

THE COURT: Overruled. It is not -- while it does depict an eight-year-old boy nude with facial injuries, it is not that gross or prejudicial. It does show the deceased remains as it was located.

MR. STIDHAM: State's Exhibit 23 depicts the same thing as in 22 and we object as to repetition and also the same arguments we had with 17.

MR. FOGLEMAN: This particular picture is mainly showing the condition of the bank.

MR. CROW: There are other pictures of the bodies that show the bank.

MR. FOGLEMAN: They don't show the bank like these do. They are closer.

MR. STIDHAM: We disagree with the prosecutor. (R 1241)

THE COURT: It is a different view and it does show the left leg restraints connected to the right wrist. I'm going to allow it.

MR. STIDHAM: (Holding Exhibit number 27) What does this show?

MR. FOGLEMAN: I'm not sure -- I don't --

MR. STIDHAM: Number 27 -- we object to anything that they don't know what it is.

MR. FOGLEMAN: I said I didn't. That doesn't mean the witnesses don't.

THE COURT: I'm going to allow 23.

MR. STIDHAM: Exhibit 24 shows the victim Byers and his sexual mutilation and our specific objection to that would be that it is a very shocking and gruesome photograph and while it does show the injuries to the victim, it is particularly gruesome and that is something the Medical Examiner could testify to.

THE COURT: How many pictures of this nature do you have?

MR. FOGLEMAN: We would proffer on the victim Byers 130 and 200 to show that we have chosen a much less offensive picture.

THE COURT: I'm going to allow State's Exhibit 24 and the State is proffering 130 and 200. (R 1242) These likewise will be received for

identification purposes for any possible appellate review that might be necessary to determine the extent and scope of the Court's review of the photographs and I think they depict that the State has chosen Exhibit 24 which is much less gruesome.

MR. STIDHAM: Your Honor, State's Exhibit 26 depicts the victim Moore. All it shows is feet and genitalia. I assume the photograph is being submitted to show the condition of the bank. We submit it would be much more probative without the victim's body and genitalia.

THE COURT: It also shows his right extremities bound by what appears to be a shoestring and shows that his right hand is clenched into a fist.

MR. STIDHAM: I don't know how that is relevant.

MR. FOGLEMAN: To show the manner in which he is tied and the condition of the bank. Your Honor, I don't know that we actually have a photograph (R 1243) that shows the detail that this does on the bank. If you will look at the photograph, you can see all the scuff marks and grass with the mud on it where it has been cleaned up.

THE COURT: I'm going to allow that.

MR. STIDHAM: Can we cut part of the body out of the picture?

THE COURT: I don't see any need to. The jury is almost going to have to view the body.

MR. STIDHAM: State's Exhibit 33, 35, 36, and 39. We would submit that these pictures basically all show the same thing and they are repetitious and the prejudice outweighs the probative value.

THE COURT: I'm going to rule that 33, 35, 36 and 39 are not particularly ugly photographs and that the prejudicial effect, if any, certainly doesn't outweigh any probative value that they might have so your motion will be denied.

MR. FOGLEMAN: As to the victim Moore, we have also proffered 106, 113 and 201 to show that we have chosen less gruesome photographs.

THE COURT: They may be received for identification purposes for review. (R 1244)

MR. STIDHAM: That leaves us with 78 and 79 showing Mr. Misskelley at the time of his arrest. We object to the relevancy of his arrest photograph. His appearance on June third is that but his appearance on May 5th was nowhere near that. The fact that he chose to go out and get a squirrelly haircut like some wrestler on TV is very prejudicial and does not accurately depict the way he looked on May 5th.

MR. FOGLEMAN: I guess they can have somebody testify about that. This whole case comes down to Jessie's credibility, whether he is deceiving somebody or not, and the way he appears then -- now they've got him sitting out there looking like a choir boy -- and I think we've got the right to show the jury the way he is now is not the true Jessie Misskelley.

THE COURT: If this is the way he looked at the time of his arrest or in any close proximity, then I'm going to allow the photographs. That will be a matter of you verifying by proof --

THE FOGLEMAN: The proof will be that was at the time of the arrest. (R 1245)

THE COURT: Exhibits 78 and 79, if it is verified that is the way he looked immediately prior to or after the event, then I'm going to allow them.

MR. CROW: Note our objection.

BRYN RIDGE

DIRECT EXAMINATION OF BRYN RIDGE BY MR. FOGLEMAN

My name is Bryn Ridge and I'm a Detective for the West Memphis Police Department. (R 1246) On May 6th, 1993, I participated in the search for the missing boys and also the discovery of the bodies. At some point I received word

that I needed to go to the wooded area known as Robin Hood. Myself and Mike Allen actually went into the ditch and began searching. (R 1250) I stayed in the ditch until all the bodies were found. (R 1254)

In the process of this search, I found the victims clothing, which was pushed in the mud in the bottom of the creek. Some of the tennis shoes and a hat were floating in the water. (R 1255) Two of the pair of pants were turned inside out, still buttoned. I believed they were still zipped. And one of the pairs of pants was right side out. (R 1260)

We took a boat and searched the bayou. The victims bikes were found in the bayou. (R 1263) Steve Branch had an injury to the left side of his chin area. Chris Byers looked as though his penis had been removed and there were stab marks all over the area around his penis. (R 1273)

(ABSTRACTOR'S NOTE: The State introduced and the Court received the photographs that were previously ruled on in Chambers, subject to the Court's rulings on the Defendant's objections which has previously been abstracted herein.)

CROSS EXAMINATION OF DETECTIVE RIDGE BY MR. STIDHAM

I would say that it is probably some 450 feet from where the bodies were discovered to the interstate. You could hear traffic on the interstate where the

bodies were discovered. On the day that the bodies were discovered, it would have been difficult to see the traffic on the interstate or the Blue Beacon Truck Wash from where the bodies were discovered. This because of the dense foliage. (R 1278)

(THE FOLLOWING CONFERENCE WAS HELD IN CHAMBERS WHEREBY THE COURT HEAR ARGUMENTS WITH REGARD TO THE ADMISSIBILITY OF AUTOPSY PHOTOGRAPHS) MR. DAVIS: In regard to Michael Moore there is photographs -- the State intends to offer photographs 59A, 62A,60A, 61A, 64A, 63A, 71A, 70A, 69A, 68A, 67A, 72A, 73A, 65Aand 66A. (R 1285)

DR. FRANK PERETTI IN CHAMBERS

DR. PERETTI: These photographs aid and assist me in describing the wounds that I detailed on Moore. They are descriptive of the injuries you I observed. They aid and assist me in my testimony.

MR. STIDHAM: My specific objection would be that one photograph depicting each injury would certainly seem to be sufficient. They are very, very graphic. And jurors are lay people and they are not used to seeing this kind of stuff and quite frankly, I'm not used to seeing this kind of stuff. My concern is the

prejudicial nature of the photographs. I think one photograph depicting the head injury, one depicting the injuries to the other parts of the body are sufficient. (R 1286) Also, the photograph, State's Exhibit 69A, depicting the anal area of the victim Moore -- the Medical Examiner has told me on numerous occasions that there's no evidence of any sodomy. We would specifically object to that photograph because it's not relevant.

THE COURT: Well, I can look at the photograph from about six feet away from you and see swelling and redness to the rear. I don't know what the doctor's testimony would be, but I certainly can see some trauma to his buttocks. Doctor, what is that picture descriptive of?

DR. PERETTI: That picture is descriptive of showing the buttocks region and surrounding the buttocks region there is a focal area of abrasions or scrapes, some lividity and minimal bruising.

THE COURT: Is that lividity or is it trauma?

DR. PERETTI: You have lividity and you have the abrasions overlying the lividity.

THE CROW: So that is not bruising?

DR. PERETTI: No. The bruising is the abrasions, the scrapes.

THE COURT: Doctor, lividity is the gathering of the blood in the buttocks after death. (R 1287)

DR. PERETTI: Right.

MR. STIDHAM: Referring to 68A, can you not tell the same things from that photograph as you can from 69A?

DR. PERETTI: This is showing the buttocks that is not spread open to take the photograph. And it shows the lividity, some of the abrasions here, or scrapes, and some scrapes around the buttocks region here.

THE COURT: Will one of those photographs suffice to describe the injury and, if so, which one would best describe the injuries that you observed?

MR. FOGLEMAN: Doctor Peretti, on the photograph which is shown as State's 69A, is it correct that you found anal dilation on this victim Michael Moore?

DR. PERETTI: Yes, I did.

MR. FOGLEMAN: Does that photograph depict that?

DR. PERETTI: It shows some of the dilation.

MR. FOGLEMAN: Does the other photograph depict the dilatation?

DR. PERETTI: No.

THE COURT: I'm going to allow both of them. If your only objection is the fact that the photograph by its very nature might have some (R 1288) prejudicial effect, that is basically what you are objecting to all of these?

MR. STIDHAM: Correct, your Honor, and also the cumulative nature of them as well. Here's another photograph, 67A, showing the abrasions on the buttock area of the victim.

THE COURT: It also shows his legs and hands tied by what appears to be a shoestring.

MR. CROW: Your Honor, isn't it possible for one picture to show two things? I mean this one picture could show the abrasions and the tying.

MR. STIDHAM: We could eliminate one of these it seems.

MR. DAVIS: Judge, one thing we would like to proffer is what has been marked State's Exhibits 300, 301 and 302 and State's Exhibit 300 is another photograph showing the binds which the State withheld. These are Medical Examiner photographs. These are three pictures which are proffered for the purposes of showing that the State made an effort to introduce photographs that depict the injuries without showing those that are unduly gruesome. (R 1289)

THE COURT: Doctor, do the three photographs that we are speaking of -- 67A, 68A, 69A -- do each of those three photographs separately depict an area of your clinical evaluation and assessment of the injuries of Michael Moore?

DR. PERETTI: Photograph 67A shows the bindings. That is what that picture represents. The photograph 69A is the photograph of the anus showing no tears around the anal orifice, and it shows some of the scrapes on the buttocks region, and State's 68A is a similar photograph with the buttocks not spread open. This shows some of the injuries, but it doesn't show the anal orifice.

THE COURT: Is it significant to depict the anal orifice to describe your findings relative to that portion of the anatomy?

DR. PERETTI: Well, this photograph shows the anal dilatation, and it shows that there is no trauma around the orifice. It aids and assist me in describing my findings.

MR. CROW: Doctor, is there anything in 68A that can't be shown from 69A?

DR. PERETTI: 69 shows everything that's in 68.

(R 1290) THE COURT: You're saying we can eliminate 68A?

DR. PERETTI: Yes.

THE COURT: We're going to eliminate 68A and 301, 302 and 300. They may be attached for demonstration purposes to illustrate what photograph have been excluded.

MR. STIDHAM: State's Exhibit 59A depicts head wounds to the victim Moore as does 62A and we would ask that only one of those photographs be submitted.

THE COURT: Do you have another one showing the chest and right shoulder?

MR. STIDHAM: No, your Honor.

THE COURT: 59A shows from the trunk up. It doesn't show his lower extremities. It depicts an injury to right below the right clavicle and scrape marks above the right nipple. Is that what it depicts?

DR. PERETTI: Yes, sir.

MR. FOGLEMAN: Your Honor, it also shows on the right, the swelling which the other photographs do not. (R 1291)

THE COURT: These two photographs show completely different injuries. In the Court's opinion they are not gruesome.

MR. STIDHAM: 61A and 60A. Doctor Peretti, is there any difference in those two photographs?

DR. PERETTI: 61A shows two impact sites on the scalp, whereas 60A is a close-up of the forward, the most anterior wound. It's showing the type of injury close up.

MR. STIDHAM: Could you not do that with just one of the photograph?

DR. PERETTI: You can see both of them here. This is just a close-up of it.

THE COURT: Take out the close-up then. 60A. Although I think it clearly is admissible and could be used, I'm going to remove 60A.

MR. STIDHAM: With regard to the remaining photographs, we just have a general objection to the prejudicial nature.

THE COURT: Overruled.

MR. DAVIS: Judge, these are the photographs in regard to Steve Branch. 70B, 71B, 72B, 73B, 63B, 62B, 61B, 64B, 65B, 59B, 66B, 67B, 68B, 69B, and 60B.

THE COURT: Doctor, in 71B and 73B is there any significant difference between those photographs? (R 1292)

DR. PERETTI: 73B shows the neck hyperextended, and it's showing some additional injuries on the neck region and State's Exhibit 71B you don't see those injuries on the neck, but you can see the facial injuries. But 73B is a close-up

--

THE COURT: -- of 72B. Can you describe those injuries from one of those photographs or two of them?

DR. PERETTI: 72B shows some additional injuries that are not clearly visible in 73 and 71.

MR. STIDHAM: What you're saying you feel like you need all three of those to demonstrate those wounds to the jury?

DR. PERETTI: I can use all three but if you would eliminate one, I would eliminate 71B.

MR. FOGLEMAN: Of course, it doesn't show the wounds to the front of the face.

MR. STIDHAM: But they're only on one side.

MR. FOGLEMAN: Well, you've got a pattern above his eye that you can't see on the other --

DR. PERETTI: Yes. Right. There's this here --

MR. DAVIS: And also the injury to the top of the nose.

THE COURT: Okay. What about 62B and 63B? (R 1293)

DR. PERETTI: These are -- 63 and 62 demonstrate the injuries on the ear, in front of the ear and back of the ear.

THE COURT: Do you think both of those are necessary for you to accurately describe the injury and to depict what you're describing?

DR. PERETTI: Yes, sir.

THE COURT: 64B and 65B shows the penis and scrotum of the victim Branch. Are they both necessary to describe the injuries?

DR. PERETTI: Yes. These are.

THE COURT: What is the difference in the two?

DR. PERETTI: Here what I'm trying to show -- you can see the front of the penis, the head of the penis with some scratching and bruising, and on State's Exhibit 64B I'm trying to point out the circumferential nature of the injury, how it completely encircles the penis. There's one part of the penis that is clearly involved -- the head of the penis. And the shaft is not involved.

MR. STIDHAM: We would strongly object to both of those. We would ask that the Court consider allowing only one of those into evidence due to the prejudicial nature of the photographs.

THE COURT: The mere fact that they depict the genital region and describe an injury to an eight-year-old child alone is not sufficiently (R 1294) prejudicial to override its probative value of evidence.

MR. CROW: I understand, your Honor. But I believe the injury on the penis is basically the same in both places. He can testify to the fact that is around the whole shaft.

THE COURT: If they aid and assist him in his testimony, I'm going to allow them. The same would be true of all of these.

MR. FOGLEMAN: We would proffer to show that we picked less offensive -- number 303, 304, 305, 306 and 307.

THE COURT: I will have to admit that the ones you just handed me are a whole lot worse than the ones you're tendering in evidence. These may be attached as an exhibit to show that an effort was made to remove gruesome photographs that were not necessary to establish the injuries observed by the Medical Examiner.

THE COURT: I'm going to allow the others over the objection made. (R 1295)

MR. CROW: I would state that I don't feel it is necessary for every single injury to be shown. I think at some point we get to the point of overkill. I just don't think --

THE COURT: I'm not trying to tell the prosecution what they need to put in and what they don't need to put in. If they choose to show all the injuries and have some desire or interest to do so as long as it is not overly gross or offensive, then I'm going to allow it to some extent. I'm aware of the latest cases on it. For years and years it didn't matter how gruesome or horrible the photographs might be. If it had evidentiary value it was allowed. And just very recently in the last year our Court has tempered that ruling to some extent and basically it's, as I understand it, left with the discretion of the Court to make an effort to prevent the unnecessary display of gruesome, horrible photographs. I think we're doing that as best as possible. Just the facts of the case that the injuries occurred.

MR. CROW: Just note my objection, please.

MR. DAVIS: The next photographs are photographs of Chris Byers and the ones we anticipate introducing are 60C, 59C, 64C, 63C, 68C, 67C, 66C, 61C, 62C, 69C, 70C, 71C, 65C and 72C. (R 1296)

THE COURT: Let me see the ones that you have excluded. Were all these taken in the Medical Examiner's office?

DR. PERETTI: Yes, sir.

MR. FOGLEMAN: I haven't marked them yet. They will be State's Exhibits 308 and 309.

THE COURT: Doctor, between 59C and 60C it appears that one of them is a close-up of the facial injuries this victim sustained.

DR. PERETTI: Yes, sir.

THE COURT: Is there any reason why you cannot use the close-up rather than showing the length of his torso?

DR. PERETTI: 59C would be sufficient. 60C is more of an identification photograph.

THE COURT: 60C will be excluded by the Court as being duplicative of 59C. 69C and 70C, can you explain the need for both of those photographs in your testimony?

DR. PERETTI: 69C shows the genital mutilation, but it also shows the injuries situated on the right thigh. Whereas 70C is a close-up showing the genital mutilation and the injuries around the penal area (R 1297) and the cutting wounds of the thighs.

MR. STIDHAM: Obviously that photograph is to show the mutilation, not the bruise on his thigh, and we would submit that one of those would be sufficient. He can testify that there's a bruise on his thigh.

MR. DAVIS: It also depicts where the bindings were on his lays.

THE COURT: I'm going to allow these photographs as well. (R 1298)

ARGUMENTS REGARDING THE DEFENDANT'S MOTION TO EXCLUDE FIBER EVIDENCE PERTAINING TO CO-DEFENDANTS WHOSE TRIALS WERE SEVERED FROM THAT OF THE DEFENDANT

MR. STIDHAM: I anticipate Ms. Sakevicius testifying to fiber or hair comparisons with regard to the other co- defendants. That is not relevant in this case.

MR. FOGLEMAN: We say that it's relevant. Mr. Misskelley said these people were involved. I think that in order to show that what he said was true, I think we ought to be allowed to show other evidence that these other two people that he said were involved were involved. (R 1300)

MR. STIDHAM: I assume the Court is ruling that it is going to be relevant?

THE COURT: My notion of the case is from the very beginning Misskelley has been characterized as an accomplice, or stood by, aided and assisted or in some way assisted the other two in the perpetration (R 1301) of these crimes and the fact that evidence is adduced as to the other two is simply a part of the case.

MR. STIDHAM: Part of our defense is that Mr. Misskelley made up this story and it is not out of the realm of possibility that Damien and Jason did do it, but that's not relevant against Mr. Misskelley --

THE COURT: I think the total circumstances of what allegedly happened there are admissible and a part of the res gestae and that whatever applied to them applied to Misskelley as an accomplice.

ADDITIONAL ARGUMENT WITH REGARD TO THE ADMISSION OF POLYGRAPH EVIDENCE

MR. FOGLEMAN: One other thing, your Honor. I'm planning on getting into the statement today. I was kind of left in question about where we stood on the polygraph issue. I understood that you had ruled on results. (R 1307)

MR. STIDHAM: Would the Court consider allowing us to talk about the polygraph and the results and offer the jury an instruction they are not to consider the results of the test as evidence of innocence or guilt of the accused?

(R 1308) THE COURT: The results of the tests from either examiner will not be admissible. Y'all need to decide right now which way you want to go. If you don't want the polygraph mentioned, that's fine. If you want to go into it as being coercive to Jessie Misskelley to the extent that it would have overridden his free will, the you're going to have a free opportunity to do that, but the results are not admissible. I'm not going to get into a swearing match between two so-called experts on a device that hasn't even been declared scientifically accurate in any court that I know of unless it was by stipulation and agreement.

There's a specific statute in Arkansas that prohibits the use of polygraph or the results in court, and I am relying on that, and I am also relying on the other cases that have said basically what I did that if you want to go into it you can, but I'll have to give an instruction to the jury that they are not to even consider the results of a polygraph and whatever the other language is in the cautionary instruction. But I'm not going to get into a swearing match between two people on a device that is not even considered to be scientifically accurate. (R 1310)

MR. STIDHAM: Judge, it would be illogical and probably ineffective assistance of counsel for us to be willing to say that he took it and flunked it and not be able to say that he passed it. Therefore, we would ask that we be allowed to

make an offer of proof with regard to what our expert would say with regard to the polygraph and the coercive nature --

THE COURT: You have already done that. We took testimony on that.

MR. STIDHAM: And also we would like to have the Court rule that there be no mention of polygraph. If we're not going to be able to put all of it out there, we don't want to put any of it out there due to the prejudicial nature.

THE COURT: Well, you're not going to put the Court in the position of barring your testimony. You will just have to make an election based on my ruling. And my ruling is very simple and narrow and that ruling is that the results from either expert are not admissible. Basically, everything else goes. (R 1310)

MR. STIDHAM: But it would be extreme prejudice to the defendant for us to say that he took it and flunked it because that's going to make the jury --

THE COURT: I'm not going to allow the prosecution to say that he flunked it.

MR. CROW: The only way it would come in at all would be that he took it and he was informed he flunked it. The jury is going to surmise that the officer is not lying to them.

MR. STIDHAM: If we can't tell them the whole story, Judge, we don't want to tell them anything about it.

THE COURT: So what do you want to do?

MR. STIDHAM: We don't want to mention anything about it.

THE COURT: Y'all are told that you cannot mention the polygraph at all.

(R 1311)

DR. FRANK PERETTI

DIRECT EXAMINATION OF DR. FRANK PERETTI
BY MR. DAVIS

My name is Dr. Frank Peretti, Associate Medical Examiner for the State of Arkansas. I am a forensic pathologist. I perform medical legal autopsies for the State of Arkansas to determine cause and manner of death. (R 1313)

I performed autopsies on the bodies of Michael Moore, Steve Branch and Chris Byers. I took photographs of the bodies as part of my customary procedure to document the injuries. (R 1316) The body of Michael Moore was bound, at the time of the autopsy in a hog-tied fashion with shoelaces. The wrists were bound to the ankles bilaterally with black shoelaces on both sides. (R 1320) Michael Moore sustained multiple injuries. We have head injuries. We also have neck, chest and abdominal injuries. We have lower extremity injuries and back injuries, upper extremity injuries and injuries to the inside of the body plus evidence of submersion. (R 1321) The injuries

exhibited in State's Exhibit 61A were inflicted by an object with a broad surface, which could possibly be a log approximately three to four inches in diameter. (R 1323) The injuries depicted in State's Exhibit 62A were inflicted with an object of smaller diameter, such as a piece of wood, a two by four, a stick or broom handle are capable of inflicting these types of injuries that you see. (R 1323)

With regard to my examination of the anal area of Michael Moore, I found that there was anal dilatation, which means a loosening or slackening of the muscles surrounding the anal area. There was also some abrasions, scrapes and the postmortem lividity, which is a settling out of the blood vessels after death. (R 1324)

Michael Moore's head injuries consisted of multiple facial abrasions, or scrapes, and contusions, or bruises. He had multiple abrasions and contusions of the lips. He had multiple scalp lacerations and contusions or bruising of the scalp. (R 1328) He had other injuries to the torso and his extremities. The cause of death of Michael Moore was multiple injuries with drowning. The head injuries which I have described could have caused his death

independently of drowning, but in this case the drowning did contribute to his death. (R 1329)

On the autopsy of Steve Branch, I found that he had head injuries, chest injuries, genital injuries, lower extremity injuries, upper extremity injuries, and evidence of terminal submersion. (R 1332) State's Exhibit 71B is a photograph of the face showing the abrasions and the gouging type wounds, and you can note at the top here there is a patterned abrasion that looks like a bell, and almost has the appearance of a belt buckle. (R 1333) State's Exhibit 61B is a photograph of the back of the skull of Steve Branch that would be consistent with a three or four inch diameter club or log. (R 1334) There were also injuries to the penis and the anus. The anus showed dilatation and hyperemia of the anal mucosa, which is redness of the mucosa. (R 1336) Exhibit 64B and 65B are photographs of the penis. 65B shows the mid-shaft of the penis and the head of the penis with contusions, bruising and overlying scratches. This injury to the penis could be from oral sex. It could also be from a squeeze, a very tight squeeze on the penis. This could also be caused from a squeeze, an object could have been placed around the penis and tightened very fast. (R 1337)

In Steve Branch's case, he had multiple facial abrasions, contusions and lacerations, and subgaleal contusions and bruising underneath the scalp. We also had multiple fractures to the base of the skull. We also had hemorrhaging involving the brain in association with the head injuries. We also found evidence of drowning consistent with the wrinkling of the hands and feet, aspiration of water into the sinuses, pulmonary edema and congestion. Mr. Branch died of multiple injuries with drowning. (R 1339)

With regard to the autopsy performed on Chris Byers, we found head injuries, neck injuries, genital and anal injuries, injuries to the right leg, injuries to the left leg, back injuries, injuries to the right and injuries to the left arm. His hands were bound to the ankles behind the back in a hog-tied fashion. Strands of hair-like material were found on the left posterior thigh, on the back of the left thigh, and under the bindings of the left ankle. The right wrist was bound to the right ankle with a black shoelace. (R 1340) And the left wrist was bound to the left ankle with a white shoelace. The anus was red, injected, and some capillary dilation was there. There were also cutting wounds and abrasions to the buttocks area. State's Exhibit 70C is a close-up of the genital mutilation of Chris Byers. Here we have multiple gouging type

injuries where the skin has been pulled out. The skin overlying the shaft of the penis was carved off. (R 1343) The red area in the photograph is the shaft of the penis after the skin has been removed and you can see the scrotal sac and testes are missing. The whole genital area is missing, especially the internal aspect of the shaft and penis. Around these areas you can see the multiple gouging type wounds, stab wounds and cutting wounds. State's Exhibit 69C is a photograph showing the legs and the area of the genital mutilation. Here we can note on the top of the thighs and inner aspect of the thighs multiple bruising and contusions on inside the thighs. These types of injuries we normally see in female rape victims when they are trying to spread their legs for penetration, or they may be hit with an object also. (R 1344) With regard to Chris Byers autopsy, I found similar injuries to the mouth and to the ears as were found in the other two victims. The injuries to the genital area were inflicted by some sharp object such as a knife or piece of glass. Injuries to the head were probably inflicted by an object such as a piece of wood or a large stone. (R 1346) The cause of death, of Chris Byers, is multiple injuries, consisting of multiple facial contusions, abrasions, lacerations, the contusions and abrasions of the ears, the left parietal scalp

lacerations, the fracturing of the base of the skull, hemorrhage and contusions of the brain, and the abrasions that were situated in the front of the neck. In addition there is genital mutilation with absence of the scrotal sac, testes, skin and head of the penis with multiple surrounding gouging and cutting wounds. We also have the dilated anus, the multiple contusions, abrasions, and lacerations of the torso and extremities, terminal aspiration of gastric contents. There was no evidence of drowning in Chris Byers. (R 1347)

CROSS EXAMINATION OF DOCTOR FRANK PERETTI
BY MR. STIDHAM

You do not have to be a pathologists or a Medical Examiner to look at the bodies when they were recovered to determine there were head injuries, injuries to their faces, injuries to other parts of their body including the genital mutilation. These are obvious injuries, to anyone who had been there and seen it. With regard to the injuries which I was describing earlier to the victims ears, I found no evidence of semen in the oral cavities. The dilation of the victims anal orifices, was caused by the fact that the bodies were in the water. With regard to your specific question, is there any evidence whatsoever indicating that these victims were sodomized, no semen was detected in the anal orifice and canal. (R 1350)

There were no evidence of any trauma or lacerations to the anal orifice or to the anal mucosa. The only thing I saw was the hyperemia or reddening of the mucosa. My experience in dealing with many children of rape, is that I have found anal trauma, and I would expect to find that if the victim had been sodomized. There were no indication that any of the three victims were choked, although there were some abrasions or scrapes on the neck region, but there was no evidence of any type of strangulation. If one of the victims had been choked with "a big old stick" I would expect to find a pattern of injuries on the neck and underlying neck muscles, which I did not find on any of these victims. (R 1351)

I specifically did not find any such patterns on the victim Byers. Further I found no abrasions or injuries to the strap muscles of the neck, and there were no fractures to the larynx or hyoid bone. I would expect to find hemorrhage in the victims neck if they had been choked. There does not appear to be any evidence of sodomy or choking on any of these victims. (R 1352)

REDIRECT EXAMINATION OF DR. PERETTI
BY MR. DAVIS

The absence of semen does not rule out the possibility of sexual assault, it indicates that there was no ejaculation. On Chris Byers, the anus was dilated

more than on the other two victims. On cross examination by Mr. Stidham, I indicated that I found no tears or anything in the anal orifice, any tears or trauma to the anal orifice itself. Whether or not there was any trauma of that nature would depend on whether or not there was penetration. If the penis enters into the anal canal, because the canal is tight, I would expect to find tearing and bruising and abrasions of the opening. (R 1354) The size of the object penetrating would determine if there was any laceration or tears.

RECROSS EXAMINATION OF DR. PERETTI BY MR. STIDHAM

If there was forceful penetration into the anal orifice and into the rectum, I would expect to find injuries to the orifice. In the absence of those injuries, I would expect that there were no penetration into the canal.

REDIRECT EXAMINATION OF DR. PERETTI BY MR. DAVIS

I am familiar with medical literature that indicates there can be sodomy to young children without evidence of tears or lacerations. (R 1355)

RECROSS EXAMINATION OF DR. PERETTI
BY MR. STIDHAM

My experience in the cases that I have dealt with, I have always seen trauma to the anal orifices. (R 1357)

MIKE ALLEN

REDIRECT EXAMINATION OF OFFICER MIKE ALLEN BY MR. FOGLEMAN

I am the same Officer Mike Allen who testified earlier in this trial. On June 3, 1993, I was assigned the task of making contact with Jessie Misskelley Junior. Mr. Misskelley was not a suspect at that time, we wanted to ask him questions about Damien Echols. I went to the home of Jessie Misskelley Junior, I was told that Jessie Misskelley Junior was not there. (R 1358) I contacted Jessie Misskelley Senior and inquired as to the whereabouts of Jessie Misskelley Junior. (R 1359)

Jessie Misskelley Senior went and picked up Jessie Misskelley Junior and brought him back to the repair shop. I asked Jessie Misskelley Junior, if he would come to the West Memphis Police Department to talk to me about two individuals that lived down in Lake Shore. In response to your questions, to be as specific and precise about exactly what I said to him, I asked him "would you mind coming up to the police department to talk to me about some friends of your out at Lake Shore?" He said, "Sure." (R 1360) He rode with me in the front seat and was not handcuffed. We arrived back at the police department around ten o'clock. I filled out a subject description form. (R 1361)

After completing the subject description form, I talked to the defendant, and Detective Ridge was also present. (R 1362) After a while into the interview, I felt that everything he was telling me was not the truth, and I advised him of his Miranda rights. I did not use any force, promises, threats or coercion to get him to sign the rights form, or make any statement. (R 1363) The defendant and I left the police department to get a permission form signed by his father. We found his father, who signed the permission form and we returned to the police department. (R 1366) After returning to the police department, I had no further involvement with the defendant. (R 1367)

RECROSS EXAMINATION OF OFFICER MIKE ALLEN
BY MR. STIDHAM

The reason by Inspector Gitchell asked me to make contact with the defendant was because his name had come up as a person that was a friend of Damien Echols. On the morning of June 3, Mr. Misskelley Junior was not a suspect. (R 1368) After I filled out the subject description form, I talked to the defendant about Damien Echols, as far as his friendship with him. He told me that he knew who Damien was. The defendant told me some things about Damien Echols, but he told me that he didn't know anything about the

murders. (R 1369)

I asked him his whereabouts on the day of the murders and he told me that on the date of the murders he worked with Ricky Dees. He told me that he worked Tuesday, Wednesday, and Thursday and that he worked until five o'clock each evening that week. From the information that I had received from the other officers, some of the things that he was saying did not agree with what they had said, and I didn't know at that point who was telling the truth. I did not make any attempt on June 3, 1993, to call Mr. Dees and see if in fact if Mr. Misskelley was working with him that day. (R 1370)

I was not aware of the fact that Mr. Misskelley has a mental handicap. I have dealt with mentally handicapped people before, but I did not know that he was mentally handicapped at the time or if he is mentally handicapped now. The police department had received some information that Mr. Misskelley had been to a cult meeting with Damien Echols.
(R 1371)

At a previous hearing, I testified that Damien Echols was a suspect from the beginning of this case. On June 3, 1993, I do not specifically remember having a conversation with Jessie Junior or Jessie Senior about the

thirty thousand dollar reward. If it was brought up, I would probably have said something about it, but I do not specifically remember it. If someone had asked me on that day I would have told them what the reward was, I would have told him that there was a reward available. I also testified previously that I couldn't remember exactly all the questions that I had asked Mr. Misskelley on the morning of June 3, 1993. My notes do not reflect everything that was asked, just the highlights of the conversation. (R 1372)

REDIRECT EXAMINATION OF OFFICER MIKE ALLEN

BY MR. FOGLEMAN

On June 3, 1993, during my conversations with both Mr. Misskelleys, I did not bring up anything about the reward. They may have brought it up. (R 1373)

RECROSS EXAMINATION OF OFFICER MIKE ALLEN

BY MR. STIDHAM

Damien Echols was certainly one of our top three suspects on June 3, 1993. I knew that Jessie Misskelley Junior was seventeen years old on June 3, 1993. I did not in any time get his fathers permission to waive his Miranda Warnings. (R 1374)

BILL DURHAM

DIRECT EXAMINATION OF OFFICER BILL DURHAM
BY MR. FOGLEMAN

My name is Bill Durham, detective and polygraph examiner for the West Memphis, Arkansas Police Department. (R 1374)

On June 3, 1993, I interviewed Jessie Misskelley Junior. I advised him of his rights, and filled out a rights form with him which he signed. (R 1375)

I did not use any force, promises, threats or coercion to get him to place his initials by each right or to have him sign the form. After advising the defendant of his rights, I had a hour long conversation with him. During the course of this conversation he did not provide me with any information or details about the murders. (R 1376)

CROSS EXAMINATION OF OFFICER BILL DURHAM

BY MR. STIDHAM

I do not have any special training in dealing with people who are mentally handicapped. During the hour long conversation that I had with Mr. Misskelley on June 3, he denied all involvement in these murders. (R 1377)

ABSTRACTOR'S NOTE: At this point during the testimony, the following colloquy took place in Chambers regarding the admissibility of

polygraph evidence during the trial.

THE COURT: I want the record to be very explicit that I am not excluding that tender or that testimony if you choose to follow that defense. The only thing I'm limiting are the results of the polygraph from either side.

MR. CROW: I want the record to reflect why we are doing that.

MR. STIDHAM: Your Honor, it's not logical from a defense standpoint to allow the State to say he flunked it and not allow us to say he passed it. We can't have it both ways. It's got to be one way or the other.

THE COURT: I'm not going to allow them to say that he flunked.

MR. STIDHAM: Well, the fact that he took it and they kept interrogating him for four more hours -- (R 1381) it is kind of a red flag.

THE COURT: You can argue that is a tool of confessions, that they do it all the time and that they tell these people that they failed it whether they did or not. Sometimes they don't even give them a test. You can do all kinds of stuff.

MR. STIDHAM: If the jury is not properly schooled on the polygraph and the results that can be interpreted from them, they are going to assume that he flunked it and, therefore, he must be guilty.

THE COURT: Well, the point is I'm not excluding that tender of testimony or that argument. I'm only excluding the results which I think is consistent with Arkansas law.

MR. STIDHAM: Judge, you're not suggesting that we have waived our proffer?

THE COURT: No. Are you talking about on the Denno hearing? No. That is a matter of record. I'm saying you have elected to waive during the trial that defense. I'm not prohibiting --

MR. CROW: Only because of the Court's ruling. If the Court would allow us to put our expert on, we would have gone into it here.

MR. FOGLEMAN: The judge has ruled you can put your expert on. (R 1382)

MR. CROW: Not about the results of the polygraph. I understand the Court's ruling. I'm not arguing about the Court's ruling.

THE COURT: I'm saying you can make your argument whether or not the results were ever admitted.

MR. CROW: We understand that, but we don't think we can make it effectively without the other part.

CONTINUING REDIRECT EXAMINATION OF DETECTIVE BILL DURHAM

BY MR. FOGLEMAN: During the time that I questioned Mr. Misskelley, I was not questioning him about his involvement in the murders the entire time. The main focus of my questioning was whether or not he was an associate of another person that we were looking at as a possible suspect, whether or not he was involved in any of these alleged cults that we had heard about. (R 1383) I also asked him whether or not he knew who may have possibly been responsible for this crime. I was not satisfied with the responses I was getting from the defendant. (R 1384)

BRYN RIDGE

REDIRECT EXAMINATION OF DETECTIVE BRYN RIDGE
BY MR. FOGLEMAN

I am the same Bryn Ridge who previously testified herein. On June 3, 1993, I participated in some questioning of the defendant Jessie Misskelley, Junior. (R 1384) Going back to the day the bodies were found, we made efforts to keep bystanders away from the crime scene and to keep them from seeing the victims and the injuries they suffered. Going back to June 3, after Detective Durham talked to the defendant, I questioned the defendant along with Inspector Gary Gitchell. During the questioning of the defendant by

Gitchell and myself we did not use any force, promises, threats or coercion to get him to make any statements to us. We began our interrogation of the defendant at approximately 12:40 P.M. (R 1386) At the beginning of the interrogation the defendant was not considered a suspect, but later on it was determined that he was a suspect and we began to tape record the interrogation. Before we turned on the tape recorder, he told us that he had attended some kind of satanic cult meeting, and that he was a member of a satanic cult. He told us that they had meet in various parts of the state, generally on a Wednesday, generally late in the evening, and even into the night. He stated that boys along with girls would attend and that there would be sessions of sex and that dogs and animals had been killed, and in fact portions of those animals had been eaten by the members. (R 1387)

He also talked about some phone calls that he had received from Jason Baldwin in which he could hear the voice of Damien Echols in the back ground. He said that he had received three phone calls. One was on the day before the murders, one was on the morning of the murders and the last one was the night after the murders. With regard to the phone call he's received the day before the murders, he something to the effect that they were going to

go somewhere and get some girls the next day or something to that effect. This information is contained in my notes of the interrogation. One page one of my notes it reflects that the defendant stated that he had received a phone call from Jason Baldwin the night before the murders. (R 1388)

My notes reflects that Jason Baldwin told the defendant that they were going to go out and get some boys and hurt them. The defendant stated that he could hear Damien in the background. Jessie said he knew what they were going to do the next day. Jessie also told us about a brief case that showed up at some of these meeting they would have. Brief case contained a couple of guns, some Marijuana, and some Cocaine. Mr. Misskelley told us that there was a picture in a brief case that he saw before the boys were killed. Mr. Misskelley told us that there was a picture in the brief case of the boys that were killed. He further told us that Damien had been stalking these boys and watching them. (R 1389)

Mr. Misskelley told us that he had received a phone call after dark after the murders in which he could hear Damien in the background saying, "We did it, we did it. What are we going to do now? What are we going to do if somebody saw us?" During the course of the interrogation, Inspector Gitchell

showed him a picture of one of the victims. The picture is State's Exhibit 76 and depicted the body of Chris Byers. (R 1390)

The circumstances in which the photograph was shown to the defendant was that he had gotten to a point where he had almost not been talking. He slowed down in giving us any information, at which time Inspector Gitchell left the office and came back with this picture. (R 1391)

The defendant picked up the picture and sat back in his seat and became fixated on the picture. I could tell he was tense, and he just intensely looked at this picture. We took the picture away from him and laid it on the desk and he just continued to look at the picture. Inspector Gitchell then moved the picture out of his sight and we continued to talk to him. Then Gitchell played a tape where a few words were said by a young person. The person's voice was somebody that the defendant was acquainted with. (R 1392)

After we showed Jessie the picture of the body and played the tape, Jessie said something to the effect that he wanted out, and he wanted to tell us everything at which time we started asking him some more questions. We asked about this third telephone call he had received and I felt this was extremely good information and that we were on the verge of getting a good

witness. I decided it was time to take a break, and I wanted to inform Sergeant Allen of this information. At this point I did not have any reason to suspect that the defendant was involved. Our demeanor in how we were questioning him was just mostly we were just as nice as we could be. We were not hollering. We were not loud. It was just as though I'm talking to you right now. (R 1393) There was not anything except the incident with the picture where you could see stress on the defendant. After theincident with the tape recorder, the defendant stated "I wantout of this. I want to tell you everything." In addition, before I left the room, Gitchell showed Mr. Misskelley a diagram of a circle. This is an interrogation technique that Gitchell used. It is basically a circle that willbe drawn on a piece of paper. There were dots all over thepaper. The defendant was asked where he was in the diagram. "We asked him are you a witness, or are you a defendant?" That is when I left the room. Gitchell also cameout and informed me that the defendant had just told him thathe was there when the boys were killed. Everything that wassaid from that point on was tape recorded. (R 1394)

During the conversation that was tape recorded, the defendant told us he had a pair of blue and white Adidas tennis shoes. He said that he wore these

shoes on the night of the murders, and that he had given those shoes to a subject by the name of Buddy Lucas. State's Exhibit 95 are the shoes that were recovered from Buddy Lucas. (R 1395)

CROSS EXAMINATION OF DETECTIVE BRYN RIDGE
BY MR. STIDHAM

These tennis shoes, State's Exhibit 95, were sent to a Crime Lab for analysis. Nothing with regard to the tennis shoes linked Mr. Misskelley to the scene of the crime. Prior to the tape recorder being turned on, I asked Mr. Misskelley questions about his participation in a cult and his whereabouts on May 5, at this point, I did not consider Mr. Misskelley a suspect. (R 1396)

We had received some information that a cult like group existed and that Jessie Misskelley had been to one of these meetings. This meeting was held somewhere in the area of Turrell, Arkansas. I was taken to a spot by a witness where the meeting was supposed to have taken place. (R 1397) I did not find anything that would suggest that a cult meeting had taken place there. In Jessie's statement, he tells us several people that are in this cult with him. We were never able to confirm that any of these people were members of this cult. (R 1398)

We were investigating this as a cult killing. Damien Echols was one of several suspects that we were investigating as being responsible for these murders. (R 1399) There were rumors in West Memphis that Damien was involved in these murders. (R 1400)

Gitchell and I did not consider Mr. Misskelley a suspect until he told us that he was present at the time of the murders. That is when we decided it was important to record all of the interrogation from that point on. I did not write down everything and every question that I asked him prior to turning on the tape recorder. My notes do not reflect everything that was discussed. I cannot remember everything that was asked and answered during the interrogation, prior to the tape recorder being turned on. Initially Mr. Misskelley denied any involvement whatsoever in the murders. He told us that he was roofing with Ricky Dee's on the day of the murders. I did not make any attempt on June 3, 1993, to verify this information. (R 1401)

The diagram of the circle with the dots in the middle and the dots in on the outside happened right before the defendant told us that he was present when the boys were killed. The tape recorded message with the little boys

voice on it was played to the defendant just a few minutes before he was shown the diagram. (R 1402)

The purpose for showing Jessie the photograph of the body, playing the tape of the little boys voice, and showing him the diagram, was that there were times during questioning when Jessie would not talk. He was getting slower with the information. He's telling us the same thing over and over. Those techniques were used to evoke a response. It did not occur to me on that day, that Mr. Misskelley had a mental handicap. I did not have any special training in dealing with people with mental handicaps. I don't know whether showing him a picture of the body scared him. I guess you are scared into making a statement. (R 1403)

I did not think it would scare him when Gitchell drew this circle and made the diagram. I thought that probably the tape recorded statement with the little boys eerie voice would scare him if he was involved. Gitchell did that to invoke a response from the defendant. The circle diagram was just a circle drawn on a piece of paper. There were dots drawn on the piece of paper. It was shown to Mr. Misskelley and we asked him where he was on this diagram. Was he inside the circle with the people that everybody was

looking for, or was he on the outside of the circle. We asked him where he was, and he replied "I want out". I testified earlier that when the defendant looked at the picture of the boys body he was fixated. He was kind of frozen and just sat there and looked at it. (R 1404) I think that would be indicative of fear. Misskelley was at the station house from 9:30 that morning up until the time that he was placed under arrest. As far as I was concerned, he was under arrest when he confessed to the crimes.

There was a window of opportunity when the murders could have occurred, which we found between 6:30 on the fifth of May until approximately 1:30 the next day on May 6 when the bodies were recovered. I was shocked when Jessie told us on the tape that the little boys were killed at noon, because I didn't feel that the murders took place at that time. (R 1405)

I knew that the little boys were in school that day and I also knew that there were eye witnesses that placed them near there homes at 6:00 or 6:30 P.M. on May 5th. Jessie was not asked about the time of the killing again until the second tape which was conducted by Inspector Gitchell. I was also shocked when Jessie told us on the tape that the boys were tied up with a brown rope. (R 1406)

At some point they may have been tied up with a brown rope, but that is not the way we found the bodies. There was a lot of pressure on the police department to solve this crime. (R 1407)

REDIRECT EXAMINATION OF DETECTIVE BRYN RIDGE
BY MR. FOGLEMAN

During Jessie's tape recorded statement, I did not interrupt him in the middle of his confession and question what he was telling us because we wanted him to keep talking. I did check with the person that he was working with on May 5th and found out that Jessie wasn't telling us the truth about how long he had been working that day. I discovered that he had gotten off work about 12:30 that afternoon. (R 1408)

In regard to the circle diagram, there were dots all over the paper. I do not remember how many dots were inside the circle.

We discovered sights near Highland Park and Lake Shore where animal carcasses were found and graffiti was discovered. There were pentagrams, upside down crosses, and writings such as AC/DC, heavy metal rock music type stuff.

(R 1410)

RECROSS EXAMINATION OF DETECTIVE BRYN RIDGE

BY MR. STIDHAM

With regard to the graffiti, it's possible that this could have been a bunch of kids just getting together and playing loud music and drinking beer. (R 1410)

REDIRECT EXAMINATION OF DETECTIVE BRYN RIDGE
BY MR. FOGLEMAN

I would not expect to find a bunch of animal carcasses around if it was just a bunch of kids drinking beer and playing loud music. I would not expect any of the people that Jessie Misskelley identified as being possible members of this cult, to admit there involvement in the cult or that they had been eating dogs. (R 1410)

RECROSS EXAMINATION OF DETECTIVE BRYN RIDGE
BY MR. STIDHAM

I can not prove that any of those people that Jessie named were in a cult. (R 1411)

GARY GITCHELL

DIRECT EXAMINATION OF INSPECTOR GARY GITCHELL
BY MR. FOGLEMAN

My name is Gary Gitchell and I'm the inspector for the West Memphis Police Department Criminal Investigation Division. (R 1412) On June 3,

1993, I had a conversation with the defendant. I began talking to the defendant, along with Detective Ridge, at approximately 12:40 P.M. Initially, we were not making any attempts to preserve the conversation. Detective Ridge may have been taking some notes. I do not take notes when I talk with someone because I want to be able to listen and have my complete attention on the conversation. During the course of my conversation with Mr. Misskelley, I showed a photograph of one of the victims bodies to the defendant. (R 1413)

I also played a small portion of a tape for the defendant. During our conversation with Mr. Misskelley, I also showed the defendant a diagram. I cannot specifically remember, but I think I showed the defendant the diagram first. Then some time passed and then there was the picture. Next, I played the tape recorded statement of the little boy. In describing the diagram, I was asking him to quit straddling the fence and be on one side or the other. I drew a circle, and I had several dots within the circle and several dots outside the circle. I then asked Mr. Misskelley, "Which side is he going to be on. On the outside or inside?" No one in particular was on the inside of the circle, no one was named. But I did indicate to the defendant that law enforcement was on

the outside of the circle. The ones that were on the inside of the circle were the ones responsible for these crimes. When I showed the diagram to Mr. Misskelley, he immediately said he wanted to be on the outside of the circle with the law enforcement officers. A short time later is when I stepped out of the room and obtained the picture of the body. I also got a recording of a phrase that I wanted to play the defendant. (R 1415) I knew that the defendant knew who the boys voice would be.State's Exhibit 76 is the photograph of the victims body thatI showed the defendant. When I showed it to the defendant, he took it into his hand and he just went back intohis chair. He locked in on it and became fixed on the photograph. I took the photograph from his hand and placed iton the table where we were working. A few minutes later, I played the tape for him. (R 1416)

The voice on the tape said, "Nobody knows what happened but me." After I played the tape the defendant immediately stated that he wanted to tell us about the homicides. At some point thereafter, Detective Ridge left the room. After Detective Ridge left the room Jessie indicated to me that he was present during the time that the boys were murdered. (R 1417) At some point the defendant said that he had went back to the scene, but I do not know

whether that was before or after he admitted being there when the murders took place. It gets confusing even for me to remember the exact events. He said that he went out to the woods where the murders occurred and said down and cried. (R 1418)

Jessie was crying. We never yelled at him or were mean to him or threatened him or promised him anything. I went out of the room and instructed Detective Ridge to get a tape recorder. After the tape recorder was brought into the room, we advised him of his rights for the third time that day. (R 1419) [THE COURT ADMITED THE STATEMENTS OF THE DEFENDANT, THE ADMISSIBILITY OF WHICH HAD PREVIOUSLY BEEN RULED UPON BY THE COURT, AND OVER THE RENEWED OBJECTIONS OF THE DEFENDANT]

[Appellant has previously abstracted the First Statement of the Defendant at Abstract page 139 - 144]

CONTINUING DIRECT EXAMINATION OF INSPECTOR GITCHELL

BY MR. FOGLEMAN

In the defendant's statement, there was some reference to pictures from a newspaper. The defendant was attempting to name the boys as far as the

injuries and we used a picture. (R 1421) The defendant was pointing out what damage was done to the boys. Detective Ridge read the caption underneath the picture at the time. At one point the defendant named one boy but he named the incorrect boy. He picked out the right boy who was castrated but he called him by the wrong name. (R 1422)

At times he was pointing to himself, that is why we mentioned, on the tape, "Are you speaking of the groin area?" That is where the defendant stated "at the bottom". The first tape recorded session ended at 3:18 P.M. Later on I did a follow up interview that was tape recorded. I did not have any conversation with the defendant in between the two tape recorded sessions. (R 1424)

We had made some reference to him going out to the crime scene with a camera and showing us things. This was not done because of the media coverage of this case. Many times when we would go out to the crime scene we were followed by the media. We did not want to hinder any arrest of the other suspects. (R 1425)

The defendant mentioned Jason Baldwin in his statement, and the clothes that he was wearing at the time of the murders.

(THE STATE OFFERS FOR INTRODUCTION INTO EVIDENCE, STATE'S EXHIBIT 99 WHICH DEPICTS JASON BALDWIN, THE DEFENDANT MISSKELLEY'S CO-DEFENDANT, AT THE TIME OF MR. BALDWIN'S ARREST)

(THE FOLLOWING COLLOQUY TOOK PLACE IN OPEN COURT)

MR. FOGLEMAN: Judge, we would offer State's Exhibit 99.

MR. STIDHAM: Judge, I don't think it is relevant.

THE COURT: Overruled.

MR. STIDHAM: What did it fairly and accurately depict?

MR. FOGLEMAN: The defendant Jason Baldwin's appearance at the time of his arrest.

MR. STIDHAM: Your Honor, what does that have to do with this case? (R 1425)

MR. FOGLEMAN: The defendant has said, your Honor, that Jason Baldwin was one of the people involved and I think the jury ought to be able to see his appearance.

THE COURT: I allowed it into evidence. (REFERRING TO MR. STIDHAM) Don't question me again.

MR. STIDHAM: You Honor, I never got a chance to respond.

THE COURT: If you want to state an objection, I'll allow that, but don't ask me to respond to a ruling. All right?

MR. STIDHAM: Yes, your Honor.

THE COURT: Do you want to make an objection?

MR. STIDHAM: I'd like to make an objection for the record. THE COURT: All right.

MR. STIDHAM: Your Honor, he asked -- the statement that Mr. Misskelley gave -- the question was what was he wearing on May 5th. What he is wearing on June 5th, the date of his arrest, has no relevancy whatsoever -- and I wasn't trying to be improper to the Court. I never got a chance to respond before your Honor admitted it.

THE COURT: Approach the bench.

(THE FOLLOWING CONFERENCE WAS HELD AT THE BENCH OUT

OF THE HEARING OF THE JURY) (R 1426)

THE COURT: The relevancy of the picture is not -- I didn't understand him to say what he was wearing on June the 5th. Is that what you said?

MR. FOGLEMAN: No. In the tape he says what was he wearing --

THE COURT: -- and then you asked him to identify that picture, and he said that is what he was wearing on the date of his arrest. Is that the way is went?

MR. STIDHAM: That's what I was trying to do, your Honor.

THE COURT: The relevancy should be quite obvious that if it corroborates what Jessie said in his statement, then it is some relevant evidence as to what the boy was wearing, clothing of a similar nature and type. Also, it could be relevant as to -- I think I know what you're getting at. It's something that --

MR. STIDHAM: Your Honor, may we retire to chambers?

(THE COURT STOOD IN RECESS AND THE FOLLOWING CONFERENCE WAS HELD IN CHAMBERS) THE COURT: Dan, I --

MR. STIDHAM: Your Honor, before you speak, may I make a motion?

THE COURT: Sure, but I want to say one thing. You were questioning the Court and demanding that I make some explanation as to a ruling that the Court had attempted to make which would have required the Court, had I chosen to respond to your challenge, to comment on the evidence. That is the reason that I mentioned to you don't question me on it because by doing that, one, you are challenging the Court's ruling and, two, you are forcing the Court, if I felt the need to respond, to comment on the evidence and I can't do that, obviously.

I understand what you're trying to do and I'm going to let you -- anytime you want to make an objection, I'm going to let you make that objection and I'm going to let you amplify it and clarify it. I've never failed to do that so if you want to make an objection, let's do it.

MR. STIDHAM: Your Honor, I know it's been a long day, but I'd like to make a motion for a mistrial because of the way I was admonished in front of the jury. I think it was a clear comment that I had done something improper, which I submit that I had not. (R 1428) Your Honor made a ruling before I ever had a chance to make an objection. If your Honor felt I

was acting improper, it would have been best to bring me back to chambers and --

THE COURT: I agree that it would have been best if I had brought you back to chambers, but I'm going to deny your motion for a mistrial.

MR. STIDHAM: It makes it look like I can't stand up and object and protect my client's interest --

THE COURT: No, no --

MR. STIDHAM: -- if I can't stand up and speak.

THE COURT: I disagree with that. In fact I have never done that. We're back in chambers now. You can make your objection.

MR. STIDHAM: Your Honor wants me to make my motion again with regard to the photograph.

THE COURT: Yes. Sure.

MR. STIDHAM: The Court has denied my motion for a mistrial? THE COURT: Yes.

MR. STIDHAM: Your Honor, with regard to the photograph, my objection was that Mr. Fogleman asked the witness -- or the taped statement suggested that Mr. Misskelley was describing to the interrogator what Mr.

Baldwin was wearing on the date, May 5th. (R 1429) Mr. Fogleman asked the witness if this was a fair and accurate depiction of what Mr. Baldwin looked like on the date of the arrest, which is June the third. My objection is what is the relevance of that photograph when --

THE COURT: You made the objection, "What is the relevancy to that photograph," and I overruled your objection and allowed it. They you started questioning the Court's ruling.

MR. STIDHAM: Your Honor, I never had an opportunity to say anything before you allowed it to come into evidence.

THE COURT: You had made your objection. I had ruled, and then you started questioning it.

MR. STIDHAM: That was not my intent.

THE COURT: I understand it, and I'm not upset about it. I agree I hardly ever say anything to any lawyer unless it is in the back room. The way you were doing it, Dan, I couldn't do anything other than say, "Don't question my ruling."

MR. STIDHAM: Your Honor, I meant no contempt.

THE COURT: I understand that, and I'm not taking offense. Let's move on to the real issue if you are raising the question of relevancy of the photograph.

MR. STIDHAM: Yes, your Honor. (R 1430) I don't think it is relevant, especially with the foundation that was laid for its admission.

THE COURT: Well, you can cross examine him on when the photograph was taken. I thought it was clear that it was tendered as a photograph of Baldwin at the time of his arrest, June --

MR. FOGLEMAN: Third or fourth.

THE COURT: -- whatever it was. I thought that was the way the question was proffered to the witness. And the relevancy of it -- there are a multitude of reasons why it is relevant. We just listened to a long description of what all three of them were wearing on the day that it happened. It was similar type clothing. There was some reference about, "Do you wear black," or something. It is also relevant to that, and I also suspect that the picture is being offered for other reasons.

MR. STIDHAM: Your Honor, he didn't say what his reasons were. All he did was -- he attempted to mislead the jury --

(MR. STIDHAM, MR. FOGLEMAN AND THE COURT SPEAKING AT THE SAME TIME - UNINTELLIGIBLE)

MR. STIDHAM: -- I'm not accusing you of intentionally misleading the jury. What I'm saying is the way that the offer was made for the introduction was made, it sound like that was the clothes he was wearing on the night of May 5th.

THE COURT: I didn't take it that way.

MR. STIDHAM: That is exactly the way I took it, and his Honor ruled on it so quickly I never had a chance -- perhaps I should have asked to come to the bench. My concern is now, your Honor, in the eyes of the jury I'm a rogue --

THE COURT: I don't think so.

MR. STIDHAM: -- And that I'm rude and crude to the Court, and I'm afraid it's prejudiced my client's chance for a fair trial.

THE COURT: I don't think that it has and that motion is denied. You want me to go back and tell them I think you are a nice guy?

MR. CROW: No, your Honor.

THE COURT: I'll be glad to do it. You want me to go back and say --

MR. STIDHAM: Your Honor, I'm not sure any instruction to the jury can cure that problem.

THE COURT: I think so.

MR. CROW: I don't want any instruction, your Honor.

(R 1432)

THE COURT: A mistrial is a drastic remedy, and I am not prepared to grant a mistrial at this time but don't challenge the Court's rulings. If I'm wrong, then appeal it.

MR. STIDHAM: Your Honor, that's not -- that wasn't my intention.

THE COURT: It sure was. You repeated it two or three times.

MR. STIDHAM: Mr. Fogleman and I were in a rapport, and I thought your Honor was going to make a ruling after we were discussing the relevancy.

THE COURT: Maybe I didn't see it the way it happened, but my observation was he offered it. You made an objection as to relevancy, and I overruled it and allowed it, and then you kept challenging me while seated, I might add, as to what is the relevancy, three or four times, and that it what happened. That's why we are here.

I understand that the appearance of all three of these boys could very well be relevant to anybody that might have seen them, and I think that it is relevant. The way they looked at the time of their arrest is relevant. Anything else?

MR. CROW: No, your Honor. (R 1433)

THE COURT: Are you not going to have another witness that purports to have seen them -- you raised that, Paul, on some motion you raised about Damien being seen with his girlfriend?

MR. FORD: That's correct.

THE COURT: Also in this statement -- I might be confusing it with this statement and something else y'all brought up in this case -- but something about somebody with sandy hair --

MR. FORD: The description was Damien and his girlfriend, Domini Teer, and Domini Teer has red hair. I've never seen her, but I understand it's kind of fire engine red.

THE COURT: I don't know but I'm assuming that the appearance of this young man could be similar in stature and hair color as the girlfriend. If

that is the case, it is extremely relevant based upon your objection. That was what was in my mind at the time I allowed it to be received.

MR. FORD: I realize that was something that took place at a previous hearing. I agree. There's been some argument to the Court about whether or not the witness is mistaken in her identity of Domini versus Jason.

THE COURT: So it's relevant for that purpose. I might be anticipating what will be introduced, but I have already heard it from you so I have got to anticipate to some extent, and it's relevant certainly for that purpose of confused identity or mistaken identity.

MR. FOGLEMAN: That's correct.

THE COURT: And, Dan, if I owe you an apology, I'll certainly apologize to you, but it certainly appeared to the Court that you were challenging the Court's ruling.

MR. STIDHAM: I was just trying to set the record for appeal, Judge. The courts have ruled if you don't state specific objections --

THE COURT: I don't ever have a problem with you making an objection. Just stand up and say, "I object." And I thought that you had stated your objection as to relevancy and I overruled it. Then you kept on saying,

"What is the relevancy," demanding that I reply to you which would require the Court to comment on the evidence and which is totally and completely inappropriate.

MR. STIDHAM: I was referring to Mr. Fogleman --

THE COURT: You were looking at me and saying, "What is the relevancy," and you said it more than once. I'll be happy to go out and tell the jury if I admonished a lawyer in their presence, that I was wrong. To my knowledge, I've never done that. (R 1435) But the way you did it just caused that response to come from me, and I don't like to do that. I like you. I think you are doing a good job in this case.

CONTINUING WITH THE DIRECT EXAMINATION OF INSPECTOR GARY GITCHELL BY MR. FOGLEMAN:

After Mr. Fogleman arrived at the department, he requested that I have some further conversation with the defendant, which I did. This conversation was tape recorded as well.

(AT THIS TIME THE COURT ADMITTED THE DEFENDANT'S SECOND TAPED STATEMENT INTO EVIDENCE, SUBJECT TO IT'S PREVIOUS RULINGS AND OBJECTIONS BY THE DEFENDANT) (R

1436) The Appellant has previously abstracted this statement at Abstract page 144 - 145.

CONTINUING WITH THE DIRECT EXAMINATION OF INSPECTOR GARY GITCHELL BY MR. FOGLEMAN:

In this statement Jessie was demonstrating to me how the co-defendants' were holding the boys by their ears and forcing oral sex. There are places during this recorded statement where I stopped the tape recorder and walked out of the room to confer with Mr. Fogleman. (R 1437)

We did not talk to the defendant in between the first taped statement and the second taped statement.

ABSTRACTOR'S NOTE: THE DEFENSE RESERVED THEIR CROSS EXAMINATION OF GITCHELL UNTIL THE NEXT DAY.

THE COURT: You know who the witness is?

MR. STIDHAM: I believe so, your Honor. I would note for the record our previous objections to this witness.

THE COURT: I don't remember them. You'll have to come and tell me.

MR. FOGLEMAN: It's to relevance since it involves Damien. It's the thing about corroboration and the objection they have had to relevance.

THE COURT: Well, you've got to place, if you can, Damien and Jason at the scene or near the scene of the crime, and that corroborates the confession.

MR. CROW: That's our understanding of the Court's ruling. We object to it. (R 1439)

TABITHA HOLLINGSWORTH

DIRECT EXAMINATION OF TABITHA HOLLINGSWORTH
BY MR. FOGLEMAN

My name is Tabitha Hollingsworth, and I live in Marion. I am seventeen years old. On May 5th my mom, some other family members and I (R 1440) drove down by Love's and the Blue Beacon. We drove on the interstate. It was at about 9:30 P.M. I saw Damien and Domini, Damien's girlfriend, walking down the road. Domini has red hair and it's long. Damien was wearing black pants and a black shirt. Domini was wearing some black pants that kind of had flowers on them. (R 1441)

Her pants also had holes in the knees. Both of them appeared to have mud on their clothes. I saw them beside the Blue Beacon, that's where they were walking. (R 1443)

CROSS EXAMINATION OF INSPECTOR GARY GITCHELL

BY MR. STIDHAM Detective Ridge and I did not rehearse Jessie's story before we turned the tape recorder on. He's statement was a contemporaneous thing after we showed him a photograph, the diagram of the circle, and played him the tape. I believe there was a lot of repetition on Mr. Ridge's part of what Jessie had said. (R 1443)

Jessie told us in his first taped statement that he, Jason and Damien went down to the woods and that they got down there about 9:00 in the morning. We confirmed that Jason Baldwin went to school that day, May 5th, 1993. On page 9 of transcript of the defendant's statement, Jessie says that the murders took place around noon. I knew this had to be incorrect, because the victims were still in school at noon on that day. (R 1447)

On the same page of the transcript, he makes reference to the fact that the little boys had skipped school that day. The little boys did not skip school that day, but Jason was to skip school that day, he did not. In Jessie's second taped statement, he told us that the little boys were tied up with a brown rope. I believe that the defendant did tell us a good bit of the truth, but sometimes defendants try to lessen their activity in a statement. That's common. Jessie simple got confused. The Prosecuting Attorney was obviously concerned

about some of the things that Jessie was getting wrong, and that was the purpose of the second recorded statement. (R 1449)

I did not attempt to stop him during the first taped statement because I wanted him to go ahead and talk.

(R 1450) Mr. Fogleman later told me that he had some serious questions about the first statement and he asked me to go backin and talk to the defendant again. We kept it a secret asto what happened to these little boys and what injuries theysustained.

(MR. STIDHAM HANDS THE WITNESS AN EXHIBIT REGARDING THE POLICE INTERVIEWING A WITNESS BY THE NAME OF RICHARD CUMMINGS ON MAY 12, 1993. THE FOLLOWING COLLOQUY TOOK PLACE IN OPEN COURT.)

MR. STIDHAM: Do you remember the police interviewing a fellow by the name of Richard Cummings on May 12, 1993?

INSPECTOR GITCHELL: This is Lieutenant Sudbury's notes. Are you mentioning this, "pointed to the penis and said it was cut off"?

MR. STIDHAM: And that the little boys were beat up.

INSPECTOR GITCHELL: Yes, sir.

MR. STIDHAM: It is obvious that Mr. Cummings knew what had happened?

INSPECTOR GITCHELL: I believe that -- it was ran in the news media that all had been sexually mutilated. If my recollection is correct, which in fact was not true.

(R 1450) MR. STIDHAM: We're going to talk about that in a minute. (Speaking to Mr. Fogleman) Do you have any problem withthis?

MR. FOGLEMAN: Your Honor, we don't have any objection to introducing the exhibit, but it's just a series of what are answers to questions that were put to people, and I think the questionnaire ought to be attached, too.

MR. STIDHAM: Judge, the obvious question is what happened to these little boys and this is what he told them.

THE COURT: Well --

MR. STIDHAM: I don't have any problem with attaching the questionnaire as a part of the exhibit.

THE COURT: Let me see what you're doing.

MR. STIDHAM: Your Honor, the purpose of the exhibit is to demonstrate to the jury that this information about what had happened to the

little boys wasn't a top secret situation. Everybody in West Memphis knew about it and heard rumors about it.

THE COURT: (Speaking to the Prosecuting) Are you objecting?

MR. STIDHAM: No, they said they had no objection, your Honor.

THE COURT: Well, I didn't follow. There was some objection -- (R 1451)

MR. FOGLEMAN: Your Honor, the only thing we've said is if that is going to be admitted, it is hearsay because Detective Gitchell did not do it but if it's going to be admitted, we think the questionnaire ought to be attached as well.

THE COURT: Approach the bench.

(THE FOLLOWING CONFERENCE WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY)

THE COURT: Are you objecting to the admission of this? It is hearsay and police reports are not admissible.

MR. STIDHAM: They have already said they have no objection.

THE COURT: It was kind of equivocal. "If it is going to be admitted." I don't know if that's objecting to it or not. That's what I'm asking.

MR. STIDHAM: I understood they had no objection.

THE COURT: If they don't, go ahead.

MR. DAVIS: We don't have an objection if the questionnaire is attached to it. But if we end up with --

THE COURT: Are we going to go through a whole series of interviews of people? MR. STIDHAM: We have two.

THE COURT: Okay. Go ahead. (R 1452)

(DEFENDANT'S EXHIBIT ONE IS RECEIVED IN EVIDENCE)

CONTINUING CROSS EXAMINATION OF INSPECTOR GITCHELL

BY MR. STIDHAM:

Dalton Shane Kellon was picked up for questioning. He related to me that he had heard rumors of castration and mutilation and the boys were beaten to death. Defendant's Exhibit Two are my notes concerning my questioning of Dalton Shane Kellon. (DEFENDANT'S EXHIBIT TWO IS RECEIVED IN EVIDENCE) (R 1453)

Defendant's Exhibit Three is an article by the Associated Press says that the victims' hands were tied, and their genitals had been removed with a sharp instrument. The Associated Press apparently intercepted this message from a

computer print out that was generated by the West Memphis Police Department and intended for other law enforcement agencies.

I have yelled at people and got in their face when I have interrogated them in the past.

REDIRECT EXAMINATION OF INSPECTOR GARY GITCHELL
BY MR. FOGLEMAN

I did not yell or get in the defendant's face when I interrogated him on June 3rd, 1993. I did holler and get in peoples face on at least two (2) occasions with suspects that I interrogated in this case, but I did not do this to the defendant. (R 1455)

The information on defendant's exhibit two, from Dalton Shane Kellon, does not mention specifically which victim had the cuts to the face or who was castrated. This is the information that basically was contained in the newspaper. It is not unusual, when you take a confession from a defendant, for him to have some details that are wrong.

(AT THIS POINT IN THE WITNESSES EXAMINATION, THE PROSECUTION TRIES TO ELICIT INFORMATION FROM THE WITNESS INDICATING WHERE OR NOT THERE WAS ANY EVIDENCE THAT THE VICTIMS HAD BEEN BOUND WITH

SOMETHING OTHER THAN SHOESTRINGS. THE FOLLOWING COLLOQUY TOOK PLACE IN OPEN COURT)

MR. FOGLEMAN: Do you know whether or not -- are you aware of any evidence that would indicate that there had been some sort of binding other than the shoestrings?

INSPECTOR GITCHELL: Some markings of their legs.

MR. STIDHAM: I'm going to object to that. He's not the Medical Examiner.

MR. FOGLEMAN: He can state what he observed.

THE COURT: Are you testifying from reports, records or from your own personal observation?

INSPECTOR GITCHELL: From my own observation.

THE COURT: Overruled. MR. FOGLEMAN: I want to show you State's Exhibit 59B, the mark across the leg here. Did you observe that?

INSPECTOR GITCHELL: Yes, sir.

MR. FOGLEMAN: What did you observe?

INSPECTOR GITCHELL: Well, the -- (R 1456)

MR. STIDHAM: May I interpose another objection? Your Honor, I think that calls for pure unadulterated speculation on the part of this witness who is not qualified to render such an opinion.

MR. FOGLEMAN: Your Honor, I asked him what he observed.

THE COURT: I'm going to allow him to testify to what he observed on the victims' bodies. I'm not going to let him speculate as to the cause of the observation. Your objection will be sustained in that regard. He may testify to what he personally observed.

MR. FOGLEMAN: What did you observe?

INSPECTOR GITCHELL: I observed this bruising, I believe it was on the left leg stretching approximately three and a half inches of the leg.

MR. FOGLEMAN: Did you observe a pattern?

INSPECTOR GITCHELL: Yes, sir, it appears to be of a

MR. STIDHAM: Your Honor, again, that calls for pure speculation. Why didn't he ask the Medical Examiner yesterday when he was here? He may be qualified to answer that question.

MR. FOGLEMAN: Your Honor, I think --

THE COURT: I cannot respond to why they didn't ask somebody something, but I'm going to let this (R 1457)

witness testify to what he personally observed, but he cannot draw conclusions on what he observed.

MR. FOGLEMAN: Did you observe a pattern?

INSPECTOR GITCHELL: Yes, sir.

MR. FOGLEMAN: On this piece of paper, could you draw the pattern that you observed?

(WITNESS DRAWING)

MR. FOGLEMAN: I'm going to mark this Exhibit 105A. Is that what you observed on his leg?

INSPECTOR GITCHELL: Yes, sir.

MR. STIDHAM: Your Honor, may we approach the bench?

(THE FOLLOWING CONFERENCE WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY) MR. STIDHAM: Your Honor, this witness is not qualified torender an opinion based on --

THE COURT: I'm not going to allow him to render an opinion as to causation, but I'm going to allow him to testify to what he saw.

MR. CROW: Can I view the photograph?

MR. FOGLEMAN: (HANDING) MR. CROW: I think the photograph is more adequate to

show what he observed, your Honor. (R 1458)

MR. STIDHAM: They are trying to pass him off as an

expert in pathology. That's not proper.

MR. FOGLEMAN: Your Honor, I asked him what he observed and I asked him to draw it.

THE COURT: I'm going to allow him --

MR. STIDHAM: Your Honor, that could have been caused

by a stick. That could have been caused by anything.

MR. CROW: Your Honor, the photograph shows it.

THE COURT: You are again arguing what caused those

markings that he saw, which is something you can argue at the end of the case. Each of you can draw conclusions, and you can argue what you believe to be the cause of that. The officer is going to be permitted to testify to what he saw.

MR. STIDHAM: Will this exhibit be allowed to be introduced?

THE COURT: Yes.

MR. CROW: I think the picture shows it better.

THE COURT: I'm going to allow it.

MR. CROW: Note our objection.

(RETURN TO OPEN COURT)

(STATE'S EXHIBIT 105A IS RECEIVED IN EVIDENCE) (R 1459)

CONTINUING REDIRECT EXAMINATION OF INSPECTOR GITCHELL BY MR. FOGLEMAN:

I am not aware of anybody other than the defendant who told us that there was only one of the victims that had their genitals removed and that one of them had a cut to the side of the face, and that there had been some grabbing of the ears. (R 1460)

(THE FOLLOWING CONFERENCE WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY) MR. CROW: I anticipate the next witness is going to testify that she saw the defendant at some alleged cult meeting after the murders. I don't think there's been a proper foundation laid for it. It is prejudicial and we would strongly object.

THE COURT: Is that what you're going to do --

MR. FOGLEMAN: Between the murders and the arrests.

THE COURT: But after the event.

MR. STIDHAM: Just because he was somewhere drinking and carrying on with somebody doesn't mean he's satanic --

(R 1461)

THE COURT: I'm reminded of the Ridling trial. Is there any difference in what you're trying to do here?

MR. FOGLEMAN: In this particular case the defendant in his confession talked about this cult activity. We contend that the proof is going to show that within maybe a couple weeks after the murders she got Jessie to introduce her to Damien, and Damien invited her to an Esbat, some kind of witch or Satan worship deal. Damien and Jessie took her there. And while there she observed the kids. Some of them have their faces painted black, they begin to have sex. She asked to leave and Damien took her home and Jessie stayed.

MR. STIDHAM: We have already brought out in cross examination why the police were looking -- why they picked up Jessie that morning, and this is highly prejudicial in that it occurred after the murders if it occurred at

all, and I think any probative value is surely outweighed by the prejudicial effect of this. (R 1462)

MR. DAVIS: Judge, one thing that you need to remember -- in their entire cross examination of the officers yesterday they kept asking, "Do you have any evidence that Jessie was involved in cult activity? What evidence do you have?"

MR. CROW: It has already been discussed.

MR. DAVIS: We can put on witnesses to show what evidence they have.

MR. FOGLEMAN: And they were the ones in their examination of the officers who asked about, "Where did you get this information about Jessie being involved in with this cult stuff with Damien?" THE COURT: I'm going to take a recess and think about it.

(A RECESS WAS DECLARED BY THE COURT AND THE FOLLOWING CONFERENCE TOOK PLACE IN CHAMBERS)

THE COURT: Let the record reflect that this is a hearing out of the presence of the jury. All right, gentlemen, the Court is considering the

testimony of Vickie Hutcheson. State for the Court what your theory and notion of relevance is to this testimony. (R 1463)

MR. FOGLEMAN: Your Honor, we expect that the witness would testify that approximately two weeks after the murders -- two to three weeks after the murders -- she was introduced to the co-defendant Damien Echols by the defendant and after being introduced, she kind of played detective and got Damien or led Damien to believe that she was interested in occult activity and Damien invited her to an Esbat, which I understand is some kind of witch or satanic meeting.

That Damien and the defendant took her to this meeting and that at this meeting a group of young people were there. They had their faces painted black and began to take off all their clothes and have sex with each other. Let me back up. I don't think she's -- I think she's going to say she left before that actually took place. They began to touch each other is what I think she said. Then she asked to leave and Damien took her home and the defendant stayed.

The theory of relevance is that the defendant in his confession stated that he had been engaged in cult activities with Damien Echols, and there were orgies that took place, and the defense has taken the position that we

would not be able to prove any of (R 1465) these cult activities or any connection with any cult, and this is offered to corroborate what the defendant said as far as his involvement in these activities which the defendant in his statement relates to the murders by his statement that here was a photograph of the little boys that was passed around at one of these meetings.

MR. CROW: Your Honor, first, the prejudicial effect of this type testimony in front of your average American juror is obvious. Very few members of American society are anything but Judeo-Christian. This activity allegedly occurred two weeks after the murders. There's no alleged connection between this event and the murders. There's nothing been put forth so far in the prosecution's case or anything I'm aware they're going to put on saying the actual murders were cult related other than the fact that these guys may have been in a cult together.

Jessie doesn't say in his statement it was a cult killing. There's no physical evidence, to my knowledge, on the scene making it cult related.

And the effect this thing is going to have on the jury is very substantial and the probative value for something that happened two weeks after the murder is so limited.

(R 1465)

THE COURT: I'm not going to let you do it.

MR. FOGLEMAN: You're preventing us from being able to corroborate the things he says in his statement and -- I am not arguing with the Court.

THE COURT: The last time I did it I restricted the defense and the Court reversed saying that I -- but the issue there was entrapment and it was conduct of the police that they wanted to demonstrate afterwards.

MR. FOGLEMAN: That's correct.

THE COURT: This is a little different situation, frankly. The conduct is conduct of the defendant.

MR. STIDHAM: But it's after the murders.

THE COURT: The issue is whether or not that portrayal

of him involved in cult activities with the co-defendant would so prejudice the jury against him that it would outweigh any probative value, that is, the corroboration of his statement.

MR. STIDHAM: Your Honor, would you consider this? We are not here to determine whether or not Jessie was in a cult meeting in Turrell.

We're here to determine whether or not he was involved in a homicide. (R 1466)

THE COURT: It is relevant inasmuch as you're questioning and have since the outset of the trial the statement itself made by Misskelley. You are alleging that it was contrived, that it's false and it is simply not true. So -- and basically that is the only evidence that ties Misskelley directly to the commission of a crime is his own statement. So it is extremely important and relevant that the jury be provided all evidence necessary to decide whether or not that statement was voluntarily given and whether it was truthful at the outset. So I certainly understand the State's position. I'm trying to balance the thing.

MR. FOGLEMAN: Your Honor if -- if you want to --

THE COURT: I'm more concerned about all of the fact

and details that occurred at the --

MR. FOGLEMAN: Do you want us to ask her not to say about what they were doing?

THE COURT: What took place. I think I'm inclined to let her testify that she attended, whatever you called it, occult activity with Jessie Misskelley and Damien Echols.

MR. STIDHAM: That's the prejudicial part that we are objecting to.

THE COURT: You're not objecting to black painted faces and sex? (R 1467)

MR. CROW: We're objecting to that, too.

THE COURT: I think it is relevant, and they're entitled to show that it's true that there were cult activities, based upon at least this witness' representation.

But I'm more concerned about all the details and circumstances that the witness would be prepared to testify to. Those to me are more prejudicial than the fact that he went to a cult activity.

MR. STIDHAM: Your Honor, the State is required to corroborate the homicides, not corroborate that maybe he was at a meeting --

MR. CROW: -- two weeks after the murder.

MR. STIDHAM: -- with teenagers drinking and having an orgy --

MR. CROW: -- two weeks after the murder.

MR. STIDHAM: He's here on a homicide. That is why we are here before the Court is to determine if he was involved in a homicide.

MR. CROW: If they want to prove that he was at some cult activity prior to the homicides as he says he said in his statement, that's one thing. But proving he was at cult activity after the homicide -- something he didn't discuss in his statement -- is totally out of bounds. (R 1468)

MR. FOGLEMAN: If we were talking about three months after, I could see the point about -- but we are only talking about a few weeks. And, really, if y'all were not arguing false confession, we wouldn't be in a position like we are because all we would have to do is corroborate that the crime occurred. But with you arguing false confession, we feel compelled to try to corroborate details unrelated that he says in his statement.

MR. CROW: Corroborating with stuff -- his activity prior to the crime, which is things he talked about, is one thing. Maybe he said he was a St. Louis Cardinal baseball fan and saying he went to a St. Louis Cardinals game after the crime -- I just don't see the -- obviously that is not prejudicial.

MR. STIDHAM: That's why they are wanting to hang this boy and that is why the newspapers have been splashing this cult stuff and that's why everybody's got their mind made up about his guilt or innocence because they are so petrified and horrified by this cult stuff. Mr. Crow made a good point that people -- (R 1469)

THE COURT: Everything they've just said are certainly subject matters of cross examination if he takes the stand. There's no question about that. I'm going to let them develop from the witness that she went with Jessie and Damien to a cult activity and that -- to that extent, basically. Don't go into all the circumstances of what was seen and what was done and that sort of thing.

I think the fact that you are challenging both the police activity -- overreaching of the defendant in taking a confession -- the fact that the confession is false, that is a fabrication on the part of Jessie Misskelley, that the State should be given some latitude to prove that this is not false. These are the underlying facts that support the truthfulness of the statement. I think just basic fairness allows him to do that.

On the other hand, I'm trying to balance the harmful effect by -- I agree to some extent if they went in there and started talking about black painted

faces and children having sex in the woods with devil signs around and all of those sorts of things, that would be prejudicial to some extent. But whether or not that prejudice would outweigh its probative value, I'm not certain. (R 1470)

I frankly think that maybe fairness would allow it to all go in to show the circumstances immediately after the crime. But I'm going to limit it to the fact that she did attend with them some kind of cult activity without allowing her to go into all the details.

MR. CROW: Note our objection.

VICTORIA HUTCHESON

DIRECT EXAMINATION OF VICTORIA HUTCHESON

BY MR. FOGLEMAN

My name is Victoria Hutcheson. My eight year old son was really good friends with Chris and Mike and Steve, (R 1471) and they ran together, but Steve more or less ran with my older boy. Steve, Aaron and Chris were all in the same class together. While living in the Highland Park area I became acquainted with the defendant, Jessie Misskelley Junior. We really became close friends. At some point after the murders, I decided that I wanted to play

detective.

(R 1472)

I had heard some things about Damien Echols and I wanted to try to learn more about him. I had Jessie Misskelley introduce me to Damien. Don Bray, of the Marion Police Department gave me his library card and I went and checked out some satanic books. At this time the West Memphis Police Department was not aware of what I was doing. I took these books on satanism and spread them out on my coffee table like it was everyday reading.

(R 1473)

Later Damien invited me to go an Esbat meeting. An Esbat is an occult satanic meeting. I went to this meeting with Damien and Jessie Misskelley Junior went with us. We drove in a red Escort that Damien was driving. There were approximately twelve or fifteen people at this meeting. Shortly after we arrived at the meeting, I asked Damien to take me home, which he did. (R 1474) Jessie Misskelley stayed at the meeting. (R 1475)

The tape that has been played with the voice that says "nobody knows what happened but me". That is my child Aaron, and the defendant is acquainted with Aaron. The defendant and I were very close and good

friends, and he spent quite a bit of time with us. At the time that I asked him to introduce me to Damien, I had no reason to believe that he was involved in the murders. (R 1475)

CROSS EXAMINATION OF VICKIE HUTCHESON
BY MR. STIDHAM

Jessie Misskelley Junior told me that Damien was a friend of his. I came into contact with Don Bray, the officer from the Marion Police Department, because of a credit card mess up at my place of employment. There was a two hundred dollar transaction that was being investigated. All the charges against me were dropped. (R 1476)

I have been convicted of writing hot checks in the State of Arkansas. The thirty thousand dollar reward had nothing to do with me wanting to play detective and to try to catch the killers. To my knowledge, I never told anybody that I was going to get the reward money. (R 1477) The night before Jessie Misskelley was arrested, and I had no idea that he was gonna be arrested, he spent the night with me to protect me from a prowler. (R 1478)

REDIRECT EXAMINATION OF VICKIE HUTCHESON

BY MR. FOGLEMAN

There were never any charges filed against me with regard to the investigation of the credit card problem at my place of employment.

MELISSA BYERS

REDIRECT EXAMINATION OF MELISSA BYERS

MR. FOGLEMAN: You are the same Melissa Byers that has previously testified.

MS. BYERS: Yes, sir.

MR. FOGLEMAN: I want to direct your attention to an incident that occurred in February --

MR. CROW: Your Honor, may we approach the bench?

(THE FOLLOWING CONFERENCE WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY)

MR. CROW: Your Honor, previously the Court ruled that the parents would stay out of the courtroom until they testified and then let them stay. She's been in the courtroom ever since.

THE COURT: There is a specific statute that the victims' family are permitted to be in the courtroom --

MR. CROW: The Court excluded her.

THE COURT: I excluded her until her testimony in chief but I then let her back in, and the statute provides that you can so I'm waiving the rule in that regard.

MR. STIDHAM: I anticipate that she's going to testify about a photograph that someone may have taken of her child.

THE COURT: I don't have any idea. Are you objecting?

(R 1479)

MR. STIDHAM: Yes, your Honor.

MR. FOGLEMAN: What is it, is that about -- sometime between the middle of March and the middle of February the Byers say that they went to the store, were gone about 15, 20 minutes, came home and their son Chris says, "Somebody was taking my picture." He described him as having black hair and all black clothes and matches Damien's description. Jessie said in his statement about the picture of the boys.

THE COURT: What is your objection?

MR. STIDHAM: She cannot specifically identify this person and this is something that is going to be highly prejudicial.

MR. CROW: Your Honor, Jessie's statement -- that's what they're relating it to -- that's the relevance -- it was three boys not just one picture of one boy.

MR. FOGLEMAN: The kid didn't say who all was present. He said they took a picture.

MR. CROW: Then that's all they've got, your Honor --

MR. STIDHAM: There's a lot of speculation and stuff --

THE COURT: I'm going to overrule the objection.

(R 1480) REDIRECT EXAMINATION OF MELISSA BYERS

MR. FOGLEMAN: I want to direct your attention back to mid-February to mid-March. Was there an incident about a picture involving your son, a photograph --

MR. CROW: One more objection, your Honor. I'm sorry.

(THE FOLLOWING CONFERENCE TOOK PLACE AT THE BENCH OUT OF THE HEARING OF THE JURY)

MR. CROW: This is hearsay, your Honor.

MR. FOGLEMAN: Your Honor, it meets Rule 824 -- present sense impression.

MR. CROW: Fifteen, twenty minutes later?

MR. STIDHAM: That's obviously hearsay.

MR. FOGLEMAN: Let me get the rule here. Eight oh three one, your Honor, present sense impression about a declarant explaining an event immediately after the event.

MR. CROW: It was fifteen or twenty minutes.

MR. FOGLEMAN: As soon as they got back from the store

he runs up.

MR. CROW: If they are gone fifteen minutes, it doesn't matter.

MR. STIDHAM: Keep in mind this is a young child saying this stuff.

(R 1481)

THE COURT: I don't think it qualifies as a present sense --

MR. FOGLEMAN: Your Honor, it says, "made while perceiving an event or immediately thereafter." They come back --

THE COURT: It is usually the old concept of res gestae, an event involving a crime or the circumstances immediately thereafter. That is where the present sense impression exception came into being, circumstances involving the crime itself.

MR. FOGLEMAN: Can we -- it may qualify as an excited utterances. The kid runs up --

THE COURT: That is usually contemporaneous with the --

MR. FOGLEMAN: It is while he's under the stress, stress and excitement, your Honor. "Hey, this guy is taking my picture."

MR. DAVIS: The way she testifies preliminarily is going to gauge whether it fits or not.

MR. FOGLEMAN: Do you want us to make a proffer and see -- out of the presence of the jury?

THE COURT: Yeah. (R 1482) THE COURT: All right, let the record reflect that this isaproffer of proof outside the hearing of the jury.

REDIRECT EXAMINATION OF MELISSA BYERS

My son told us that a man had taken a picture of him. My other son Ryan was home and I needed some milk and cigarettes so I decided to run to the store. Chris was playing in the carport. I left Chris at home. Me and my husband jumped in the car, ran down to the corner store, bought cigarettes and milk and came right back.

When we pulled up in the carport, Chris come running out of the house, and he said, "Mama, there was a man here and he took a picture of me." (R 1483) I said, "What do you mean, took a picture of you?" He said, "He pulled up in the driveway and he scared me so I ran out in the yard so I could get away from him, and he took a picture of me." And I say, "What did the man look like?" He said, "He had black hair. He had on a black coat, black shirt, black pants and black shoes, and he drove a green car." The way he described it to me -- he was only an eight-year-old child -- the way he described it to me was like a suit, a man in a suit. That's what I thought -- a man in a suit, you know, and I didn't go any further than that. He was excited. He was frightened. MR. STIDHAM: We'd just like to renew our objection as torelevancy and hearsay. (R 1484)

THE COURT: As far as relevancy, I wouldn't have any problem in ruling and finding that the evidence is relevant.

MR. STIDHAM: We'd also argue that its prejudicial effect outweighs any probative value. She can't say who it was for sure, and the inference is very prejudicial.

THE COURT: We have eight oh three twenty-five that goes to sexual contact of a child, which is an exception to the hearsay rule. I'm not sure it is quite applicable, but it is somewhat analogous. (R 1485) My understanding of that rule previous to this is that the observation or the experience that would cause an excited utterance or present sense impression usually were those events that occurred simultaneous to or in conjunction with a crime or the event itself, part of the res gestae of it, in close proximity to the event that is the subject matter of the trial, but I'm not sure that that's completely accurate.

MR. FOGLEMAN: Your Honor, the rule doesn't say that.

THE COURT: That's what I'm saying. It could very well be some other event that in itself has independent relevancy to the crime itself. (R 1486) Do you want something in the record other than your objection as to hearsay?

MR. CROW: Your Honor, the child was no longer -- if the child was ever in danger. He had already been inside the house. That part of the excitement's over. He came out to tell mom and dad what happened. That's the whole purpose of the hearsay rule is that we can't cross examine. We can't bring out --

THE COURT: The exception is that the declarant is not available. Obviously the declarant is not available.

MR. CROW: That's why it has to be limited in scope.

THE COURT: The issue is not whether or not there was any danger at all, but the issue is whether or not contemporaneous to that event, the photograph taking, or very shortly thereafter he made that statement. That is the question and whether or not that alone if it has independent relevancy, which I am ruling it does, based upon the testimony of Inspector Gitchell from the statement of the accused. There was some reference to a briefcase and photographs. So it has relevance.

I'm going to rule that it's admissible, if not as a present sense impression or excited utterance, (R 1487) that it falls under the gamut of eight oh three twenty-four in that the statement is more probative on the point for which it's offered than any other evidence which the proponent could procure through reasonable efforts and that the interest of justice allows it.

MR. CROW: Your Honor, on that basis I would strenuously point out that the statement talks about one photograph of three boys. That is not what this is about.

THE COURT: That is again a point of argument.

MR. CROW: I understand that, your Honor --

THE COURT: You both can argue that --

MR. CROW: -- twenty-four argument. I think that's more appropriate.

THE COURT: The only question I've got is you were aware of this potential testimony and that had been made known to you prior to today?

MR. STIDHAM: Yes, your Honor, but its reliability was certainly an issue.

THE COURT: I'm going to rule that it's an exception to the hearsay rule, either eight oh three one or two or eight oh three twenty-four. (R 1488)

CONTINUED REDIRECT EXAMINATION OF MELISSA BYERS
BY MR. FOGLEMAN:

At the end of February or early part of March of 1993, Chris told us about a man that had pulled up in the drive way and had taken a picture of him. My older child Ryan was home when Chris was playing on the carport. I needed mild and cigarettes so me and my husband jumped in the car. There's a little corner grocery that is like two blocks from the house. Chris was busy and playing. We left him playing on the carport. We ran down to

the corner grocery and got a gallon of milk and two packs of cigarettes and ran right back to the house. We were not gone fifteen minutes. When I came pulling up in the driveway, Chris came running out of the door. He said, "Mommy, there was a man here and he took a picture of me." I said, "What did the man look like?" He said, "He had on a black coat, black pants, black shoes and a black shirt and he was in a green car." (R 1489) And he said he had black hair.

BRYN RIDGE

REDIRECT EXAMINATION OF DETECTIVE BRYN RIDGE
BY MR. FOGLEMAN

I am the same Detective Ridge that has previously testified herein. On June 3, 1993, after the defendant gave his confession, we executed a search warrant. State's Exhibit 90 and 91 are boots worn by Damien Echols. I took them from him at the time of the arrest.

(THE FOLLOWING COLLOQUY TOOK PLACE IN OPEN COURT)

MR. FOGLEMAN: Your Honor, we offer State's Exhibit 91.

MR. STIDHAM: Your Honor, may we approach the bench.

(R 1491)

(THE FOLLOWING CONFERENCE TOOK PLACE AT THE BENCH OUT OF THE HEARING OF THE JURY)

MR. CROW: This was discussed yesterday, I believe. We raised an objection on this --

MR. STIDHAM: I don't know whether the Court made a ruling or not. We want to raise it again. We object to any evidence introduced to show that Damien and Jason may --

MR. CROW: -- The Court may have already ruled on it. We just want it clarified.

THE COURT: Yes, I think I did. I'm allowing the State to produce all the events and circumstances that relates to the crime itself and if that includes evidence of the other two defendant in this case, that is permissible because Misskelley is being tried separately from them anyway.

MR. STIDHAM: We would like to raise our same objection that we made in our motion in limine for the record.

THE COURT: Okay.

(RETURN TO OPEN COURT)

(STATE'S EXHIBIT 91 IS ADMITTED INTO EVIDENCE) (R 1492)

(STATE'S EXHIBIT 90, WHICH ARE BOOTS BELONGING TO CO-DEFENDANT JASON BALDWIN FOUND AT CO-DEFENDANT DAMIEN ECHOLS HOUSE WERE RECEIVED FOR IDENTIFICATION BY THE COURT ALONG WITH STATE'S EXHIBIT 83) (R 1494)

CONTINUATION OF REDIRECT EXAMINATION OF DETECTIVE BRYN RIDGE BY MR FOGLEMAN:

There was no blood found anywhere at the crime scene. (R 1494)

JAMES SUDBURY

DIRECT EXAMINATION OF OFFICER JAMES SUDBURY
BY MR. FOGLEMAN:

My name is James Sudbury, I am a Lieutenant with the West Memphis Police Department. In the course of my investigation I participated in a search of the residence of Damien Echols. State's Exhibit 90 is a pair of boots belonging to Jason Baldwin which I recovered at 2706 South Grove. (R 1495 & 1496)

(ABSTRACTOR'S NOTE: THE DEFENDANT FILED A MOTION IN LIMINE, WHICH IS PREVIOUSLY BEEN ABSTRACTED HEREIN ALONG WITH ARGUMENTS HAD BY COUNSEL IN CHAMBERS, ALL OF WHICH HAS BEEN PREVIOUSLY ABSTRACTED HEREIN. THE

DEFENDANT'S COUNSEL AGAIN RAISED THESE ISSUES IN THE RECORD AT - R 1492, AT WHICH TIME THE COURT RULED ON THE DEFENDANT'S MOTION TO EXCLUDE SAID EVIDENCE REGARDING THE CO-DEFENDANTS. PURSUANT TO THE COURT'S RULING STATE'S EXHIBIT 90, 91 AND 83 WERE INTRODUCED DURING THE TESTIMONY OF OFFICERS BRYN RIDGE AND JAMES SUDBURY.)

(THE FOLLOWING CONFERENCE TOOK PLACE IN CHAMBERS,

CHAMBERS CONFERENCE REGARDING THE ADMISSIBILITY OF THE TESTIMONY OF MICHAEL DeGUGLIELMO)

THE COURT: Let the record reflect this is a hearing out of the presence of jury. Let the record also reflect that the witness Michael DeGuglielmo is present. (R 1496)

MR. CROW: Your Honor, we've been speaking with the witness about the evidence he's getting ready to submit. My understanding is there was some cuttings from jeans of one of the victims -- one or more --

MR. FOGLEMAN: I think there were two pair of pants that the cuttings were from.

MR. CROW: The witness will be testifying that they have definitely found some DNA in the cutting. The part I think we are going to be objecting to is that he also I believe will be testifying that he believes or there is a possibility --I'll let him put it in his own phraseology -- that DNA in some way indicates sperm. From my speaking to him, I'm not convinced it meets the qualifications when he can make that. He uses "believe" and "probably came from" and that concerns me.

MR. STIDHAM: We'd also like to state that it doesn't have any relevancy. As I understand it, the fact that there is DNA there doesn't necessarily mean that ties the defendant or any of the co-defendants to anything, and I believe the purpose that the prosecution is trying to introduce this is for the fact that there may be semen or sperm on the pants, and we would submit that in the event the Court feels it is relevant, we would submit that it is highly (R 1497) prejudicial and doesn't have any probative value.

THE COURT: Well, all evidence is prejudicial to someone. The question is whether or not it is probative and proper -- or extreme prejudice would be a different matter. But certainly the presence of sperm on the pants of the decedents would be relevant evidence.

MR. STIDHAM: I don't think the witness can say that with any degree of certainty.

THE COURT: I don't have any idea what he is saying. If your objection is that he's unable to testify as to the presence of sperm because of lack of qualifications or because it is not a scientific method that is recognized or a novel or new approach to some scientific method, then maybe you have a valid objection.

MR. CROW: It is not so much that the test isn't recognized. I think if he had a proper sample, it could be more valid.

The Court: That probably goes to the weight of his testimony, and you can cross examine him on the factual basis of any opinion he might render. If he is prepared to testify that he has the scientific knowledge and education in the field of genetic comparisons and coupled with that education, (R 1498) experience and ability he applied normally recognized scientific tests to the submitted sample and based upon his lab findings he is prepared to testify that he has an opinion, I'm going to allow him to testify as to what that opinion is. You can challenge the basis of that for it. You can cross examine him on it and it all goes to the weight, not the admissibility of his testimony.

MR. CROW: I understand that position, but with the amount of damage this could do with the jury, if the jury were to believe this considering that he says, "probably indicates, might indicate." That just really concerns me. I don't know if it can be cured on cross examination.

THE COURT: If it is couched in the proper terms that he has an opinion based upon some scientific basis and coupled with his education, he will be permitted to draw those conclusions.

An opinion is a speculation to begin with. That's the kind of speculation that an expert is qualified and permitted to do. I haven't heard what he's got to say, other than that sketchy outline, whether or not it meets the test of admissible evidence or not. (R 1499)

MR. STIDHAM: Your Honor, he's going to testify that there's DNA present on these cuttings from the pants of the victim. He cannot tell for sure if it came from an ape, a gorilla, a baboon or a human. He can't tell whether it came from blood or semen. He says it is likely that it came from sperm. There might have been sperm present, but he doesn't know with any degree of certainty, and we think that is highly prejudicial. If he could come in here and say, "Yes, that is definitely semen," or "Yes, that is definitely sperm" --

THE COURT: Well, wait a minute. What is it you are prepared to testify to based upon your experience, education and scientific findings?

DR. DeGULIELMO: On the specimens in question, the initial information that we were given was that they were potential seminal stains. In a potential sexual assault specimen where the possibility exists for mixed specimens we (R 1500) attempt to separate sperm and nonsperm components from other material. Because of the very small amount of DNA we preformed a PCR based test. That is a process by which amplification of the material occurs for the analysis. Here, the two items show a very small, marginal amount of DNA on the male fractions. We assume that to mean there was some DNA of human origin. (R 1501) We can not tell the difference between human beings and other higher primates, specifically, gorillas, chimpanzees and great apes. Most of the probes used in DNA testing react both with great apes, chimpanzees as well as humans.

We know is there is a small amount DNA present on the specimens that is from a higher primate. I can also tell you the two fractions that come from that are the epithelial, or nonsperm, and male, or sperm fractions. (R 1502) Here, we detected a very small amount of DNA in the male or sperm portion

of those two samples, the interpretation from that being that there likely was a small amount of sperm present on those garments.

THE COURT: Is that a conclusion you could draw based upon your experience, training and education, and is it based upon recognized scientific findings?

DR. DeGULIELMO: Yes, I believe so.

THE COURT: All right, gentlemen, what else is there to object to?

MR. STIDHAM: You told us a moment ago before we went on the record that you could not say for sure that there were sperm present.

DR. DeGULIELMO: That's correct, and I can not because I did not personally visually see sperm. I do not feel comfortable saying for sure that there are until I do. The initial screening test done in this (R 1503) case was an acid phosphatase, and that indicates the presence of semen, not necessarily even guaranteeing that there are sperm cells there though.

THE COURT: Just the hormone.

DR. DeGULIELMO: That and the fluid present -- that's correct -- the acid phosphatase. What then is done if there are sufficient specimens is to take a portion of that and do a microscopic examination to visually see sperm

cells. I did not do that. I don't believe it was done by the lab here, once again because of the limited specimen. So I can't tell you conclusively that there are sperm cells there. I can tell you that what we see is indicative ofthat and indicative of a very small amount of it and after discussing it with Kermit Channel to try to make some interpretation from the results, it appeared to be consistent withtheir findings as well and the activity that he saw with theacid phosphatase. I cannot give you a definitive statement. All I can tell you is what my interpretation would be from what I've seen.

THE COURT: I'm going to allow him to testify. It simply goes to the weight of his testimony, not to its admissibility. You can point all these things out (R 1504) on cross examination.

MR. STIDHAM: We want to make sure our objections are noted that we feel this could possibly confuse the jury.

THE COURT: That's another question. In what way will his testimony elucidate or benefit or assist the jury?

MR. FOGLEMAN: The defendant in his statement described sexual type acts occurring, and this is another thing to corroborate what the defendant said since the defense is alleging a false confession.

MR. STIDHAM: Judge, the Medical Examiner said there was no evidence of a sexual assault.

MR. FOGLEMAN: He also said he was familiar with literature which indicated that you could have sexual abuse and no findings.

THE COURT: I don't think that is what he testified to, that there was no evidence of sexual assault. He testified about the rectum of two of them being dilated --

MR. STIDHAM: -- Most likely caused by the water. T H E COURT: Again that is a question of interpreting his testimony and arguing to the jury. I don't think he gave an opinion that there was no sexual -- he just said he couldn't tell and didn't (R 1505) find any sperm.

MR. CROW: Wasn't any damage.

THE COURT: Wasn't any extensive damage to the inside of the rectum. Although he did testify that the mouths of one or two of the boys were torn up on the inside.

MR. FOGLEMAN: Their ears were all bruised.

MR. STIDHAM: But he said that could have been caused by THE COURT: Again that's argument. You can interpret thattestimony for the jury

and argue it either way you choose to. I'm going to allow him to testify. You can point outall the things you just mentioned so I guess it is some relevant evidence that possibly sperm existed in trace amounts on the clothing of the two victims and this is what wecall trace evidence.

MR. STIDHAM: He can't say there's sperm. He can only say --

MR. FOGLEMAN: He said he couldn't positively say there was sperm.

DR. DeGULIELMO: There are a lot of ways to phrase things. I certainly can -- and this happens in a lot of trials -- different people wanting my words to be phrased in different fashions. The bottom line is, (R 1506) no, I

can't positively tell you there are sperm, but that's because I didn't see them. And the only way that I or anyone else I know feels comfortable with saying they are there is to see them, but that doesn't mean that the results don't indicate to me that there could have been sperm cells there because we see DNA where we would see DNA from sperm cells.

LISA SAKEVICIUS

DIRECT EXAMINATION OF LISA SAKEVICIUS
BY MR. FOGLEMAN

My name is Lisa Sakevicius and I'm a criminalist at the Arkansas State

Crime Lab. (R 1507) In the course of my duties with the Arkansas State Crime Lab I came into contact with items from the West Memphis Police Department in their investigation of the murders of Michael Moore, Steve Branch and Chris Byers. I examined the ligatures which bound the victims and are marked as State's Exhibit 82, 81, and 80. Ligatures are the knots in the shoestrings that were used to bind the victims. (R 1508) I looked at the types of knots present and examined them for hairs and fibers. Exhibit 80 are those knots which were binding the victim Michael Moore. The knots on the left side were both square knots. The knot on the wrist on the right side was a series of three half hitches. The knot on the left side of the right side was a series of four half hitches.

Exhibit 81 is the ligatures from the victim Steve Branch. A black shoestring on the right side tied in three half hitches with an extra loop around the leg to a single half hitch with a figure eight around (R 1509) the right wrist. The left side consisted of a white shoestring tied in three half hitches around the wrist to three half hitches around the leg.

Exhibit 82 are the ligatures from the victim Chris Byers. One black shoestring tied in a double half hitch around the right wrist to a double half

hitch around the right leg. The left side consisted of a double half hitch around the wrist and leg but was tied with a white shoestring. A double half hitch is the same as two half hitches. (R 1510)

On Exhibit 82 all of the knots on both wrists and both legs are the same. On Exhibit 80, which was Michael Moore, on the left side you had the same kind of knots on both the leg and wrist, which were square knots. On the right side a series of three half hitches were used on the wrist and then on the left side four half hitches. On Exhibit 81 on the left side you had both the wrist and ankle with three half hitches. There was some half hitches with some differences on the right side. (R 1511)

On June 3, 1993, I was requested to come to West Memphis to participate in (R 1513) the search of the residence of Damien Echols and Jason Baldwin. I was looking for fibers that might match what I had seen on the tapes from the clothing of the victims.

State's Exhibit 86 is a blue shirt taken from Damien Echols residence. Exhibit 85 is a blue shirt taken from Damien's residence. State's Exhibit 88 is an item that was seized from Jason Baldwin's residence. (R 1514)

In regard to State's Exhibit 45, 44 and 8, I recovered fibers from these items. From Exhibit 44 I recovered a single red rayon fiber that was microscopically similar to those used in the construction an item from Jason Baldwin's home, a red house coat.

In regard to Exhibit 8, which is a blue and yellow cub scout cap, a green polyester fiber microscopically similar to those used in the construction of State's Exhibit 85, (R 1514) which was a shirt from Damien Echols' residence.

Primary transfer would be if I were to touch you and you touch me, and fibers from our items were found cross transferred. If I were to touch you and you were to touch someone else and I were to find fibers from my item on the other person you touch, that would be considered secondary transfer. (R 1515)

You get secondary transfer from like clothes laying next to each other or coming into contact with each other and then being transferred again.

(STATE'S EXHIBIT 85, 86, AND 88 WERE ADMITTED INTO EVIDENCE OVER THE OBJECTIONS OF THE DEFENDANT PREVIOUSLY ABSTRACTED HEREIN)

CROSS EXAMINATION OF LISA SAKEVICIUS
BY MR. STIDHAM

Microscopically similar means that I cannot distinguish the two. In other words that the two fibers look the same to me. It means that there are no distinguishable differences between the two fibers. (R 1518)

Just because two fibers are similar does not necessarily mean that it comes from the same source. There could be a number of items containing that same fiber type so we could never say it came from a particular source. Just because two fibers are microscopically similar does not mean that they came from the same particular source. I found no fibers at all that are similar to any fibers that were related to Mr. Misskelley. I've examined hundreds of fibers with regard to this case and I haven't found any fiber that was microscopically similar to Jessie Misskelley. I have also analyzed hairs in this case. (R 1519)

If you include the standards, I have examined hundreds of hairs with regard to this case. I have compared Jessie Misskelley's hairs to these known hairs, and have not found any similarities. None at all. (R 1520)

REDIRECT EXAMINATION OF LISA SAKEVICIUS

In my examination of fibers in this case, particularly three red fibers, they were not only microscopically similar to some of Mr. Echols clothing but they also turned out to be microscopically similar to some of Melissa Byers clothing, the mother of one of the victims. The Fibers from the crime scene that matched something found at Damien Echols house were also microscopically similar to items from the victim Michael Moore's home. (R 1521)

RECROSS EXAMINATION OF LISA SAKEVICIUS
BY MR. STIDHAM

I found a Negroid hair on the sheet that was covering the victim Byers body. To my knowledge, not of the three defendants who have been charged with these homicides are black. (R 1523)

REDIRECT EXAMINATION OF LISA SAKEVICIUS
BY MR. FOGLEMAN

The nature of the hair found on the sheet used to cover the victim Byers body was a single Negroid hair fragment. Out of all the hairs I found, it was the only Negroid hair. It was not found on any of the kids clothing, it was found on a sheet that had been placed on or over or under the victim. I do not

know whether or not any of the police officers with the City of West Memphis are black. (R 1523)

KERMIT CHANNELL

DIRECT EXAMINATION OF KERMIT CHANNELL

BY MR. FOGLEMAN

My name is Kermit Channell, and I'm a forensic serologist for the Arkansas State Crime Lab. (R 1530) In my duties with the State Crime Lab, I examined some items submitted from the West Memphis Police Department with regard to the case of the victims Michael Moore, Steve Branch, and Chris Byers. (R 1531)

State's Exhibit 45 and 48, are items of clothing from the victims. I examined those items for the presents of blood and semen. I did not find any blood on any of the items. These two items which were a pair a blue jeans and another pair of pants, were very dirty and muddy. I employed a laser technique to determine if there were any stains I could not see with a naked eye. I did find some questioned stains. I analyzed these stains in a microscope to see if I could identify any sperm cells. I could not. I also tried to determine whether there were any enzymes present, specifically P30

prostatic antigen. Prostatic antigen is a protein that is specific to the male prostate that is found in semen samples. I ran a test on these items for that, and I got a positive reaction. (R 1532) However, I also ran control samples which also gave me a similar reaction. I concluded there could possibly be something in the material or in the mud that was interfering with my testing. Therefore, I submitted those items also to Genetic Design where they could employ DNA testing. (R 1533)

In the course of my duties, I was also requested to come to West Memphis on or about June 3, 1993, to participate in a search of the home of Damien Echols.

(AT THIS POINT IN THE DIRECT EXAMINATION OF THE WITNESS, THE FOLLOWING COLLOQUY TOOK PLACE IN OPEN COURT)

MR. FOGLEMAN: I want to show you what I have marked for identification purposes as State's Exhibit 83 and ask if you can identify that? (R 1534)

MR. CHANNEL: Yes, I can, it is marked as E84, which is a book that came from one of the bedrooms.

MR. FOGLEMAN: Your Honor, we would offer State's Exhibit 83.

MR. STIDHAM: May we approach the bench?

(THE FOLLOWING CONFERENCE WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY) THE COURT: What is it?

MR. FOGLEMAN: Specifically, it's a satanic book.

MR. STIDHAM: Can we go to chambers before he opens that up?

(THE FOLLOWING CONFERENCE TOOK PLACE IN CHAMBERS OUT OF THE PRESENCE AND HEARING OF THE JURY)

MR. STIDHAM: Your Honor, our objection is going to be similar to the objection your Honor sustained earlier with regard to the stuff found in Jason's trailer. That may be relevant entirely against Mr. Echols at his trial, but it certainly isn't relevant against Mr. Misskelley in this trial. They have been severed, and I don't see the relevancy. Even if it is relevant, which we submit that it is not, the prejudicial value is so high because of the cult or satanic type stuff.

That came from the library, but they are going to introduce it as being some kind of satanic cult thingamabob. Basically, they may have been proving a lot of things against Jason and Damien, but they still have not yet

proven anything against Mr. Misskelley. And that doesn't corroborate anything that he might have had something to do with these homicides.

MR. FOGLEMAN: But, your Honor, it corroborates his confession. He tells the officers about Damien's involvement and stuff and his own involvement in it, and this corroborates Damien's involvement which corroborates his own statement. He says Damien's involved in it. This corroborates it.

MR. CROW: For one thing, you Honor, this book is not about any kind of satanic stuff.

MR. FOGLEMAN: It's got stuff about pacts with the devil in there. (R 1536)

MR. CROW: Obviously in the three minutes I have been looking at this book, I haven't read the whole book. It talks about -- it appears to be about witchcraft which is --

MR. STIDHAM: Judge, they had this big march in Jonesboro to tell people the difference between being a witch and being a satanist so --- Judge, there's so much prejudice attached to that it wouldn't be fair to allow the jury

to see that because they might unfairly demise [sic} that Mr. Misskelley might be --

MR. CROW: It is not a book found at Mr. Misskelley's house, your Honor.

MR. DAVIS: Judge, the allegation is that Mr. Misskelley acted in concert and was an accomplice to and acted with Damien Echols, and it's certainly a part of the State's case that the motivation for this act came about as a result of their cult related activities which he in fact mentioned in his statement, and if there are books in Damien Echols' house that go to indicate rather strongly in this instance that he was involved in cult related activity, it would be analogous to a situation if we had charged somebody with a bombing. If there are books in the house that indicate how to build a bomb and how to put a bomb to use, then that certainly (R 1537) would be relevant and admissible if a person is charged in a bombing.

In this case the State's position is that they are charged with murder, and the State's position is that it is a cult related murder, and one of the three co-defendants is found with books in his house that relate to cult activity and satanic rituals. And we don't see how much more relevant --

MR. STIDHAM: Judge, if he's going to use that analogy, where is the chapter on killing eight-year-olds? This is a homicide case not a cult case. And let's assume that he did eat a dog one time. What does that have to do with --

MR. FOGLEMAN: Jessie is the one that brought it up --

MR. STIDHAM: --there's nothing in that statement that says anything whatsoever that the killings had any motivation toward satanism.

THE COURT: I remember some remark in the statement that Jessie made to the effect that he knew what they were going to do and that either Branch [sic] or Echols when he had talked to him about meeting him that day said something to the effect that, "We are going to go out and beat up some boys."

MR. STIDHAM: That's not a homicide, your Honor. (R 1538)

MR. FOGLEMAN: Your Honor, he also said at one of these meetings that a photograph -- at one of these cult meetings

-- that a photograph of the boys was passed around, and then the boys end up dead. I think that shows a relationship --

THE COURT: Your theory is that it's admissible going to motivation, scheme, intent and design on the part of the three defendant collectively and, therefore, whatever evidence that relates to the scheme and purpose and intent on the premeditation would relate also to Misskelley.

MR. STIDHAM: Your Honor, those two defendants aren't on trial. Mr. Misskelley is.

THE COURT: He was severed and only because he made a cross-implicating statement that implicated the other two defendants. His statement wouldn't have been admissible to the other two guys so that's why he's got a separate trial.

MR. STIDHAM: Your Honor, let's assume for a minute --and there has been testimony to this effect -- that there were rumors going around West Memphis that Damien Echols was involved or is a witch or is (R 1539) involved in a cult. That doesn't necessarily mean that Jessie is, and it doesn't necessarily mean that anything found in Damien's house or Jason's house regarding satanic stuff is --

THE COURT: The whole thing is, is the cult business relevant, and I believe it is relevant because it goes to motivation, it goes to corroborate the

statement that he made that they were involved in some kind of cult or club or gang or whatever you want to characterize it, and that those activities involved doing some of the things he testified to, like eating dog leg and having orgies and things of that nature.

MR. STIDHAM: Is there anything in this book, John or Brent, other than something about witchcraft that would tend to relate this to the homicide?

MR. FOGLEMAN: I haven't read every page. There's some stuff in there about pacts with the devil and things like that.

MR. CROW: If you're talking about forced confessions -- it's talking about courts, I think, in the Dark Ages --what they did --

MR. FOGLEMAN: If Mr. Stidham wants to argue from that book, your Honor --

THE COURT: How much more evidence like this are you going to introduce? (R 1540)

MR. FOGLEMAN: Your Honor, probably -- that's the only other physical item. There will be a witness who will testify about Damien saying -- the one we talked about before about, "I did it."

THE COURT: You are raising an 804 objection to this and the other testimony. MR. CROW: Yes.

THE COURT: If you hadn't come on so hard in your defense about it being a false confession, I might have been persuaded to keep some of that out, but to me you've opened the door to this kind of testimony coming in to show that the confession was in fact based upon circumstances that existed.

MR. CROW: We acknowledge that Damien's weird.

THE COURT: That is not the issue.

MR. STIDHAM: If Jessie in his statement would have said this was a cult killing where we went out there and built a fire and killed these little kids as part of a ritualistic situation, that might be different. But there is a dichotomy between the two things.

THE COURT: The question is not what was said exactly but what reasonable inferences or relationship a jury could draw from what was said. They could conclude that this killing was based upon a cult (R 1541) ritual based upon his statement, and that would be motivation and intent, design, scheme, premeditation, all of those things. And from that kind of testimony a jury could conclude that was what occurred. I'm going to let them put it in.

MR. CROW: Note our objection.

(RETURN TO OPEN COURT)

CONTINUING DIRECT EXAMINATION OF KERMIT CHANNEL BY

MR. FOGLEMAN: State's Exhibit 83 is a book that I found in a bedroom in Damien Echols' residence. It was sitting on a chest or trunk of some sort.

(STATE'S EXHIBIT 83 IS RECEIVED INTO EVIDENCE
OVER THE OBJECTIONS OF THE DEFENDANT)

Even regular sexual assault cases you rarely find semen in the oral cavity. I would expect that being submerged in the water the chances of semen surviving in any orifice would be greatly diminished. (R 1542)

CROSS EXAMINATION OF KERMIT CHANNELL
BY MR. STIDHAM

I did not find any blood or any sperm on State's Exhibit 45 and 48. State's Exhibit 83 is a book I found at Damien's residence. It came from the Crittenden County Library. (R 1543)

MICHAEL DEGUGLIELMO

DIRECT EXAMINATION OF MICHAEL DeGUGLIELMO
BY MR. FOGLEMAN

My name is Michael DeGuglielmo. I'm employed as the director of

forensic analysis for Genetic Design. (R 1543)

Genetic Design is a genetic testing company that specializes in human identification. (R 1544) We received two items which were cuttings from two pairs of blue jeans that had questioned stains. There are two types of DNA analysis. There is traditional DNA analysis testing which is referred to as restriction fragment length polymorphism, or RFLP. The second type of DNA testing is called plenorase chain reaction, or PCR. (R 1545)

The first type of the DNA testing required a substantive quantity of DNA. With PCR based testing, the sensitivity is many times less and so we're able to do testing where we could not do it with the RFLP based testing. The analysis we did was PCR based testing because of the amount of material we had to work with. (R 1546)

With regard to the cuttings from the pants we were able to analysis these using the PCR based test called HLA DQ Alpha. We did isolate a small amount of DNA from the two questioned cuttings. The initial information we were given from the Crime Lab stated was a possibility that these could be either mixed stains or potential seminal stains. With any evidence involving a possible sexual assault, we use what is referred to as a differential extraction.

The purpose of this differential extraction is to separate sperm cells from any other material that might be there so we could match them to the appropriate donors if there were two individuals comprising a mixed stain. (R 1548)

We refer to those as the epithelial, or nonsperm portion, and the sperm, or male portion, of the sample that we have. The initial step showed a very small amount of DNA right at a marginal level of detection for the two sperm fractions and we detected no DNA present from the nonsperm portions.

For the physical HLA DQ Alpha analysis itself, though, there was not enough material for us to get a result. What I know from the cuttings is that we obtained a small amount of DNA, basically a threshold amount for our testing. The testing that we use is specific for human or higher primate. There is some cross reactivity between higher primates as far as the DNA sequences. Human begins, gorillas, chimpanzees and great apes will have some similarly in the DNA sequence. (R 1549) They are not just human specific, but we know that the DNA that we detected is from the source of a higher primate.

The other thing is that the small amounts of DNA we detected were present in the male or sperm portions of the extraction which would be indicative of the DNA having come from a sperm origin. (R 1550)

CROSS EXAMINATION OF MICHAEL DEGUGLIELMO
BY MR. STIDHAM

I can not say for certain that those were sperm stains on the cuttings from the blue jeans. In forensic science the only way that people will definitively say, to my knowledge, that there are sperm there is if they visually observe them under a microscope. And with a very limited specimen, most of the crime labs and our lab as well generally will not consume material in order to do that. We know that the extractions will separate male and female components, and we also know that the material we're looking at has to be human specific or higher primate specific to obtain a result. We did not see any sperm.

(R 1550)

JERRY DRIVER

DIRECT EXAMINATION OF JERRY DRIVER
BY MR. FOGLEMAN

My name is Jerry Driver and I am the Chief Juvenile Officer of Crittenden County, Arkansas. I am acquainted with the defendant, Jessie Misskelley Junior. I am also acquainted with the co-defendants, Damien Echols and Jason Baldwin. The first time that I saw these three people

together was around November 15, 1992. This was at Lakeshore Trailer Park. (R 1553)

I was on a street in Lakeshore Trailer Park and the three of them walked by. The three of them all had on long black coats and Damien had on a slouch hat and they all had staffs.

CROSS EXAMINATION OF JERRY DRIVER
BY MR. STIDHAM

This was the 15th of November of 1992. It was dark that night. (R 1554)

REDIRECT EXAMINATION OF JERRY DRIVER
BY MR. FOGLEMAN

That was the first time that I saw them together, and I have also seen them together after that. (R 1555) (THE FOLLOWING CONFERENCE TOOK PLACE IN CHAMBERS REGARDING THE ANTICIPATED TESTIMONY OF WILLIAM WENFORD JONES)

MR. FOGLEMAN: We have now had the second witness that has recanted after the investigator for the defense talks to them. The witness that was to be called had maintained that Damien Echols told him that he did it. (R 1555) Yesterday Investigator Lax talked to him and all Investigator Lax

asked him according to him is, is your statement true, and he says, no, it's not. Now he's saying it is all false.

In the other case we have a videotape statement. All of a sudden the police department gets a telephone call from Ron Lax saying this guy will not be coming in, that the witness decided he needs a lawyer and then recants his statement that he's given the police. (R 1556)

I'm tired of it and we would like some kind of protective order to prevent this investigator from talking to witnesses unless one of us is present because I don't know what he's saying to these witnesses.

MR. CROW: I do know that when the first witness finished his tape recorded statement, as soon as they turned off the tape recorder, he said I was lying the whole time. (R 1557)

MR. STIDHAM: He now says that he's afraid of the police and said the police yelled and screamed at him and threatened to lock him up and even bought him a pair of boots to make him happy.

THE COURT: Who is this you're talking about?

MR. STIDHAM: Buddy Lucas. I was present when Mr. Lucas gave his statement the second time. There was no intimidation, threats, force or anything towards Mr. Lucas to get him to testify or make this statement.

MR. FOGLEMAN: But you were not there the first time Lax talked to him.

THE COURT: Who is Lax?

MR. FOGLEMAN: Damien's investigator.

MR. STIDHAM: He has done some work for us, too, your Honor, in tracking down witnesses from Crittenden County. He is from Memphis.

THE COURT: Does he have an Arkansas investigator's license?

MR. DAVIS: Yes. We checked that out, Judge. (R 1558)

MR. STIDHAM: I have no reason to believe that he's intimidating anybody and if I thought he was, I would disassociate myself with him immediately, and I hope this isn't some sort of insinuation that Mr. Crow and I have done something improper. And with regard to the protective order we have a right to talk to any witness we want to. They can refuse to talk to us like they can refuse to talk to the police. We don't tell people what to say. And they get up here and take an oath to tell the truth -- if that's what they are going to say, that's what they are going to say.

MR. FOGLEMAN: We don't tell people what to say either. And when they maintain something for seven months -- this man -- this is not even somebody that the police sought out. He came to the police -- William Jones. He came to the police with this information.

MR. STIDHAM: The police are threatening people and telling them what to say.

MR. FOGLEMAN: No.

MR. STIDHAM: That is what Mr. Lucas says.

MR. FOGLEMAN: That's not true.

THE COURT: What you need to do is bring him in with a prosecutor's subpoena and consider filing charges against him for giving false statements to the police.

MR. STIDHAM: With reference to Mr. Jones, I think the reason why he decided to change his story at the last minute is because now he's fixing to have to come in to a court of law and raise his right hand and take an oath and that's something he hasn't done before, and I think that is kind of bothering him. (R 1560)

THE COURT: That may be but if Mr. Lax had an associate with this witness saying that he wasn't going to speak to the prosecuting attorney unless it was in the presence of some volunteer investigator, the Court doesn't appreciate that one bit. Did you let the woman stay in there?

MR. FOGLEMAN: We didn't have much choice.

MR. STIDHAM: The witness is scared of retaliation. That is what Mr. Lax tells me.

THE COURT: I don't know what the Court can do on this but I know -- just open up an investigation on it. That's what I suggest you do.

MR. STIDHAM: If the law has been broken, then the prosecutor can file charges. I don't see any evidence whatsoever that Mr. Lax has done anything.

MR. DAVIS: The problem is, it is not going to do us a lot of good if six months from now we find out that Mr. Lax coerced or intimidated or improperly dealt with witnesses if this trial is long since over with and those witnesses were not brought forth to testify because of his actions. (R 1561)

MR. DAVIS: Judge, one of the things we're debating is whether or not to call William Jones and treat him as a hostile witness --

THE COURT: I will allow you to do that, too.

MR. CROW: Your Honor, if they do that, the only thing his prior inconsistent statement can be for is for proof that he's lying now. The prior inconsistent statement can't come into evidence for the truth of the matter asserted. They are not surprised by his statement. If they get up there and --

MR. FOGLEMAN: -- I'm extremely surprised by his statement.

MR. CROW: They knew last night what was happening.

MR. STIDHAM: We received a phone call and I want to say this for the record. I tried to contact Mr. Fogleman yesterday before he left West Memphis, and I did talk to him last night.

MR. FOGLEMAN: Of course, by the time we find out it is too -- there are lots of other witnesses who say they heard Damien -- not at this particular instance (R 1562) -- of course, it is too late to get them up here -- I mean even last night it would have been almost impossible to get them here this morning.

MR. CROW: I tried to call you all day long. I was in West Memphis.

THE COURT: What is it you want to do, call the witness and ask him what he knows about it and then ask him, did you previously give the police a different story? Is that what you want to do?

MR. DAVIS: Yes.

MR. CROW: I would object to that. The only thing they can use a prior inconsistent statement for is to impeach his credibility. He's their witness. I don't think anything he says needs to be impeached. The prejudicial value of him saying what his prior inconsistent statement was -- even though you can tell the jury that this prior statement only goes to his credibility -- it's not evidence -- the jury is going to hear it. I strenuously object.

MR. STIDHAM: We need to take up the 804 B argument that we previously brought up. And I think what William Jones told the police earlier is that Damien got drunk and told him that he, Damien, killed the three little boys and we've got that argument, too. We've got a two-pronged argument with regard to that. (R 1563)

THE COURT: Do you want to call him in here and make an offer of proof --

MR. FOGLEMAN: Yes.

THE COURT: -- you can at least put him under oath that way. If you can later go back and prove that he lied, charge him with perjury.

MR. DAVIS: We need to bring the lady in black back here, too.

MR. STIDHAM: What evidence do you have to indicate that Mr. Lax -- did you ask Mr. Jones if Mr. Lax threatened him?

MR. FOGLEMAN: Yes, and he said, all he did was ask me if the statement was the truth. (R 1565)

CHERYL AYCOCK

DIRECT EXAMINATION OF CHERYL AYCOCK
BY MR. DAVIS

My name is Cheryl Aycock. I am employed by Inquisitor, Incorporated. It is a business operated by Ron Lax, private investigator. He is the private investigator working in behalf of Damien Echols in regard to this trial. I do not know for sure if he is employed by any of the other defendants. To my knowledge, he's not employed by Jessie Misskelley or Jason Baldwin. I came here and accompanied William Jones, a witness that was subpoenaed by the State?

Mr. Jones was advised by his mother for me to be in the room when he talked with the prosecutor. (R 1566)

A tape recorded statement from Mr. Jones was taken yesterday. I was present. There were conversations with him prior to the recorded statement.

MR. FOGLEMAN: Your Honor, before we get into that, could we excuse Mr. Jones?

THE COURT: Yes. Step out in the hall.

(WILLIAM JONES LEAVING CHAMBERS)

Mr. Lax wanted to talk with William about his statement to the police. William returned a called to Ron. (R 1567) We met him at the grocery store at Lakeshore. William got in the car and Ron said he wanted to talk about the statement he gave to the police. William said he wanted to talk to his mother before he talked to him. That is all Ron said other than "I don't think that it is true. The dates don't match."

William called his mother on the car phone, and we gave him a ride to where his mother was. (R 1568)

Mr. Lax was referring to the dates that were mentioned by William when he gave his statement to the police. It took us twenty minutes to get to

the house. They talked about his car. I was in the back seat, and I really couldn't hear.

(R 1569) He was on the phone with several people during that time. When we got to the house, we went in and sat down, and William's mother and William went to the back room and talked for a while and then she came back and got Ricky Dunham and he joined them. Ron and I stayed in the living room. Ron did not have any independent conversations with the William's mother. When she came back and asked what kind of trouble William could get into if he were to say that he lied. Ron told her it was against the law to lie to the police. (R 1570) He also said it's against the law to get on the stand and lie. This part of the conversation was not recorded.

MR. DAVIS: At what point was the conversation recorded?

MS. AYCOCK: He asked William if he could take a statement and William agreed. MR. DAVIS: Did William go over what he was going to say inthat statement before he turned on the tape recorder?

MS. AYCOCK: He said, I'm going to talk to you about what we've discussed, and I want you to answer and tell me the truth.

MR. DAVIS: So if he used coercive tactics before the

recorded statement, we wouldn't know because he didn't have the tape recorder turned on, correct? MR. STIDHAM: That sounds familiar, Judge --

MS. AYCOCK: Correct.

MR. CROW: -- sounds familiar --

THE COURT: All right. Let's go.

MR. DAVIS: And when he took the statement, what did William Jones tell him? (R 1571)

William said he had lied to his mother and that he had told her that he knew something that he didn't know. She called the police, she accompanied him to give the statement and he didn't want to admit the lie in front of her. He did not mention any other statements he had given to the police.

EXAMINATION OF CHERYL AYCOCK
BY MR. STIDHAM

No force, threats or promises were made against Mr. Jones to get him to make his statement. (R 1572) He gave it voluntarily. I live in Memphis. I am not a licensed private investigator in Arkansas.

EXAMINATION OF CHERYL AYCOCK BY MR. DAVIS

I did not question William yesterday. All I did was ride in the car. I am

not being paid for driving over here this morning. I volunteered. His mother had to go to school and he didn't want to ride with the police up here.

EXAMINATION OF CHERYL AYCOCK
BY MR. STIDHAM

No one has told Mr. Jones to do anything other than tell the truth. (R 1573)

MR. PRICE: Mr. Lax is a private investigator working for Mr. Echols. We will be submitting his fee at the conclusion of the case.

MR. FOGLEMAN: We are going to be objecting because there are plenty of private investigators that don't drive a Mercedes or BMW.

MR. STIDHAM: Judge, that has nothing whatsoever to do with anything. That's ridiculous.

MR. FOGLEMAN: What I object to is being told he is a volunteer and all of a sudden be told they are going to submit a fee petition.

MR. STIDHAM: For the record, Mr. Lax has done some work for us, too, at our request. (R 1574)

EXAMINATION OF WILLIAM JONES
BY MR. FOGLEMAN

My name is William Jones. I live with my dad. I have known Damien

since about 7th grade. I heard about the murders when they occurred. I did not have a conversation with Damien where he said he did it. I lied and told the police I did. (R 1575) I don't remember everything I said. I did not read my statement yesterday. I told them that Damien was drunk and said he did it and that he came to me the next day and said it was not true. (R 1577) There were rumors going around. I told my mom and my aunt, at the same time, that I knew something, and I didn't. When she called the police, I figured I got to lie to them, too. I went to the station. (R 1578) They took a tape recorded statement. I told (R 1580) my cousin the same day that I gave my statement that it was a lie. I asked him what I should do. I have not told any one with law enforcement before today that it was a lie.

Yesterday I called Lax. He had left a card at the house. He asked me where I was and I told him. He asked to come talk to me, I said yes. He asked me if my report was true that I gave the police. I said, I want to go talk to my mom before I talk. (R 1581) Lax told me he represented Damien Echols. (R 1582) At some point he said he thought there was a problem with dates. I think it was when we got to my mom's house. On the ride to the house we talked about his car. Nothing was said about my statement on the

way. (R 1584) I understand that you have talked to Cheryl Aycock. When we got to my mom's house I told my mom I wanted to talk to her. Then we went back up front and I told him I had lied.

MR. FOGLEMAN: You better think real hard, William. When did he say anything about something being wrong with your statement?

MR. JONES: Man, I don't know nothin' about this. Could I get a lawyer?

MR. STIDHAM: Your Honor, I don't think it is necessary for the prosecutor to --

THE COURT: Let him answer the question. Answer the question.

MR. JONES: Would you repeat yourself?

MR. FOGLEMAN: When did he first say something to you about something being wrong with your statement?

MR. JONES: I believe it was at my mom's house. He asked me if it was true at the store. He said, you know, it everything was true and, well, you are confusing me.

THE COURT: Do you think you need a lawyer? (R 1586)

MR. JONES: I don't know. Do I?

THE COURT: It sounds to me like you do. I'm going to stop it now and he can get a lawyer. That's all you need to question him about at this point. You have a right to a lawyer and anything from this point that you might say can be used against you. Do you understand that?

MR. JONES: Yes, sir. (R 1587)

THE COURT: I don't know what kind of impression the Court has from listening to it. It could be a false statement from the beginning or it could be one that he's been coerced to recant. I can't tell. But we've made a record on it. (R 1588)

MR. DAVIS: At this time the State rest. (R 1590)

MR. STIDHAM: We would like to move for a directed verdict. We would submit to the Court the State has not met its burden of proof with regard to the defendant having committed the offense of capital murder, three counts. More specifically, we would submit that there's been no evidence that Mr. Misskelley himself with the premeditated and deliberated purpose of causing the death of another person, caused the death of any of the victims.

The only evidence they have offered against the defendant is his statements to the police and if you assume that they are true, of course, we're submitting that they are

not, all he says is that he was present and he did not hurt or kill anyone.

He said he had went down and grabbed one of the boys but that was before any of the homicidal acts occurred and for the State to submit that he knew it was going to happen would be speculation and conjecture.

Second, there is no proof that Mr. Misskelley acted as an accomplice to capital murder. In order for the State to prove that Mr. Misskelley was an accomplice, they must show that (R 1591) Mr. Misskelley aided and assisted or abetted in committing the offense of capital murder and, that Mr. Misskelley had the required intent to commit capital murder.

In Fight vs State, 314 Ark. 438, the Arkansas Supreme Court held that an accomplice's liability ought not to extend beyond the criminal purposes that he or she shared. Further, the Court says that because accomplice liability holds an individual criminally liable for actions done another, it is important that the prosecution fall squarely within this statute.

There's nothing introduced by the State to suggest that Mr. Misskelley

had the intent to commit any homicidal act or aid in any homicidal act. There is nothing in the State's case without adding speculation or conjecture that Jessie Misskelley intended to kill anyone or agreed to aid or assist anyone in killing these three victims.

Therefore, with regard to the charge of capital murder, we'd ask for a directed verdict on hat basis. (R 1592)

MR. CROW: In several cases the Arkansas Supreme Court has discussed what is an accomplice. I would cite the Court to Purifoy v State, 307 Ark 482, 282 SW2d 374. In that case the Arkansas Supreme Court said, "Arkansas Code Annotated five two four three eight two provides that a person acts as an accomplice with another person in the commission of an offense if with requisite intent he aids, agrees to aid or attempts to aid another person in the commission of an offense."

Similarly in other cases the Court has made it clear that the liability of an accomplice is -- it goes to his intent, what he intended. Mr. Stidham and I decide to rob a store and we agree that no one is going to be shot, no one is going to be killed, as a matter of fact, no one's going to carry a weapon. We go in and Mr. Stidham shoots somebody. I can be charged with murder under

a felony murder position, but that's not what Mr. Misskelley has been charged with.

Under the straight strictures of the murder statute, unless my accomplice liability was to commit a homicidal act, if I didn't intend to hurt anybody, I can't be. That is why we have felony murder. Mr. Misskelley has not been charged with felony murder. (R 1593)

Similarly, your Honor, the intent that is required in capital murder is premeditated and deliberated purpose. If you go through Mr. Misskelley's statement, it isn't there. If you take his statement on its face value, which obviously for this motion it has to be, at the time he allegedly ran down a boy and brought him back, he said Damien had hit one of the boys. I think he said he had hit him bad, but there was no evidence of any intention that anybody be killed at this point. Not without going to conjecture or speculation can you get to that, your Honor. There's nothing in the record to indicate Mr. Misskelley knewat the time he aided or abetted, that he knew anyone was going to be killed or intended for anyone to be killed. Possibly murder two, which says if you intentionally inflict bodily injury and someone does die, you are guilty of murder two.

That is the difference between capital, first and second degree. That is why we have the different levels. And Mr. Misskelley's intent is the issue. (R 1594)

MR. CROW: For the record, I think I went through the different levels a while ago -- there's different levels. In the first place I would make a contention that they haven't met their burden of proof on any level from capital to negligent homicide.

THE COURT: I think you've done that, and I'm going to deny that.

MR. CROW: We would move for a directed verdict on each level -- capital murder, first degree, second degree, manslaughter and negligent homicide. (R 1596)

THE COURT: His statement, again, if the jury gives it

credence that he knew the night before that they were going to hurt the boys -- I believe that is the way I heard it --

supplies that element of intent at least to first degree and second degree murder.

MR. FOGLEMAN: He also stated a photograph of the boys was passed around at one of these cult meetings.

THE COURT: I'm going to deny the motion for a directed verdict. I'll probably instruct all the way down to possibly even manslaughter but I will have to hear the rest of the case. (R 1597)

JOSH DARBY

DIRECT EXAMINATION OF JOSH DARBY
BY MR. CROW

My name is Josh Darby, and I am eighteen years old. (R 1604) I live in the Highland Trailer Park, and I have known Jessie Misskelley Junior since we were about nine- years-old. On Tuesday, May 4, 1993 Jessie came over to my house, and spent the night with me that night. The next morning, we got up and went roofing with Ricky Deese. (R 1605) Ricky picked us up on the morning of May 5, 1993, at about nine o'clock in the morning. We went from my mom's house to go on a roof job. Jessie did not receive a phone call that morning because we did not have the phone in our trailer. (R 1606)

Jessie and I worked with Ricky Deese till about 12:30 or 1:00 p.m. At that point, Ricky dropped us off at Jessie's house in Highland Trailer Park. Jessie told me that he was going to get him something to eat, and I went home. I saw Jessie shortly thereafter with his girlfriend. (R 1607) This was about

4:00 P.M., on May 5, 1993. I have lived in Highland Trailer Park, off and on, for about fifteen years. I am not familiar with any type of cult activity. I have never known Jessie Misskelley Junior, to be involved in any kind of cult activity. To my knowledge, Jessie did not hang around with Jason or Damien. (R 1608)

CROSS EXAMINATION OF JOSH DARBY
BY MR. DAVIS

I gave a statement to the police with regard to Jessie Misskelley's whereabout on or about the 5th day of May. I believe I did tell the police that Jessie spent the night at my house on Tuesday, May 4th, 1993. I did give the police a handwritten statement on the 18th day of June. I don't think I put anything in my statement regarding the fact that Jessie spent the night with me on May 4th, 1993. (R 1609)

RICKY DEESE

DIRECT EXAMINATION OF RICKY DEESE

BY MR. CROW

In May of 1993, I was a roofer. (R 1613) I have known Jessie Misskelley Junior since his was a baby. I remember on May 5, 1993, Jessie Misskelley worked with me roofing in West Memphis. That morning I went

and got him at Little's Trailer Park with Josh Darby. I picked up Mr. Misskelley and Josh Darby at about nine o'clock. (R 1614) Jessie worked with me on that Wednesday, a half of day, I dropped off at his dad's at about 1:00 P.M. The house that Josh and Jessie were staying at on the night of May 4, did not have a telephone in it. (R 1615)

SUSIE BREWER

DIRECT EXAMINATION OF SUSIE BREWER
BY MR. CROW

My name is Susie Brewer, I am fifteen years old, and I go to school at Marion Junior High. I live in Highland Trailer Park in Marion, Arkansas. (R 1617) I am Jessie Misskelley's girlfriend. I remember the day of May 5, 1993. I went to school that day, and after school was out I walked home. (R 1618) I got home about 3:30 P.M. and I went to Stephanie Dollar's house. That's where Jessie Misskelley was because he was babysitting Stephanie's kids and she got back around four o'clock and Jessie and I went walking. While we were walking, we went to Johnny Hamilton's trailer, this was about 4:15 P.M. Jessie was with me most of the rest of the afternoon. I was with him when he spoke to Jim McNease, and I was with him when he talked to Louis Hoggard. (R 1619)

Jessie was talking to Louis Hoggard about 6:30 P.M. that afternoon. After Jessie got though talking to Louis Hoggard, he went back to his house to get his wrestling mask and he was letting some of the little kids in the neighbor try it on. (R 1620) The last time that I saw Jessie Misskelley that night was about seven o'clock. At about 7:00 P.M., I was told by Jessie that he was going wrestling in Dyess, Arkansas and I did not see him the rest of the night. (R 1621)

CROSS EXAMINATION OF SUSIE BREWER
BY MR. DAVIS

I have been Jessie Misskelley's girlfriend for a year and two weeks. We first started seeing each other on January 16th of 1993. (R 1622)

MR. DAVIS: So you talked with some other people about putting Jessie in a particular place on that particular evening. (R 1623)

MR. STIDHAM: Object to the form of the question.

THE COURT: Overruled. It's cross-examination. (R 1623)

I have talked with other people about times and places that Jessie was on May 5th, 1993. (R 1624) Fred Revelle was the first person who mentioned that Jessie was in Dyess, Arkansas, wrestling on this particular night. (R 1624)

REDIRECT EXAMINATION OF SUSIE BREWER

BY MR. CROW

After Jessie was arrested for this crime, May 5th, 1993, became an important day to me and a lot of other people in the Trailer Park. We all got together and tried to figure out what happened, and what we remember about that particular day. (R 1625)

STEPHANIE DOLLAR

DIRECT EXAMINATION OF STEPHANIE DOLLAR
BY MR. CROW

My name is Stephanie Dollar. (R 1625) The first time I saw Jessie on May 5th, 1993, was at about two o'clock P.M. I asked him if he could watch my children till I got back from a parent-teacher conference. It was not unusual for Jessie Misskelley to baby-sit for me, he did so at least four times a week. (R 1626)

I returned home at about 4:00 P.M. When I arrived home, Susie Brewer was there with Jessie. Susie and Jessie stayed for a few minutes, then they left and went down the street to a Johnny Dedman's house. I went to Johnny Dedman's house and when I got there, my husband told me that Connie Molden had slapped my son off his bike. I called the police. (R 1627)

It was around five o'clock when I called the police. We waited for around and they didn't show up and then when they did, they went down to my house instead of coming to Johnny Dedman's. I saw them leaving the Trailer Park so I went back into the house and called the police and the dispatcher. The dispatcher told me to meet the officer at the four-way stop sign, which I did. I told the officer that Connie had slapped Cody off of his bike. The officer's name was Dollahite. (R 1628)

After the officer left, I walked back to Johnny Dedman's house. Jessie Misskelley was standing at the corner on a bicycle. I thought my husband and Connies' husband were beginning to get into a fight. (R 1629) I went back in the house and called the police again. This time three police cars came back within just a few minutes. They pulled up at Connie Molden's house and talked to her for a few minutes and then they left. The whole time this was happening, Jessie Misskelley was standing next to the street at the four-way stop. After the police left, I had a conversation with Jessie. (R 1630) The police officer arrived at 6:30 P.M. The last time that I saw Jessie was at about 6:45 P.M. (R 1631)

CROSS EXAMINATION OF STEPHANIE DOLLAR
BY MR. DAVIS

In my statement to the police, I indicated that Jessie was standing close to the police car when the officer was there investigating the fight. (R 1632) Jessie Misskelley baby-sat for me at least four times a week. (R 1634) On May the 5th when the police were in Highland Trailer Park, Jessie Misskelley was no more than five yards from the police car. (R 1635)

REDIRECT EXAMINATION OF STEPHANIE DOLLAR
BY MR. CROW

My child had never been slapped by Connie Molden before this incident, on May 5th, 1993. Nor has Connie Molden slapped my child since this date. This particular night, my husband and Mr. Molden got into a fight over Connie slapping my child, that is why I remember this date. (R 1637)

JAMES DOLLAHITE

DIRECT EXAMINATION OF JAMES DOLLAHITE
BY MR. STIDHAM

My name is James Dollahite. I am employed by the Crittenden County Sheriff's Department. I was on duty May 5, 1993. I remember being dispatched to the Highland Trailer Park that evening at 6:30 P.M. According to the radio log of the Sheriff's Department that day, it shows that I was out at the Dedman residence in reference to a complaint from the Dollars. Yes I

received a call, but I was not out at the Dollar residence. (R 1638)

When I arrived at the Trailer Park the first time, I met with the complainants, a Bobby Dollar and Stephanie Dollar, in reference to a complaint that he was making on a subject by the name of Connie Molden. Ms. Molden had allegedly pulled their son's hair and pulled him off his bicycle. I never went to the Dollar trailer. (R 1639)

The second time we were at the trailer park, myself and along with two Marion Police Department units were at the scene. (R 1640) Jessie Misskelley was not at Highland Trailer Park while I was there investigating this particular incident on May 5th, 1993. (R 1641) I am not saying he was not in Highland Trailer Park, I am saying he was not where I was at in Highland Trailer Park. (R 1642)

ABSTRACTOR'S NOTE: At the conclusion of the Direct Examination of Officer James Dollahite, the defendant attempted to introduce the officer's written report into evidence. The Court rejected this piece of evidence pursuant to it's earlier ruling that Rule 803 of the Arkansas Rules of Evidence excludes police reports from being admissible into

evidence, which appears in the record at (R 1600).

CROSS EXAMINATION OF OFFICER JAMES DOLLAHITE
BY MR. FOGLEMAN

The first time that I went out to Highland Trailer Park on May 5th, 1993, I arrived on the scene at 6:27 P.M.

(R 1643) After taking the complaint from the Dollars, I received a second call at 6:31 P.M. We received a third call at 6:43 P.M., and I arrived at Highland Trailer Park again at 6:47 P.M. I never saw Jessie Misskelley Junior at the Trailer Park that night. (R 1647)

That day I never went to Stephanie Dollars residence.(R 1648)

JOSH DARBY

REDIRECT EXAMINATION OF JOSH DARBY
BY MR. CROW

I am the same Josh Darby that testified earlier this morning. (R 1649) Jessie Misskelley spent the night with me on the night of May 4th, 1993 at Little's Trailer Park where my mom lives. There is no phone in my mom's trailer, and there was not on that night. (R 1650)

JENNIFER ROBERTS

DIRECT EXAMINATION OF JENNIFER ROBERTS
BY MR. CROW

My name is Jennifer Roberts, I'm sixteen years old, and I attend school

at Marion High School. I have known Jessie Misskelley Junior for one year and a month. (R 1651) I have lived in Highland Trailer Park for a year and two months. During this time period I have not been aware of any kind of cult activity. I saw Jessie Misskelley at the Trailer Park on May 5th, 1993. I was at Johnny Hamilton's house about 4:00 or 4:30 and Susie Brewer and Jessie Misskelley walked up. (R 1652) I saw him later that afternoon sitting on his front porch with Christy Jones. Later that night Roger Jones, my cousin and Jessie came to my house after they got back from Dyess wrestling. This was at about 11:00 P.M. Jessie stayed at my house until just a couple minutes before midnight. I know it was just a couple minutes before midnight because that is when my mother was suppose to be home. Jessie liked to leave my house before my mother got home. (R 1653) I am sure that this was May 5th, because of the incident with Cody being pulled off his bike. (R 1654)

CHRISTY JONES MOSS

DIRECT EXAMINATION OF CHRISTY JONES MOSS

BY MR. STIDHAM

My name is Christy Jones Moss. I have been friends with Jessie

Misskelley for almost two years. On May 5th, 1993, Jessie Misskelley Junior was at his house with me and I remember him being with Susie Brewer earlier in the day when the cops were called to the Trailer Park. They were called to the Trailer Park because Connie had pulled Stephanie's little boy off his bicycle. This is how I can remember May 5th, 1993. (R 1663)

The first time I seen Jessie on May 5th, was at about 4:30. We were over at Johnny Hamilton's house and he and Susie came in. Later on Susie and Jessie left and they went to Jessie's house. I went over there and we were all sitting out on his front porch. Stephanie Dollar pulled up in her car and Jessie went out to the street to talk to her, and they were talking about what happened with the cops. After that Jessie and I left, and went to Johnny Hamilton's. A few minutes after 7:00 P.M., Jessie, Marty, Roger, Fred and a guy named Bill left to go wrestling in Dyess, Arkansas. (R 1664) I actually saw them get in the car and leave. (R 1665)

CROSS EXAMINATION OF CHRISTY JONES MOSS
BY MR. DAVIS

I gave the handwritten statement to officer Bryn Ridge back in October of 1993. In my statement to Officer Ridge, I did not make mention that I had seen Jessie on the afternoon or evening of May 5th, 1993. (R 1667)

The reason that I gave the statement to the police in October of 1993 is because they wanted me to come to the police department because I was suppose to be in a cult. That's all they said. Every time I tried to tell the police something about Little Jessie, they didn't act like they were listening. They changed the subject. They wanted to know if I had time to go to cult activities in the evenings. (R 1669)

The night of May 5th, 1993, when the police were in the Trailer Park investigating the incident where the child was pulled off the bike, I saw Jessie and Susie talking to the police officer. (R 1670)

What crystallizes my memory about this being May 5th, is the fact that I remember Stephanie Dollar pulling up in front of Jessie's house and they were talking about the incident that had just happened with the police. (R 1672)

REDIRECT EXAMINATION OF CHRISTY JONES MOSS
BY MR. STIDHAM I talked to the police in October of 1993, they wanted to know about a cult. They told me that Jessie said I was a part of a cult. I have never been in a cult and I have never known Jessie to be part of a cult. (R 1673) Every time I tried to tell the police what I knew about May 5th, and seeing Jessie, they would change the subject. They would

start talking to me about this cult. I talked to Mr. Crow in September of 1993 about the events of May 5th, 1993. I told him basically what I testified to here today. (R 1674)

CHARLES ASHLEY JR

DIRECT EXAMINATION OF CHARLES ASHLEY, JUNIOR
BY MR. CROW

My name is Charles Ashley, Junior, but I go by the nickname Bubba. (R 1674) I live in Highland Trailer Park about three or four trailers down from Jessie Misskelley. I am seventeen years old and I am in tenth grade at Marion High School. I have known Jessie Misskelley Junior all my life because he's my cousin. (R 1675)

I remember an incident in May of 1993 where the police were called to the Trailer Park about a fight involving Connie Molden and Cody Dollar. The police came in response to this incident, there were three or four police cars present. I was present when this occurred, and so was Jessie Misskelley Junior. (R 1676)

MR. DAVIS: Was it your impression that [reviewing Officer Dollahite's police report concerning the slapping incident] was done so that you could refer to [it] in trying

to place this incident on May 5th? (R 1678)

MR. ASHLEY: No, sir.

MR. DAVIS: Did you look at the police report?

MR. ASHLEY: I just glanced at it. I didn't pick it up and read it.

MR. DAVIS: Fact of the matter is, that is where you picked up your time, wasn't it? (R 1678)

MR. CROW: Objection, your Honor. I don't believe he testified about any times.

THE COURT: This is cross-examination. (R 1679)

MR. DAVIS: You are also familiar with Jason Baldwin, right? (R 1680)

MR. ASHLEY: Yes, sir.

MR. DAVIS: And him and Jessie used to hang out together a whole bunch?

MR. ASHLEY: Yes, sir.

MR. CROW: Objection, your Honor. That's not proper cross examination.

THE COURT: Overruled.

JESSIE MISSKELLEY SR.

DIRECT EXAMINATION OF JESSIE MISSKELLEY, SENIOR

BY MR. STIDHAM

My name is Jessie Lloyd Misskelley, Senior. Jessie Lloyd Misskelley, Junior is my son. We live in Marion, Arkansas at Highland Trailer Park. I am currently employed by Jim McNease Repair Service and I was so employed there back in May of 1993. I remember the events that took place on May 5th, 1993 because that was my first day of DWI school. I had to go to DWI school to get my driver's license back. (R 1682)

I left Jim's Repair Shop at about 5:30 because they wanted me to be there early to make the fifty dollar payment for the class. The class started at 6:00 P.M. It was supposed to have lasted until 8:00 P.M. but the lady let us out at seven o'clock. At 7:00 P.M. I came straight home, and I got home about fifteen minutes after seven. When I arrived at the Trailer Park I seen all those police cars leaving as I was coming into the Trailer Park. I got scared they were going they were going to get me for driving on suspended license so I

hurried up and went home. After I got home Jessie Junior came in and I asked him what was going on.

(R 1683)

He told me that the police were out there because Connie Molden had pulled Stephanie's little boy Cody off of his bicycle by the hair of the head and slapped him. He also said that when Bobby Dollar came home, Stephanie's husband, he and Melvin, Connie's husband, got into a fight and the police were called back out there again. Jessie Junior left about 7:30 P.M. to go the Dyess, Arkansas to wrestle. He went with Johnny Hamilton, Fred Revelle, Josh Darby, Dennis Carter and some other guy named Bill something or other.

I also remember the day that Jessie got arrested. I had a conversation with Jessie Junior and Officer Allen about the reward money. (R 1684) Mike Allen and Jessie Junior were joking about the reward money, the forty thousand dollar reward. Officer Mike Allen said that if they get a conviction out of this, Jessie will get the forty thousand reward, and Jessie Junior told me he was going to buy me a new truck. (R 1685)

CROSS EXAMINATION OF JESSIE MISSKELLEY, SR.
BY MR. DAVIS

MR. DAVIS: After your son was arrested, did you grant

certain television interviews where you went on T.V.?

MR. MISSKELLEY: I imagine I did.

MR. STIDHAM: I object to the relevancy of it.

MR. DAVIS: Your Honor, I am going to ask him about some statements he made on T.V.

THE COURT: Go ahead. Overruled.

JIM MCNEASE

DIRECT EXAMINATION OF JIM McNEASE
BY MR. STIDHAM

My name is Jim McNease, and I lived in West Memphis, Arkansas. I am a mechanic and I also work for Union Pacific Railroad in Little Rock. I remember May 5th, 1993 because I had to close my own shop and it upset me a little bit. Jessie Misskelley Senior had worked for me for three or four years and he always opened and closed for me. I had to stay that day and close the shop because he had to go the DWI School. At 5:30 p.m. he left the shop and I had to close down. I closed the shop down about 6:15 P.M. (R 1690)

I saw the defendant Jessie Misskelley Junior that afternoon down on the corner where I lived in Highland Trailer Park. He and Dennis Carter were walking down the road. The last time that I seen Jessie Junior that evening

was about 6:30 P.M. He was down at the end of the street talking to the deputy sheriff. (R 1691)

When he and Dennis Carter were walking down the street, I walked out to the street and was picking at them. I said what are you fixing to do, and Jessie told me that he was going wrestling. I told him that he was not big enough to go wrestling. I told him that he wasn't big enough to fight the gnats off his ass much less go wrestling, and that is exactly what I said to him. (R 1692)

MR. DAVIS: Det. Bill Durham of the West Memphis Police Department attempted to take a statement from you - - (R 1694)

MR. STIDHAM: Your Honor, may we approach the bench?

(THE FOLLOWING CONFERENCE TOOK PLACE AT THE BENCH OUT OF THE HEARING OF THE JURY)

MR. STIDHAM: We went through this before. I think what he's trying to do is impeach the witness by saying that Mr. Stidham told him not to talk to the police. That matter has already been discussed twice, and I think that objection has been sustained.

MR. DAVIS: He refused to talk to the police.

THE COURT: I'm going to allow him to develop it.

MR. STIDHAM: Would you note our objection?

THE COURT: Yes. (R 1694)

LOUIS HOGGARD

DIRECT EXAMINATION OF LOUIS HOGGARD

BY MR. CROW

My name is Louis Hoggard, and I am and eighteen wheeler owner-operator. I drive my own truck, over the road. I live in Highland Trailer Park in Crittenden County, next door to Jessie Misskelley. I have lived in the Trailer Park since August of 1987. All the time that I have lived in the Trailer Park, I have never seen or been advised of any kind of cult activity. (R 1696)

I was in Highland Trailer Park on May 5th, 1993. I know this because I have examined my logs for my trip at that time period, and because of the police report that I looked at. Defendant's Exhibit 6A, 6B and 6C, are the logs of the trips that I made on those days. (R 1697)

On May 5th I arrived in West Memphis, Arkansas, at 4:45 P.M. and unloaded until about 5:00 P.M. From 5:00 P.M. until 5:16 P.M. I drove to Memphis, Tennessee and performed a post- trip inspection. I was off duty by 5:30 P.M. and was off the rest of the day.

When I got off work at 5:30, on May 5th, 1993 I went home to my residence in Highland Trailer Park. I was not in West Memphis on May 6th, 1993. (R 1699)

On May 5th, 1993, I saw Jessie Misskelley Junior in front of my house and at my neighbor's house across the street. This neighbor, is Stephanie Dollar. It was 6:00 or 6:30 P.M. on May 5th, 1993 when I saw him. I came home from work that day and started mowing my yard. While I was mowing my yard, I observed a police officer going into Stephanie Dollars' yard and saw Jessie approach the police car. I assumed they were talking but I could not hear them. (R 1700)

The police car left and shortly after that Jessie started walking toward his house down the street. I stopped and asked his what he was talking to the officer about. Jessie Junior told me that somebody down the street had slapped one of Stephanie's sons. (R 1702)

CROSS EXAMINATION OF LOUIS HOGGARD
BY MR. FOGLEMAN

MR. FOGLEMAN: So for all that time up through January you didn't tell anybody with law enforcement, hey, I might have some information you all might need to know. (R 1706)

MR. STIDHAM: Your Honor, I don't think that's properimpeachment. He's trying to insinuate the prosecution and the police didn't know about it. They knew about it. The police report indicates they knew about it.

MR. FOGLEMAN: Your Honor, this is proper going to -- if he's had this information all along, it seems to me he'd come forward.

THE COURT: Go ahead. I'll allow the cross examination. (R 1707)

DENNIS CARTER

DIRECT EXAMINATION OF DENNIS CARTER
BY MR. CROW

My name is Dennis Ray Carter, Junior. I am fifteen years old and in the ninth grade at Marion Junior High. I live in Highland Trailer Park, right across the street from Jessie Misskelley's house. I remember seeing Jessie

Misskelley Junior on the afternoon of May 5th, 1993. After school he and I walked up and down the road for a while.

(R 1714)

(AT THIS POINT IN THE TESTIMONY, THE FOLLOWING COLLOQUY TOOK PLACE IN OPEN COURT)

MR. CROW: Do you remember a conversation with Jim McNease? (R 1715)

MR. CARTER: Yes. MR. CROW: Tell me about the conversation.

MR. DAVIS: Your Honor, I object. He's asking him to respond in terms of hearsay - -

MR. CROW: Mr. McNease has already testified about that - -

MR. DAVIS: Your Honor, it doesn't matter if Mr. McNease testified or not. He cannot get up here and testify to what someone else may have or may not have said. That's hearsay.

THE COURT: I'm going to sustain the objection to hearsay. He may state he was present or he heard a conversation, period. (R 1715)

I remember having a conversation with Jim McNease while Jessie Misskelley Junior was present. (R 1715) The nature of the conversation was about wrestling. I went wrestling that night with Jessie Misskelley Junior, Freddie, and Johnny. There could have been some more people, but I don't remember. I remember going wrestling that day because of my conversation with Jim McNease. (R 1716)

I remember giving a statement to the police on June 22nd and on June 9, 1993. The information that I gave to the police on those dates was not correct. I understand that I am under oath here today and I am testifying truthfully.

(R 1717)

CROSS EXAMINATION OF DENNIS CARTER

BY MR. DAVIS I am the Dennis Carter that talked with Officer Diane Hester of the West Memphis Police Department on June 9th, 1993. This was six days after Jessie Misskelley's arrest. (R 1718)

MR. DAVIS: Point to me where in that [previous] statement you mentioned that you were with Jessie Misskelley onthe day of these murders. (R 1719)

MR. CROW: I object to that, your Honor. He's already responded - -

MR. DAVIS: This is cross examination.

THE COURT: Overruled.

In my statement to Officer Hester I did not mention that I was with Jessie Misskelley on the day these murders occurred. I signed that statement but I did not read everything on it. I just skimmed thought it. (R 1721) I did not mention to the Officers that Jessie Misskelley was with me on Wednesday afternoon, May 5th, 1993. I told the officer that I went to Dyess one or two times to wrestle with Jessie, but it was after the three little boys were murdered. As I testified to earlier, I was mistaken when I gave this statement to the police. I wrote in my statement dated June 22nd, that I had never been with Jessie to Dyess. (R 1722)

REDIRECT EXAMINATION OF DENNIS CARTER
BY MR. CROW

I understand that I am under oath here today. I am telling the truth today. (R 1725)

FRED REVELLE

DIRECT EXAMINATION OF FRED REVELLE
BY MR. STIDHAM

My name is Fred Revelle. On May 5th, 1993 I lived in Lakeshore Trailer Park. I remember the day of May 5th, 1993 because Kevin Johnson,

one of the guys that went to wrestle with us, was at a search and rescue meeting that night and he did not get to go wrestle with us. (R 1725)

Also Kevin's brother Keith, went with us that night to go wrestling in Dyess, and that is the only night that he ever went with us to go wrestling. Also the fact that May 2nd is my birthday, and that helps me remember that particular time frame. Also I remember hearing about them finding the little boys on May the 6th. Back during that time, we were going to Dyess on a regular basis. We were going to this particular place in Dyess because they have a wrestling ring there. That is where I trained to wrestle. My father trained me there and I knew the ring was there. I was buying the wrestling ring from Charles Stone. (R 1726)

I remember seeing Jessie Lloyd Misskelley Junior on May 5th, 1993. We all met at Kevin's house, because Kevin's house was a central location where everyone lived that went with us. Jessie Misskelley was there, and he rode with us that night. We met Keith, Kevin's brother at the old Exxon station on Highway 63. It was getting dark when we left Highland Trailer Park. (R 1727)

We met Keith Johnson at the old Exxon station at the intersection of Interstate 55 and Highway 63. Bill Cox did not trust his car to drive all the way to Dyess, so he parked his car and we changed vehicles. And Roger Jones and Jessie Misskelley got out of the car with Zella Adams and Johnny Hamilton and got in the car with Keith. Bill Cox, Dennis Carter, Johnny Hamilton and Zella and I rode in the other car. After we left the Exxon station, we went straight to Dyess. This was the only night that Keith went with us wrestling. (R 1728)

After we got to Dyess, Bill Cox threw Jessie Misskelley in the ring and Jessie hit his head on the side of the ring, which put a big note on his head. We all got back to West Memphis around 11:30 P.M. From the time we left the Trailer Park about dark, and until we got back to the Trailer Park about 11:30, Jessie Misskelley Junior was with me the entire time.

I gave a previous statement to the police, in which I told them that particular night I had paid some money to Charles Stone, later I found out that this was not true.

(R 1729) I thought I had given Mr. Stone some money that night but later I found out that was not the night.

CROSS EXAMINATION OF FRED REVELLE

BY MR. DAVIS I sought the police out to tell them that I knew for certain that Jessie Misskelley was with me on May the 5th,(R 1730) I told the police that the reason I was certain was because I had paid three hundred dollars, and had signed a contract that day with Charles Stone. When I had talked to the police I had gone down to talk to Mr. Stone and confirmed with him that we had exchanged money with regard to the wrestling ring on that date. (R 1731)

The fact of the matter is that I paid the three hundred dollars to Mr. Stone a week before the night of the murders, April 27, 1993. (R 1734) Charles Stone informed me that we gave him the money on May 5th, 1993. (R 1737)

MR. DAVIS: It wasn't like the police called you into the office and under the pressure you were not able to recall. You went and actively searched for information and went to the police with information in an effort to come up with an alibi for Jessie Misskelley, didn't you.

MR. STIDHAM: Your Honor, how long is this going to continue?

THE COURT: Do you have an objection?

MR. STIDHAM: Yes, your Honor.

THE COURT: What is your objection?

MR. STIDHAM: It is improper impeachment. He's asked him three or four times- -

THE COURT: Overruled.

MR. STIDHAM: The witness has answered it three or four times- -

THE COURT: Overruled. Avoid repetition, however.

REDIRECT EXAMINATION OF FRED REVELLE
BY MR. STIDHAM

There is no doubt in my mind that Jessie Misskelley was with me in Dyess, Arkansas wrestling on May 5th, 1993.

(R 1742)

ROGER JONES

DIRECT EXAMINATION OF ROGER JONES
BY MR. CROW

My name is Roger Jones, I am nineteen years old, and I live at Highland Trailer Park. (R 1742) I lived with my aunt in Highland Trailer Park on May 5th, 1993, about five or six trailers down from Jessie Misskelley. I remember the date of May 5th, 1993 because we went wrestling in Dyess that night. (R

1743)

The first time that I saw Jessie Misskelley on May 5th, was at about 5:30 P.M. The next time that I saw him was at 7:00 P.M. when he came down to my aunts house. (R 1744)

When Jessie got there, we sat and talked for a little bit and then we went down to Johnny Hamilton's house. We were waiting at Johnny Hamilton's house for Bill to get there. Myself, Little Jessie, Fred Revelle, Keith Johnson, Bill Cox, Janice Carter, Zella and Johnny Hamilton all went to Dyess and went wrestling on May 5th, 1993. We met Keith Johnson at the Tyronza/Jonesboro exit at that old Exxon station. Jessie and I rode with Keith in his car. (R 1745)

Dennis Carter, Fred Revelle, Bill and Zella and Johnny rode in Johnny's car. Bill's car was left at the Exxon station. We left Highland Trailer Park somewhere between 7:15 and 7:30 P.M., and we arrived back from Dyess at the Trailer Park at about 11:15 P.M. (R 1746)

When we got back to the Trailer Park Jessie Junior and I went to my house. We sat down there and talked to my cousin until about midnight and

then Jessie went home. He went home at a little before midnight because my aunt always comes home at midnight. (R 1747)

KEITH JOHNSON

DIRECT EXAMINATION OF KEITH JOHNSON
BY MR. STIDHAM

My name is Keith Johnson and I live in Marked Tree, Arkansas. I do not remember the exact date, but I made plans to go with my brother Kevin Johnson to go wrestling. He told me to meet him at Lake David, that old Exxon station, at about 6:00. I arrived at the Exxon station at about 6:00, and I had to wait because nobody showed up. It was getting dark by the time everybody showed up. I do not remember all the people's names that showed up that night because it was the first time that I had met these people. The only one that I had met before, was Johnny Hamilton. The defendant, Mr. Misskelley was there that night. (R 1753)

After the people arrived, they asked me if a few of the guys could ride with me. I only had room for two because I had some big speakers in the back and could not get anybody in the backseat. So Jessie Misskelley and another guy, I do not remember his name, got in the front seat with me. We left the Exxon station, and drove straight to Dyess. While we were in Dyess

wrestling, somebody tried to throw Mr. Misskelley back in the ring and he hit his head on the ring. After that he set out wrestling the rest of the night. I do not know exactly what time we left Dyess, but I got back to my house in Marked Tree a little after 10:00 o'clock that night. (R 1754)

I can not remember specifically what date this occurred, but I do remember hearing about the little boys after that date. I have only been to Dyess wrestling on one occasion.

(R 1755)

CROSS EXAMINATION OF KEITH JOHNSON
BY MR. FOGLEMAN

I do not know the exact night that I went wrestling with Mr. Misskelley, but my brother called me, he was suppose to show up and he did not show up because he was at a search and rescue meeting that night. (R 1755)

KEVIN JOHNSON

DIRECT EXAMINATION OF KEVIN JOHNSON

BY MR. STIDHAM

My name is Kevin Johnson, and I reside in Highland Trailer Park in Marion, Arkansas. (R 1756) I am familiar with the defendant, Jessie Misskelley Junior because we live right next door to each other. I remember

May 5th, 1993, because I was at a search and rescue meeting. I was suppose to have went wrestling that night, but I did not make it because I went to the meeting. (R 1757)

Shortly after the murders took place, I had a conversation with Jessie Misskelley Junior. (R 1758) I told Mr. Misskelley that one of the boys was beaten and castrated. I also told him that they were tied up with shoestrings. I got this information from other members of the search and rescue team. (R 1759)

RHONDA DEDMAN

DIRECT EXAMINATION OF RHONDA DEDMAN
BY MR. STIDHAM

My name is Rhonda Dedman, and I reside in Highland Trailer Park in Marion, Arkansas. (R 1756) I am familiar

with Vickie Hutcheson. I had a conversation with Vickie Hutcheson about the reward money.

MR. DAVIS: Objection. Hearsay.

MR. CROW: Vickie was asked about that on cross examination and she denied making the statement, this is proper impeachment.

MR. STIDHAM: She testified she was not sure whether she made the statement of not.

[The parties agree that Hutcheson testified that she did not recall making such a statement.]

THE COURT: You did not confront her with what you are trying to impeach her with and give her an opportunity to refute or deny it. I am going to sustain the objection.

(R 1766)

ABSTRACTOR'S NOTE: From R 1773 - R 1819 argument was had in chambers as to the anticipated impeachment of defense expert Dr. Wilkins. The prosecution announced that it intended to impeach Dr. Wilkins with records of a disciplinary proceeding and psychological testing which was preformed on Dr. Wilkins. The defense objected at R 1799. At R 1784 the defense asked for a continuance for the purpose of having another psychologist evaluate the defendant. Said motion was denied at R 1786

RON LAX

DIRECT EXAMINATION OF RON LAX
BY MR. STIDHAM

My name is Ronald L. Lax. I am a private investigator and I have an

office in Memphis. (R 1820) From where the bodies were recovered, to the service road which is adjacent to the interstate, it is 516 feet. (R 1824) It is not possible to see the service road standing down in the creek bed where the bodies were recovered. (R 1825) If you standing up on the bank, along side of the creek, it would be very difficult to see the service road with heavy foliage on the trees. (R 1826)

MARTY KING

DIRECT EXAMINATION OF MARTY KING
BY MR. STIDHAM

My name is Marty L. King. On May the 5th, 1993, I was employed by Bojangles Restaurant on Missouri Street in West Memphis, Arkansas. I was on duty on the night of May 5th, 1993 when an unusual occurrence happened. This was the night of the homicides, and at about 9:30 that night a customer came into the restaurant. (R 1827) It was a lady and her daughter. They went to the restroom, but she returned within a minute. She told me that there was a black gentleman in the women's restroom. In the women's restroom I found this gentleman with his head in his lap. When I entered the women's restroom, above the commode on the wall there was a forearm print of blood along with blood that was around the toilet where the gentleman was sitting.

I spoke to the gentleman and he raised his head and looked kind of disarrayed. He also had muddy feet, wet up to his knees, and he spoke, but I just was checking to see if he was alright, and I asked him to leave the building. He told me he was alright but he did not get up. He left approximately fifteen to twenty minutes later. (R 1828)

After I asked him to leave, I called the police department. The West Memphis Police Department responded to my call, but the officer never got out of the car, she just came to the drive thru window and asked me what the problem was. By this time the gentleman had already left and was walking away.

I could not leave the mess, so we had to clean it up. We drug the water hose around and proceeded to wash and clean up the restroom. The gentleman left behind a pair of sunglasses in the toilet which he had tried to flush. (R 1829)

The sunglasses were not in the restroom before he entered, and with the bowel movement that he had all over him, the seat, the floor, and everywhere, there was nothing in the toilet except the glasses when I went in there to clean up the mess. So that leaves me to believe that he tried flushing them.

He also got some blood on a toilet tissue roll where he had tried grabbing for it, and it was discarded in the waste can. I did not hear from the police again that night. An off duty police officer did come into the restaurant the next morning, and I told him about it and we looked at it and he said, "Well, just leave it alone." (R 1831)

This off duty police officer left and said he was going to go tell somebody about it. Later that night two police officer came to the restaurant and looked around the outside of the building with a flashlight. They also took some samples of blood that they had scraped off the door and off the wall in the hallway. The toilet tissue was not taken by the officers, but the sunglasses were. I told the officers about the toilet paper roll but they did not take it. (R 1831)

CROSS EXAMINATION OF MARTY KING
BY MR. FOGLEMAN

There was blood on the hall outside the bathroom from where he staggered out of the restroom and grabbed the door knob to the men's restroom door. And then there was blood on the hallway directly across from the women's restroom. I could not tell whether he was actually bleeding himself.

(R 1832)

REDIRECT EXAMINATION OF MARTY KING
BY MR. STIDHAM

I am familiar with the crime scene, where the boys bodies were discovered. I used to live in Mayfair Apartments. The crime scene, where the bodies were discovered, is due east of the restaurant. There is a railroad track leading into the open field which would come up on seventh street there. This gentleman looked like he had been walking in a field that night because there was mud on the bathroom floor along with the blood. (R 1834)

WARREN HOLMES

DIRECT EXAMINATION OF WARREN HOLMES

BY MR. STIDHAM

My name is Warren B. Holmes and I reside in Miami, Florida. I was a detective sergeant with the Miami Police Department for thirteen years, and I left that job to open up my business. I make my living primarily lecturing various law enforcement agencies throughout the United States including the F.B.I., the C.I.A., and the Texas Rangers. I've lectured in Memphis, and I've lectured in Little Rock on the subject of criminal interrogation. I also lectured to the Royal Canadian Mounted Police for two years.

I worked on the assassination of President Kennedy. I worked on the Martin Luther King murder. (R 1841) I worked on Watergate, and more recently, I worked on the William Kennedy Smith case. I was also involved in the Boston Strangler case and the Hampton case in Louisiana. I have been qualified as an expert on police interrogation techniques by court throughout the country at least fifty to a hundred times. I have interrogated a little over twelve hundred people who have been accused of the act of murder. I have taken several false confessions from suspects who have been accused of the act of murder. (R 1842)

There are several things that an interrogator needs to look for when taking confessions that might raise a red flag and be indicative that the person giving them a confession is giving them a false confession. The first thing that you look for is that the confessor should be giving you, the interrogator, information that you don't already know. The second thing that you would look for is that whatever the confessor says does not conflict with the evidence or the crime scene analysis. The third thing that you would look for is that the confessor should be able to lead you to the fruits of the crime or the crime weapon utilized.

In the initial part of the confession, it's always in narrative form where he suddenly just gets it off his chest and there is an indication of relief that sets in, and he tells the interrogator about it, and it is not necessary to prompt him or lead him with questions. When he is done telling you in narrative form, that's when you start asking the questions. Another thing that would indicate whether you are getting a false confession is when you question him, if you are wrong, he will tell you that. He will tell you, "No, that's not the way it happened." He will correct you. You do not have to correct him. To confirm a confession you always look for little incidental details, things that you can later on go out and verify. (R 1843)

An example of this would be that during a crime the confessor tells you that a man was walking a dog across this field, and later on you can go out a verify that there was in fact a man walking a dog across that field. Another thing that is important is that the confessor will describe the behavior or himself and of the victims. They will describe their feelings at the time and they will describe the conversations between the culprit and the victims. They will also describe the conversations between the co-defendants. They will also describe their feelings since the crime has committed.

And when they are confessing, you get the impression that their words match the emotion that you see. If you do not see that match, and their manner is stilted, it could be contrived and you could be getting false information. But what you are always looking for is something that corroborates a confession. An independent witness, a piece of physical evidence, a statement made by a co-defendant. Something beyond his words. The best test, to verify a confession, is to take the confessor out to the scene and let him walk you through the crime and see what happens. (R 1844) That is when you can assess whether he is telling you something based on memory or he is just fantasizing it as he goes along. Most of your confessions, particularly in homicide cases, come in the fourth hour of the interrogation. There's a waning of resistance where the person becomes a victim of what I call a captive audience syndrome, where he almost becomes mesmerized by the relationship between himself and the interrogators. Anything from four hours on is a diminishing resistance that can lend itself to a confession whether it be false or valid.

I have had an opportunity to examine the statements made by Jessie Misskelley Junior that were given to the West Memphis Police Department on

June 3rd, 1993. I have also had an opportunity to listen to the actual tape recording of the confession. (R 1845)

Obvious things that bother me about the confession is his mistake on the time. He is saying nine o'clock, then he is saying he went home at twelve. I just do not understand if he was involved in this crime how he made a mistake on the time factor. Also the ligature that was used to tie up the victims. He certainly knows the difference between shoelaces and a rope. These are the two most prominent things, but there's a multitude of questions in my opinion that he should have been asked to ascertain the validity of his confession. When he had the wrong, it should have been a signal that something was radically wrong. That is when the question should have been more probing to determine whether or not he was making it up or giving a valid confession.

You don't have to ask any questions in the initial part of the confession. You just let them talk it and get it out, you just sit and listen. (R 1848) What I did not like about Mr. Misskelley's confession is that most of it emanated from questions right off the bat without any narrative of any length at all, without any descriptions about feelings or conversations. It is all in response

to questions. When he is wrong, then they would change it around and say, "Well, in effect could it have been this way?" (R 1849)

Either Mr. Misskelley's totally innocent and just made up the confession and does not know the case facts, or two, he was so doped up he does not remember what happened, or three, he is psychologically impaired, which the ramifications are a faulty memory, or he wanted to get somebody off his back and he decided, "Well, I'll just give them a bunch of baloney, the wrong case facts, and then recant later." There is no doubt in my mind that there is false information in the confession, the whole question is why? Is it because he's innocent or because he's duplicitous and cunning and decided to offer a false confession and retract that later on. (R 1850)

The whole purpose of an interrogation is corroboration. It is important to corroborate the confession with things that are independent of the confession that links the suspect to the crime. You need independent confirmation of what he is telling you. (R 1851) You want to have something that he just can not lie about. That is what you look for some irrefutable piece of evidence to corroborate the confession. When you do not have that, you are in trouble. (R 1852)

CROSS EXAMINATION OF WARREN HOLMES BY MR. DAVIS

If the defendant were able to point out to the interrogators which of the three victims was castrated, that would seem to indicate that he was present, provided that the interrogators did not suggest any facts to him prior to him making that definitive statement. If he just suddenly blurted it out, yes, that's significant. However if it was suggested to him in some way through hours of interrogation, then that negates it's weight. (R 1854)

During an interrogation it is important to go for at least four hours with the questioning. It's also important for the interrogator to keep the confessor talking. Generally if the confessor says something that the interrogator knows is wrong, you would let them keep talking and explain what's going on, but not in this particular instance with Mr. Misskelley. When Mr. Misskelley comes up with the wrong time and he does not know what the victims were tied up with, the interrogator should have tried to clarify. They steered away. When they saw something is wrong with the time factor and the ligature, they did not ask any questions to try to clarify. Only in the second taping do they clarify the time factor, but they omitted clarifying the difference between

shoelaces and rope. The time factor and the ligature to me is the key to this whole case. (R 1856)

I have not heard what the officers said about the interrogation. (R 1857)

MR. STIDHAM: I object. The prosecutor objected to the witness hearing that. We asked that the witness be allowed to hear that. We would ask that he should not be allowed to impeach him with that information.

THE COURT: They asked for the Rule to apply to him. I do not know why any material necessary for him to formulate an opinion could not have been supplied to him. Overruled. (R 1858).

REDIRECT EXAMINATION OF WARREN HOLMES
BY MR. STIDHAM

The personality traits of a person who is likely to give a false confession are a low IQ, highly suggestible in personality structure, intimidated when in the presents of dominant personalities, always attempting to solve the immediate stress factor, get the interrogators off my back and just let me go home, naively assumes that they can all straighten it out later, wherein they become an agent of there own victimization. They give the police or the prosecutor a sword then the sword is stuck in them with there

own confession, but they assume that they can go out and tell there parents or an attorney that they just made it up and the whole thing will be straightened out. It's extremely difficult for the average person to believe that someone would confess to a crime they did not do. (R 1863)

RECROSS EXAMINATION OF WARREN HOLMES
BY MR. DAVIS

I would have looked at this kid with a fish eye the same way these investigators did, and I probably would have felt the same way they did, but the minute he came out with wrong time of death, and not knowing what the proper ligature is, that is when I would have backed off. When they did not resolve those things, that is when they aborted professionalism. I have a sense in listening to the tape that they had a sense that there was something wrong, and that is the reason they did not ask more probing questions. (R 1865)

In 99 percent of cases were someone has confessed, he is guilty. (R 1867)

ABSTRACTOR'S NOTE: At this point the defense objected stating that the guilt or innocence of other people who confess was not admissible. The defense argued that the objection was similar to the prior bad acts rule found in Rule 404. The court over ruled the objection at R 1870. It is not

unusual for people to recant their confessions. There is always things that are unresolved, but not of this magnitude. (R 1871) I would agree that people who make incriminating admissions regarding their involvement in the crime, that ninety-nine percent of the time they are telling the truth. (R 1872)

[Abstractor's Note: The defense renewed its objection to this testimony.]

It is rare when you get a full disclosure, however there should never be any major discrepancies as you have in this case. (R 1873) I do not agree that the officers who took the confession are the persons are in the best position to make the determination as to whether Mr. Misskelley is being truthful. Not in this case because in a case of this importance, national significants, they had a vested interest in it. What I am concerned about here is that the defendant did not provide enough information to offer a valid confession in my opinion. (R 1874)

I do not really know whether I was hired by the defense in this case or not. They told me they did not have any money and that they felt there was something wrong. I have not submitted a bill on this case yet, but I intend to ask for my plane fare. (R 1875)

I am presuming that the officers tainted the mind of the defendant with facts and information about the crime. In response to your question, could it have been a lucky guess on the part of the defendant when he guessed which of the victims had been castrated, he had a one out of three chance of getting it right. I am acutely aware of some troubling things in the confession of the defendant that I have read. (R 1876)

I am not familiar with all the facts and circumstances surrounding this case, and this is just one of thousands of confessions that I have read in thirty-nine years. (R 1877) (ABSTRACTOR'S NOTE: AT THE CONCLUSION OF THE TESTIMONY OFMR. HOLMES, THE DEFENDANT MOVED TO MAKE A PROFFER OF MR. HOLMES TESTIMONY FROM THE SUPPRESSION HEARING REGARDING THE POLYGRAPH GIVEN TO THE DEFENDANT ON JUNE 3, 1993. SAID PROFFER WAS ACCEPTED BY THE COURT AND MADE IT PART OF THE RECORD HEREIN)

WILLIAM WILKINS

DIRECT EXAMINATION OF WILLIAM E. WILKINS
BY MR. CROW

My name is William E. Wilkins. I'm a psychologist and my practice is

primarily located in Jonesboro, Arkansas. (R 1885) While I was ask George W. Jackson, I conducted forensic testing for the State of Arkansas. (R 1886) In the past two years I have attended continuing education programs in forensic psychology. (R 1888) In the course of my practice while in Jonesboro, I have testified on the behalf of Mr. Brent Davis, the prosecuting attorney. (R 1889). In the past fifteen years, I have performed probably four thousand forensic evaluations. I am currently licensed in the State of Arkansas as a psychologists. (R 1890)

I cannot deal with child abuse cases because of the disciplinary action against me. (1390–upper right pagination)

I was ordered to be supervised by the board but I am not supervised yet. (1397–upper right pagination)

Dr. Hazlewood examined me and said there was a failure to appreciate the limitations of my professional competence. (T 1402 upper right pagination)

I did not file my letter of intent to practice forensic psychology until last week. (T 1405, upper right)

I performed what is commonly known as IQ test on the defendant,

Jessie Misskelley Junior. I performed the standard one known as the Wechsler Adult and Intelligence Skill Revised. That is a fairly standard measure of intellectual ability. The scale is designed with two broad sub-categories. One called verbal abilities and one called performance abilities. As the titles imply, verbal measures verbal ability, verbal reasoning, verbal thinking, and verbal manipulation of things. Performance implies performances of physical manipulation of things, objects, and ideas. Jessie received a full scale I.Q. of seventy-two with a verbal I.Q. of seventy and a performance I.Q. of seventy-five. Average intelligence is considered to be between eighty-four and a hundred and sixteen. (R 1920)

I also performed some intelligence test from a qualitative sense rather than from a quantitative sense. (R 1921) Mr. Misskelley responded to these tests the way I would expect a seven to an eight year old child to respond. I also performed some testing on Jessie based on moral judgement and on the work of Lawrence Kolberg. (R 1923) After performing these tests on Mr. Misskelley, my conclusion was that Jessie reasons on the level of about six toeight year old child. (R 1925) I also conducted some evaluations of Mr. Misskelley's reading level. I determined thatJessie

Misskelley Junior has a third grade reading level. (R 1926) With regard to his writing level, I determined that Jessie Misskelley Junior has a writing level of less than first grade. With regard to his verbal comprehension, Jessie has a very impaired ability to give details about a short story that you read to him. After a seven or eight word sentence he begins to lose what is happening. For example, on the first page of the second confession that he did, he's asked, "Alright, you told me earlier it was around seven or eight. Which time is it?" Jessie replies, "It was seven or eight." (R 1926)

He got only the last half of the sentence, and the firsthalf of the sentence was gone. I also did testing on Jessie Misskelley as to his personality pattern, more specifically I did the MMPI-2, a House/Tree/Person and Rorschach. The findings on the Rorschach were of no value. The result of the MMPI found some moderate problems with being somewhat dependent, some antisocial characteristics and some of what are called schizotypal characteristics. (R 1927)

He is dependent upon others to make major decisions for him. He has major difficulty some times separating out fantasy from reality, and at times especially when he is under a great deal of stress becomes almost unable to

decide which is which. (R 1928)

(AT THIS POINT THE FOLLOWING COLLOQUY TOOK PLACE IN OPEN COURT)

MR. CROW: Did you do a -- some kind of suggestibility test?

DR. WILKINS: Yes, I did.

MR. CROW: Can you tell about that?

MR. DAVIS: Your Honor, at this point regarding the suggestibility test, to my knowledge and I looked through the literature, I'm not sure that there are any scientific tests that qualifies as such and before we get into an area of speculation that is not based on any scientific research or data and or any reliable foundation. I don't want to get that testimony in front of anybody if this is just some off- the-wall theory.

(The following occurred outside the presence of the jury)

CONTINUED DIRECT EXAMINATION OF WILLIAM E. WILKINS

BY MR. CROW

I have reviewed the text book by Gisli Gudjonsson. The text book is titled The Psychology of Interrogations, Confessions and Testimony. (R

1929) Dr. Gudjonsson is looking at a wide variety of issues in the psychology of interrogations and confessions testimony. This is in one place where he reiterates some of the things he had done in the past on the suggestibility scale. He lists fifty-six references to himself dealing with this issue. Dr. Gudjonsson is at the Institute of Psychiatry in London, he is recognized world wide as a leading authority on false confessions and police interrogation techniques. Dr. Gudjonsson developed the suggestibility scale. It has been used. It has a scientific basis. (R 1930)

MR. CROW: I think we've met the argument showing, your Honor, that it's based on scientific criteria and that the---

MR. DAVIS: If I may voir dire---

THE COURT: Yes.

VOIR DIRE

There is a standardized Gisli Gudjonsson suggestibility scale. There is a standardized test. That is the test that I performed on Jessie Misskelley. I have the test and the results. The scientific or empirical data has been used to validate this test is that (R 1931) Dr. Gudjonsson has used it in a wide variety of circumstances, used it in interpreting the differences with

intelligence levels, self- concept levels, predictability in a wide variety of cases.

MR. DAVIS: How many American subjects and subjects in this country has he used in his evaluation?

MR. CROW: I object, your Honor. I don't see the relevance of whatever --

MR. DAVIS: -- it's

THE COURT: -- Well --

MR. CROW: -- excuse me, could I finish my objection, your Honor?

THE COURT: Go ahead.

MR. CROW: I don't see the relevance. If this was -- possible relevance I guess if this was done in some third world country or something that maybe the academic standards were lower, but this is in Great Britain and also in Iceland. I don't -- I think the standards are -- are the same for educational excellence and I don't see the relevance.

MR. DAVIS: Your Honor --

THE COURT: Overruled. I can see some possible relevance. Proceed. (R 1932)

CONTINUED VOIR DIRE

I do not know how many Dr. Gudjonsson himself has done in this country. I am not aware of any he has done in this country. Testing has been used in this country as well. Doctor Ofshe has done some testing on people from the United States. It has been tested on a wide variety of age groups and mental groups. Including people as younger than 17 years. (R 1934) It should not make any difference if the test subjects are American or otherwise. The basic premise of science is that we are trying to develop universal principles. You can not know of you have done so until you test it universally. I have never used this test before this case. (R 1936) Others in forensic psychology in this County who have utilized this test are Dr. Arnett in Hawaii, Doctor Unger in Minnesota, Doctor Gumaugh (phonetic) in Salt Lake City, Doctor Zimmerman in Louisiana. Those are some that come to my mind.

THE COURT: Are you telling the Court that this is a universally recognized phenomenon in the field of psychology

that is purported to be reliable and accepted in the field in general? (R 1937)

DR. WILKINS: I am saying that the area of suggestibility has been investigated in psychology for a long time in a wide variety of areas.

THE COURT: Well, that's not -- I'm not --

DR. WILKINS: This particular test has been around eight, ten years and it is a method that is being experimented with and looked at and dealt with.

THE COURT: Well, I certainly understand suggestibility and I am quite certain that it has been inquired into in learned treatise for years. The question is: Has this test been accepted in the field of psychology as a valid testing tool to determine suggestibility and is it accepted in the field?

DR. WILKINS: I don't know how to answer that, your Honor.

THE COURT: Well, yes or no?

DR. WILKINS: But I don't know whether it's yes or no.

THE COURT: Well, are you telling me that it's not a universally accepted scientific tool that's utilized for testing?

DR. WILKINS: I'm saying that the MMPI and the WAIS-R are not universally tested tools. (R 1938)

THE COURT: Well, they've been around for quite a while.

DR. WILKINS: Yes. And what I'm saying to you is when you said, "Are they accepted in the field?", is that different people in the field accept different things as being valid and reliable. Different people in different parts of the field use different things.

THE COURT: Well, I'm just trying to determine whether or not it's scientifically accurate. In the first place I have -- nobody's really indicated to me what the test is or what the scientific basic is. You've used the term that there were empirical studies done which means that somebody took a -- the effort to test it at least on some segment of society and documented the results.

MR. CROW: Your Honor, for the record, we would tender the test that was done.

THE COURT: Alright, I'm going to read it here in a minute.

MR. STIDHAM: Your Honor, am I to understand the State's objecting that this Doctor Gudjonsson is from Iceland and practices psychiatry in London?

MR. FOGLEMAN: Doctor Gudjonsson is not testifying.

(R 1939)

MR. STIDHAM: Well, it seems to me that -- the prosecution's objection was based on, "Well, this is something that comes from Great Britain."

THE COURT: Are you making a statement or an objection?

MR. STIDHAM: Your Honor, I'm making a -- I'm trying to determine what the nature of their objection is.

THE COURT: Well, their objection is that the test that he's purporting to report is not scientifically accurate. It does not meet the Frye Test, and is not of scientific import and, therefore, not admissible. Now, that's the plain simple objection and I'm trying to weed it out and determine whether or not it's a test based upon any credible research and whether or not it's a test that is recognized in the field and one which people rely upon. That's the sole issue.

MR. STIDHAM: I thought the witness testified to that, your Honor.

MR. FOGLEMAN: He said he didn't know whether it was generally accepted or not.

MR. CROW: He also testified that he didn't think the MMPI was generally -- excuse me -- universally accepted.

DR. WILKINS: It is generally accepted by a wide number of people. Now, what that means to the field, I don't know. (R 1940)

THE COURT: (EXAMINING DOCUMENT) did you make up this suggestibilities tale here yourself?

DR. WILKINS: No, I did not.

THE COURT: And is this little scenario -- is that the one that's suggested in this textbook?

DR. WILKINS: Yes.

THE COURT: Are there any other variations of it?

DR. WILKINS: No. That one is not in the textbook. It's from an article by Doctor Gudjonsson where the actual scale is published, but he makes reference to --

THE COURT: -- What is the scale? Tell me what the scale is.

DR. WILKINS: You read a short story about some facts, then your concern is how well the person recalls the facts of the story. Then you're concerned with if I begin to apply pressure to you, will you change your response?

THE COURT: What is the scientific method that's employed in this?

DR. WILKINS: I'm not sure what you're asking me.

THE COURT: Well, if you had a (R 1941) seventeen year old boy that had a low I.Q. in front of you and you being a professional person, a doctor, would that not in and of itself -- the position you hold -- create some level of suggestibility?

DR. WILKINS: Probably.

THE COURT: Well, what is the scientific method that's employed?

CONTINUED TESTIMONY OF DR. WILKINS

There is a criteria to measure yield. There is a statement about what you say to them to apply pressure which is standardized. There is probably some subjective elements to that, but there are subjective elements in a lot of tests in psychology. (R 1942) Some of them are more objective than others.

MR. CROW: Your Honor, if I may briefly. My understanding of the Arkansas Supreme Court is they have abrogated the Frye Rule. We're not under Frye anymore. It's now based on Rule 703. The last sentence of 703 says that - -they're talking about a test --anything the expert can base his opinion on --"If of a type reasonably relied upon by experts in a particular field" --not generally, you know -- "by experts in a particular field in forming

opinions or references upon a subject the facts or data may not admissible in evidence." Your Honor, I think he testified as to numerous experts in the field that have relied on this test.

THE COURT: Well, I think that's what I asked him --was this a recognized test that's relied upon by experts in his field.

DR. WILKINS: And to what I answered, "Yes." And he asked me, "Is it widely" -- I don't know what he means by widely, and I was not trying to be difficult. I was trying to decide where -- what -- if we're talking about it being universal or not, or by nine-tenths, or two-thirds, or what (R 1943)

THE COURT: How they can benefit the jury's finding of the fact? That's what I want to know. What is it that he can testify to that a jury wouldn't already have the capability of doing on their own?

MR. CROW: Your Honor, I think every individual would have a different suggestibility -- amount of suggestibility, and that's -- I don't think that's obvious from a jury watching Mr. Misskelley from across the room or even listen to him testify as to how suggestible he is or isn't. Similarly, while the jury may have a general idea of what someone's I.Q. is, if you look at them

and watch them you kind of get an idea of whether -- what you think, but we're certainly allowing evidence every day as to someone's I.Q.

THE COURT: The issue in this case, besides guilt or innocent, is your defense notion and idea that the police overrode his free will and either told or suggested to him what his responses should be in a confession. That is an issue that the jury will have to resolve. (R 1944) What is it that this expert or any other expert can give to the jury that would aid and assist them in arriving at that ultimate finding that he was over-reached or --

MR. STIDHAM: Your Honor, Doctor Gudjonsson's scale measures suggestibility in individuals. It's empirical. Doctors and psychologists use that to measure suggestibility among individuals. The suggestibility scale and the results that Doctor Wilkins conducted on Mr. Misskelley would help the jury understand his level of suggestibility.

MR. CROW: Some individuals may have a high level of suggestibility, other ones may have low, and we're going to -- we're attempting to find out.

THE COURT: I'm reading Rule 704 with regards to the ultimate issue, and the annotation or nineteen eighty-four by Congress amending it --I don't know if Arkansas has amended it and apparently we haven', but --

MR. STIDHAM: We have not, your Honor.

THE COURT: -- the quote is added to Rule 704 is, "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental (R 1945) state or condition constituting an element of the crime charged or a defense thereof."

MR. CROW: Your Honor, if I may respond to that. Nothing we're going to put on here is going to have Doctor Wilkins or any other expert testify as to what was -- as to whether Mr. Misskelley had the proper mental state to commit this alleged crime. The issue -

THE COURT: That's not the sole issue.

MR. CROW: Your Honor, I understand that, but as to whether or not he is suggestible or not -- it that is -- you're going back so far -- again a mental state includes I.Q., and we certainly allow that type of evidence in, your Honor. And to say that just because anything dealing with mental state suddenly we don't let it in, is a total abrogation of what the Rules are. Your Honor, whether or not Mr. Misskelley is suggestible is a separate issue from

whether he was guilt or innocent. The jury could find he was very suggestible, yet believes that he's guilty.

MR. STIDHAM: The jury could decide the voluntariness of this statement to the police, your Honor. The suggestibility goes toward the voluntariness of the statements that were made by Mr. Misskelley. (R 1946)

THE COURT: I can read and that goes to a fact of your defense.

MR. DAVIS: What the State is concerned about is whether somebody is easily suggestible or whether they caved in to police coercion or whatever as the defense alleges, that's something that the jury can make a determination of. If they're provided with some hocus-pocus test --

MR. CROW: I object to that, your Honor.

MR. STIDHAM: Your Honor, that's ridiculous.

MR. DAVIS: -- object all you want, I'm characterizing it as I see it -- some hocus-pocus test. Doctor Wilkins who's testified four thousand forensic evaluations, never used it before in his life, for the first time in this test -- in this case decides to use a test that has admittedly doesn't have universal acceptance. He can cite only his expert witness in this case as using it, and he's not even a psychologist.

MR. CROW: That's not a correct statement, your Honor. He said several other individuals have used it.

MR. DAVIS: Well, he cited them from Hawaii --

MR. CROW: From Louisiana.

MR. DAVIS: Right. And he's never used it himself. (R 1947) He's never administered it himself.

MR. STIDHAM: Your Honor, Mr. Davis' interpretation of law is not correct.

MR. FOGLEMAN: Your Honor, there has to be a scientific basis. That's Rule 702.

MR. CROW: Sure.

MR. STIDHAM: The witness has testified to that, your Honor.

THE COURT: Well, I'm not sure I have understood what the scientific basis of the test is yet. Try to explain that to me again, Doctor Wilkins.

THE WITNESS: I think we're having trouble with the -- what -- I'm not sure we're talking about what scientific basis means and in the same way. That may be what --I'm trying to figure out what -- how I can explain to you if that's the issue.

THE COURT: The issue is I want to hear some scientific basis that would justify on a general scale a person in your profession and in your field utilizing and relying upon this particular test, and what degree of assurance you would have that -- it was valid. DR. WILKINS: The general issue of suggestibility has been around a long time, okay. It has been studied in a wide variety of ways for a long time. (R 1948) The present issue about this particular scale, the scale was developed in nineteen eighty one. The scale was designed to try to assess and to understand how the process of false confessions may happen. And part of the issue involved here is false confessions happen. The results, the generally accepted results are yes in about eighteen percent of all murder cases.

Now if they do happen, how are we to study, how are we to look at those instances in those places where that may or may not have happened and what factors are involved in the person involved in that who would be more inclined to be influenced into making a false confession. The scale then is one of many options that if used, much like we do not depend on any one scale for personality assessment, we use several. The suggestibility scale which has been used in a wide variety of places --many of them in Great Britain, I agree

-- but -- they have been used in a wide variety of places. It has all kinds of read out reliability date of a --it has validity data. There it is demonstrated to be a valid and reliable instrument. It has been used a great deal outside this country. (R 1949) It is becoming increasingly used in this country. I have not used it before in my practice before, but it has to do with the fact that I have never had need for it before.

THE COURT: It's not based upon the objective findings of the examiner?

DR. WILKINS: It is based upon the objective findings of the --

THE COURT: Your conclusions that are drawn from questions that you ask after you read a one paragraph statement to someone.

DR. WILKINS: Yes.

THE COURT: Is it not based further upon your interpretation of those responses to some standard?

DR. WILKINS: No. Well, I do not know what you mean by that. There is a yes-no category. If they say this, it's yes, if they don't say that, it's no. So my interpretation has nothing to do with this. It depends on what they say if it fits in category A or category B. (R 1950)

THE COURT: Well, it's not like math where there is an exact response.

DR. WILKINS: There is there is nothing in psychology that is an exact response like math.

THE COURT: Alright, have you got any other questions?

MR. DAVIS: Yes, sir.

THE COURT: Go ahead.

MR. DAVIS: How do you perform this test?

DR. WILKINS: You tell the person that you're doing it on, "I'm going to read to you a story. I want you to remember as many things as you can." You read them the story and then ask the questions.

MR. DAVIS: Okay, and is it the reflection (sic) in your voice on certain questions and how the question is asked in order that -- (R 1951)

DR. WILKINS: No.

MR. DAVIS: -- in order to increase the suggestibility?

DR. WILKINS: No.

MR. DAVIS: You just ask them in a deadpan fashion --

DR. WILKINS: Yes.

MR. DAVIS: -- each question?

DR. WILKINS: Yes.

MR. DAVIS: No difference each time?

DR. WILKINS: No.

MR. DAVIS: No inflection?

DR. WILKINS: No.

MR. DAVIS: And then you interpret from their responses DR. WILKINS: Yes.

MR. DAVIS: -- based on this scale?

DR. WILKINS: In the questions there are some questions that are accurate in the sense of being what is in the story. There are some questions that you ask them that are not accurate in terms of what's being said in the story regarding size, race, weapons, different things. Was it three people or was it two people? The question is, "Which was it --three people?" And they answer yes or no.

Now, the questions are designed so that it's either factual or non-factual according to what's in the story itself. (R 1952) You then see what their score is in terms of -- how many accurate ones that they get. You then say to them, "This is really important. You didn't do very well this time. I want you

to think carefully about it and we're going to do it again." If you get more and more hostile, you may get more and more yield. I have not gone to any schools on how to give the test. (R 1953) It is described word- for-word what you do in the in demonstrations and instructions. I have been trained in how to give the MMPI. (R 1954)

MR. CROW: Your Honor, as far as training goes, I think it's clear that he followed -- he followed the instructions given.

DR. WILKINS: I also have plenty years of experience. It is not the first test I've ever seen. (R 1955)

MR. DAVIS: Well, could have Mr. -- could Mr. Crow havepicked up those directions and read them and conducted this test on his client?

DR. WILKINS: Yes.

MR. DAVIS: He would be just as qualified as you to testify as to the results if he had read --

DR. WILKINS: No, he wouldn't be he would not be as qualified to interpret their meaning.

MR. DAVIS: But you haven't had any training in how to interpret that, correct?

DR. WILKINS: I've had training in how to interpret suggestibility. It's well known in the field. It's been taught forever.

THE COURT: What is the ultimate thing you're trying to get him to testify to on -- based on this test?

MR. STIDHAM: Your Honor, Mr. Misskelley's results from the Gudjonsson suggestibility scale which is a scientific test which has empirical findings to back it up and they're all in this book. Doctor Wilkins has testified to the fact that it is commonly used by experts in this field and we submit that under the Rules of Evidence it's admissible and it goes to -- it should go to the trier of fact to help them determine the issue of voluntariness of the statements made to the West Memphis Police Department. (R 1956)

MR. DAVIS: Your Honor, of course, our basis for objection is that it is not -- there hasn't been a basis or clear showing that the results of this test in this particular instance under these circumstances have any scientific validity based on the failure to show proper scientific and empirical data to support the test based on the test examiner's lack of qualifications, training or experience in giving the test and his very own admission that his interpretation is an important aspect of the results of the test and he told the Court that he has no

training, no experience, no background in conducting this test until this particular case.

MR. STIDHAM: Your Honor, the State has had nine months to retain an expert to put in front of the jury to testify in rebuttal to this.

MR. DAVIS: Judge, the State doesn't believe that there's an expert on the face of the earth that can give any kind of test that can tell any more about suggestibility than what twelve people sitting right there can figure out on their own.

MR. STIDHAM: Judge, I have one in the next room that I plan to call to testify here in a few minutes.

MR. DAVIS: Well, and we don't believe he's worth the -- (R 1957)

MR. CROW: Your Honor, if I understand the State's last comment then, it's not an issue of any type of training for this test that's at issue, or any type --or how many times he's used it, whether it's once or twenty million, that doesn't mean he doesn't think the test is valid. That's -- not for him to decide, your Honor.

THE COURT: I'm going to take a ten minute recess so I can weed through all of this garbage.

MR. STIDHAM: Thank you, your Honor.

(RECESS)

THE COURT: You want to call another witness?

Alright, let the record reflect that this is a continuation of a hearing out of the presence of the jury for the purpose of questioning the scientific veracity of a test. I guess that's what we're doing. Go ahead. (R 1958)

DR. VAUGHN RICKERT

DIRECT EXAMINATION OF DOCTOR VAUGHN RICKERT

My name is Vaughn Rickert. I am employed as an associate professor of pediatrics at the University of Arkansas for Medical Sciences, and on the professional staff at Arkansas Children's Hospital as a pediatric and adolescent psychologist. I have been licensed since 1986. (R 1959) I am not a medical doctor. I'm a psychologist. (R 1960) I heard the discussion about the test regarding suggestibility. I have not heard of the Gisli Gudjonsson Scale of suggestibility. I have never seen it administered in my practice. I have concerns about the validity of such tests on children, adolescents, or adults who have significant memory impairments. Individuals who have difficulty recalling the auditory information. You may not be assessing suggestibility

but simply guessing because of an inability to remember what the subject had just heard. Mr. Misskelley has significant impairments in visual and auditory memory. I would feel uncomfortable in testifying as an expert if I had never received any training in how to administer a test and had never administered a test to anyone before in that particular area. (R 1962)

CROSS EXAMINATION OF DR. RICKERT

BY MR. STIDHAM: I am a pediatric and adolescent psychologist. Ievaluate children. I provide direct clinical service. I provide educational experience for the residents and do research. I have never worked with children who have been interrogated by the police. I am not shocked that I have never heard of the Gudjonsson Suggestibility Test. I have not readthe literature in regard to thew or how to perform it. Ibriefly scanned one of the chapters so I could better understand how the test was administered. The ability to remember things could be part of suggestibility. It depends uponwhat you're assessing. All I'm testifying to is Iwould have some concerns based on Doctor Wilkins' report where he indicated that Mr. Misskelley had difficulties in auditory and visual memory skills. And I would be concerned thatthe results that Mr. Misskelley obtained on this particular instrument may be compromised and in my professional opinion are

significantly compromised because of hismemory impairment. I have not read Doctor Gudjonsson's book.

THE COURT: The Court is of the opinion that the test regarding suggestibility is flawed in that it does not meet a scientific standard upon which the profession generally relies. Secondly, that Doctor Wilkins' absence of experience, training, and education in the utilization of the test would fatally flaw any results that he might conclude from such test. I will, however, allow Doctor Wilkins to continue his testimony, for you to elicit from him his opinion -- if he has one -- as to the defendant, Jessie Misskelley's, likelihood or probability of having information suggested to him.

In other words, I will allow you to ask Doctor Wilkins, "Doctor Wilkins, based upon your examination, your testing, and your complete information," -- from whatever source -- "regarding Mr. Misskelley, do you have an opinion as to whether or not he is an overly suggestible individual?" And if he says, "I have such an opinion, based upon that training and information and testing," what is the opinion, and he'll be allowed to give that opinion.

If that opinion is that he is suggestible, then I'm going to allow the State to do everything they can to discredit that testimony -- calling additional expert witnesses, questioning his data, questioning his competency in the area, but I'm not going to allow him to (R 1965) parrot out the results of a test that I consider to be lacking in scientific foundation, first, and, secondly, his ability to administer such test should it have any scientific basis that's recognized within the field.

So it's a twofold objection that I'm ruling. That one is I don't think it's scientific. Two, if it is scientific he's not qualified to administer it, but that does not preclude him from testifying as to his general opinion and notions based upon the field of forensic psychology that Mr. Misskelley was suggestible. If that makes sense.

MR. CROW: Note our objection, your Honor.

MR. CROW: We would offer this suggestibility test.

THE COURT: Alright, it may be received for identification purposes as a proffer to evidence. (R 1966)

(DEFENDANT'S EXHIBIT SEVEN IS RECEIVED AS AN OFFER OF PROOF)

THE COURT: Why don't you just outline what he would have testified to. Just dictate it right now.

PROFFER OF TESTIMONY OF WILLIAM E. WILKINS I would have reported that I had given the scale and whatthe yield scores would have given. I would have gone through how the test was given, and how the scoring was done. Iwould have explained how the pressure was

stepped up at each stage. I would have given the results.

(R 1968)

RETURN TO OPEN COURT

CONTINUATION OF DIRECT EXAMINATION OF DOCTOR WILLIAM E. WILKINS BY MR. CROW:

I spent in the neighborhood of eighteen to twenty hours with Mr. Misskelley conducting tests and interviewing him. In my opinion based on my interaction with him, is that Mr. Misskelley is quite suggestible. Jessie comes from a family system that has a fair amount of alcohol abuse and some child abuse as well. When we look at abusive family's, one of the things we see a lot of is called co-dependency. (R 1973)

By co-dependency we're talking about people in the system taking responsibility for other people's actions and people's feelings. In this case in

terms of children. One of the things they begin to look at and deal with is that somehow they're doing something wrong. That they're at fault, that they're the cause of the abuse occurring. They use a kind of general tendency to accept fault and try to please the abusing person. (R 1974)

CROSS EXAMINATION OF DOCTOR WILLIAM E. WILKINS
BY MR. DAVIS

I took a history from the defendant prior and during the course of my examination of him. He relayed to me particularly a period I think I recall from about thirteen to fifteen or so, he huffed gas regularly on a almost daily basis. He had also used alcohol and had also experimented with other drugs. Marijuana as I recall. (R 1976)

An I.Q. Test was performed on Mr. Misskelley in 1989 which determined that he had a performance I.Q. of eighty- four and a verbal I.Q. of sixty-eight, with a full scale of seventy-four. (R 1980)

There was also an I.Q. Test conducted on the defendant in 1992 which indicated his performance I.Q. was eighty-eight. His full scale I.Q. in 1992 was seventy-three.

(R 1981) With regard to the defendant's MMI test results, there was a mind elevation which could be interpreted to show malingering. (R 1983)

In my opinion Jessie was able to differentiate between right or wrong at the time of this alleged incident. In addition he had the ability to conform his conduct as that required by the law at the time of this incident. I also concluded that he wasn't mentally retarded. (R 2003)

REDIRECT EXAMINATION OF DOCTOR WILLIAM E. WILKINS

BY MR. CROW

Jessie Misskelley Junior has been diagnosed in the past as being mentally retarded. Mr. Misskelley is not mentally retarded. My tests indicate that Jessie Misskelley is not mentally retarded using a psychological standard. In this, I I'm not applying the legal standard. (R 2005)

JOHNNY HAMILTON

DIRECT EXAMINATION OF JOHNNY HAMILTON
BY MR. STIDHAM

My name is Johnny Michael Hamilton and I reside in Knoxville, Tennessee. On May 5th of 1993, I resided in Marion, Arkansas, at the Highland Trailer Park. (R 2007)

On May 5th, 1993, I was in Dyess at the old theater practicing wrestling with the defendant, Jessie Misskelley Junior, Roger Jones, Keith, my nephew, and Bill. I do not know what Bill's last name is. There were other wrestler's

that I was helping out at the time. We left to go to Dyess at approximately 7:30 just before dark time. We stopped along the way a picked up my nephew, Keith Johnson. We picked him up at the intersection of 63 highway and the interstate at an old deserted Exxon station. (R 2008)

We usually left the old theater building somewhere after ten o'clock because the man that owned the building did not want a lot of noise after ten o'clock. We arrived back at Highland Trailer Park pretty close to eleven o'clock.

CROSS EXAMINATION OF JOHNNY HAMILTON

BY MR. FOGLEMAN

That was not the same night that we signed the contract with Mr. Stone. There was not a new contract signed and dated each time a new person arrived at the wrestling ring. Every time a new person arrived Mr. Stone ask that person sign it. He just added their name to the list for injury purposes. I do not recall the date that I signed the contract. (R 2009)

In response to your question about what is it about May 5th that makes me remember it, my nephew is on the search and rescue squad for Crittenden County. He was suppose to go wrestling with us on May 5th, but he never

showed up. So when we got back from Dyess, he told us that he'd been to a search and rescue meeting and that the boys were missing. (R 2012)

Him not showing up the rest of that night because of the search and rescue meeting sticks out in my mind because the next day they were searching for the kids. It was big talk all over the Trailer Park. (R 2014) I was never contacted by the police department regarding this. (R 2017) The first time anybody contacted me about this was Sunday night at the end of January, 1994. A private investigator called me at my home in Knoxville, Tennessee. (R 2019)

DR. RICHARD OFSHE

DIRECT EXAMINATION OF DOCTOR RICHARD OFSHE
BY MR. STIDHAM

My name is Richard Ofshe. I'm a professor of sociology at the University of California at Berkeley. (R 2026) I received a Bachelor's Degree in psychology from Queens College of the City University of New York, a Master's Degree in sociology from the same institution, a Ph.D. in the sociology department of Stanford University with a specialty in social psychology. Social psychology is a specialty area that is found both within psychology and within sociology. It deals with influence, decision making,

belief, and attitude change, techniques of pressure and coercion and I specialize particularly in extraordinary techniques control and influences.

All my work for the last thirty years or more has been on the subject of influence starting out doing work in traditional problems in social psychology having to do with decision making, group influence, interpersonal influence. (R 2027) I did a lot of work for about ten or twelve years studying cult groups. That is to say groups that are very strongly organized, that exert enormous pressure on individuals and that can lead individuals to change the way in which they see the world and be willing to take part in activities that otherwise would ordinarily not take part in.

I specialized in studying cult groups that generate violence. I did a great deal of work involving the analysis of groups that led their followers to commit murders. I did a lot of work for prosecutorial agencies, analyzing and prosecuting such crimes.

I began the study of police interrogation, particularly techniques that have to do with coercing confessions from individuals and generally manipulating them in extraordinary ways. (R 2028) I have done a great deal

of work and written about police interrogation tactics, in particular police interrogations that can and do lead to coerced and/or false confessions.

My work on all of these subjects have been published. I am familiar with Doctor Gudjonsson. He is one of the other people who is a specialist in techniques of interrogation and police interrogations. (R 2029)

My work is mentioned in Dr. Gudjonsson's book, "The Psychology of Interrogations, Confessions, and Testimony". Dr. Gudjonsson asked me to review certain chapters of the book and make comments with regard to them. He also discussed my work in the substance of his work.

I shared in the 1979 Pulitzer Prize for public service. (R 2030) We did an expose on a group called Synanon which started out as a drug rehabilitation organization and turned into a violent cult group that was assaulting and attempting to murder people in their immediate area. I am a member of the American Psychological Association, the American Sociological Association, the American Psychological Society, the Sociologic Practice Association, and the Pacific Sociologic Association.

At the request of the Supreme Court of Florida, I have been asked to address for a half day a judicial conference in Florida on the subject of false

confessions. I have been involved in both civil and criminal cases dealing with false confessions and confessions in general. With regard to confessions, I have testified thirteen separate times. I've been involved in many more cases, but much of the work that I do does not necessarily culminate in testimony. (R 2032) Most of the confession cases in which I have testified have been cases involving coerced or coerced false confessions and, therefore, my testimony has been principally for the defense in those cases. I have been qualified as an expert witness in the area of influence and police interrogations twenty-five separate times, in both State and Federal Courts. (R 2033)

I have testified in the State of Arkansas, in Federal Court in Fort Smith regarding a cult group. (R 2034)

VOIR DIRE OF DR. OFSHE BY BRENT DAVIS

At the University of California at Berkley I teach courses in social psychology and courses on extreme techniques of influence including police interrogation. (R 2035)

No state has ever refused to accept me as an expert witness. There was one case in California in which a line of testimony to which my testimony

would have been foundational was rejected. It was with regard to the insanity defense, and in that case, the judge barred that particular line of testimony. (R 2036)

With regard to this particular case involving Mr. Misskelley, I have studied the following materials: the police reports and notes of Detective's Gitchell, Ridge and Durham, the transcript of the first tape recorded interrogation of Jessie Misskelley, the transcript of the second tape recorded interrogation of Jessie Misskelley. I've listened to the tape recordings of both interrogations. I studied the transcript of and the video recording of an interview of Buddy Lucas. I've studied the treatment records of Jessie Misskelley at East Arkansas Mental Health Center. The transcript of a hearing in which Detective Ridge sought his search warrants from Judge Rainey. I attended a hearing in this case on January 13th, 1994, at which I hear and saw the testimony of Detectives Allen, Durham, Ridge, and Gitchell with respect to what occurred during the interrogation. And I subsequently reviewed the transcripts of that hearing and then I interviewed Jessie Misskelley on December 15, 1993, and have subsequently carefully reviewed, and studied, and analyzed the transcript of that interview. This interview with Mr.

Misskelley lasted three hours, moreor less. It worked out to be an eighty-seven page transcript. (R 2037)

My opinion with regard to this case, is based on the literature on the subject of influence, and particularly what is known about techniques of influence, the conditions that lead up to coerced confessions. The analysis that I preform involves the pattern and details of the interrogation. (R 2038) My opinion is grounded in the research on what is known about the conditions that lead up to coerced confessions. There are patterns of conduct that are known to lead to coerced confessions. There are consequences that follow from those patterns that are generally used to identify a coerced confession. There are criteria that are used to judge whether a confession is coerced, and whether it is a confession that appears to be the product of influence or appears to be the product of memory. This is all based on empirical studies. (R 2039)

The truth or falsity of a confession is important and sometimes it is possible to know whether a confession was in fact true or false. There have been studies on disputed confessions. It is not necessary to presume that a confession was coerced for those studies to have validity. Sometimes one

knows that a confession is false and therefore coerced because of (R 2040) independent factors, such as knowing, eventually identifying who the real killer might be. I do not know that I have ever testified that something was a false confession. I know I have testified as to whether something was coerced. (R 2041)

(AT THIS POINT, THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY)

MR. CROW: Is he the (prosecutor) qualifying this witness or is he cross examining him? THE COURT: I am interested in knowing what a sociologist is going to testify to that would aid and benefit the jury and what is the scientific basis of that testimony. It seems to me that you have called this witness to give an opinion that the confession was coerced and that it was involuntary

MR. STIDHAM: That's exactly right, your Honor. (R 2042)

THE COURT: That is a question for the jury to decide and I am not sure I am going to allow him to testify in that narrow framework. I can see him having value testifying that these are common techniques employed by the police overrides one's free will. I found such and such of these conditions

prevailing here and things of that nature, or maybe group dynamics of a cult. But I'm not sure I'm prepared to allow him to testify that in his opinion it's coerced and therefore invalid. I mean, what the hell do we need a jury for?

MR. STIDHAM: He's not going to testify whether or not the confession is false or true or whether the defendant is guilty or innocent. He's going to testify to the voluntary nature of the confession -- statement to the police -- whether or not it was coerced. That's an issue that the jury has to decide and that's what an expert witness is for, to help the jury decide these issues.

MR. DAVIS: That is the real crux of the matter, whether the confession was coerced or not, does not make --whether it was the truth. (R 2043) It is whether it was the truth and they are trying to get through the back door what they can not get through the front door.

MR. CROW: Disagree, your Honor. I --

MR. STIDHAM: Your Honor, that's not the correct statement of the law.

MR. CROW: The law recognizes --

THE COURT: No. I've ruled that it was voluntary. The jury, I guess, could go back and decide that it was not. If that is the issue you are talking about --

MR. CROW: That is what Arkansas law --

THE COURT: -- but the question of whether or not psychological ploys or tools were used to get a guilty person to give a true statement, now that's another issue.

MR. STIDHAM: Your Honor, that's not what he's going to testify to.

THE COURT: I don't know what you've got him here for. What is he going to testify to? I want to know.

MR. STIDHAM: Your Honor, he has an opinion as to whether or not the statements made by Mr. Misskelley to the West Memphis Police Department were voluntary. (R 2044)

THE COURT: Is that the way you're going to couch the question to him and is that the way he's going to give his opinion. In my opinion they were involuntary.

MR. STIDHAM: Yes, your Honor.

THE COURT: That the police used subtle techniques to cause an innocent man to confess -- to confess.

MR. CROW: He's not going to say whether he's innocent or not, your Honor.

MR. STIDHAM: Your Honor, that's for the jury to decide.

MR. DAVIS: Judge, what we've got -- they're trying to get through the back door what they can't get through the front. It's the same way.

MR. STIDHAM: Your Honor --

THE COURT: Well, unfortunately they might be able to do that under the status of our law.

MR. DAVIS: Your Honor, the concern that I have here is that for there to be any empirical data and for him to actually claim to have any scientific basis, somebody somewhere has to categorize these cases as false confession cases or coercion cases. And what I'm saying is that this man along with his cohorts in the field have -- they label things to -- back up or substantiate their particular theories, and --

THE COURT: Well, I think all of those go to the weight of his -- weight of his testimony.

MR. STIDHAM: That's what -- that's what experts do.(R 2045) If they want to bring an expert to counter them, they can.

THE COURT: I think you can call your man to say in his opinion that there was nothing that they did out of the ordinary and that the statement was freely and voluntarily made.

MR. STIDHAM: That's the correct statement of the law, your Honor.

THE COURT: Well, we might as well get on with it. I'm going to let him testify but I'm not about to let him testify that in his opinion Misskelley is innocent --

MR. CROW: No, your Honor.

THE COURT: -- that his confession was a lie and false. I'm not going to allow him to do that.

MR. STIDHAM: He has an opinion as to what --

THE COURT: Don't even try to ask him whether or not he has an opinion whether the confession was true or false, because I'm ruling that he cannot do that. (R 2046) And I am not going to allow him to testify that, in my opinion these officers illegally exacted or coerced a confession from his either. I'm not going to allow him to testify to that.

So what is he going to testify to?

MR. STIDHAM: He' going to testify as to -- he has an opinion that this -- the statements made by the defendant were involuntary and a result of psychological coercive tactics employed by the West Memphis Police Department.

(R 2047) CONTINUING DIRECT EXAMINATION OF DOCTOR RICHARD OFSHE

BY MR. STIDHAM

I have been requested to analyze a total of forty-eight separate interrogations leading to confessions. I have taken a coerced confession/false confession from someone. (R 2049)

I was requested by the prosecution to interview a suspect in a multiple murder and sex abuse crime case. I became suspicious as to the validity of the confessions that he had given. I invented a crime and told him that one of his sons and one his daughters claimed he had done something in particular to them. Initially he denied involvement. He then started using the techniques that he had been using to try to remember events and I simply allowed him to do that. He produced for me the next day a three page written detailed confession including dialogue that supposedly happened during the crime, (R

2050) to a crime that never happened that I invented and that the daughter who was supposedly involved in it confirmed never happened.

I have been able to break down my work into percentages with regards to analyzing these confessions. Of the forty- eight separate interrogations I have been asked to analyze, fifty-five percent of the time my conclusion has been that the statement that was made was voluntary or it was impossible for me to make a determination and forty-five percent of the time that the particular statement that was elicited was either coerced compliant confession or a coerced internalized confession. These are the two different types of false confessions. One is called coerced compliant. (R 2051) This comes about because a individual can no longer stand the strain of the interrogation and knowingly gives a statement that they know to be untrue. The other kind of confession is a much more complicated one. It's called a coerced internalized confession and this kind of statement arises when an individual actually becomes convinced that he or she has committed a crime that they had nothing to do with.

The far more common of these two types is the coerced compliant statement when the individual simply gives up and agrees to whatever they

need to say because they can no longer stand the strain of what is going on. It is possible for police interrogation tactics to produce a false confession. I do not know of any one in this field who does not acknowledge that false confessions come about in the course of police interrogation. (R 2052)

There has been a study of miscarriages of justice in capital cases in American history. A study done and published in the Stanford Law Review. In this study they identified three hundred and fifty examples of false convictions in capital cases in American history. And using the standards that they developed to judge whether or not a particular conviction was a miscarriage of justice, which often had to do with the real killer being found, they identified examples where the jury had found someone guilty who was in fact innocent. (R 2053)

(AT THIS POINT THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY)

MR. DAVIS: The Court laid down certain ground rules and now we're talking about percentages in terms of false -- false confessions. We aren't talking about opinion.

THE COURT: I'm interpreting this as an -- as an attempt to -- to use coercive techniques on the jury to suggest to them that this is a false confession and that there is danger on their considering the confession and that it suggests to them that they have to be very careful not to make a three hundred and fifty error -- whatever the percentages were. Gentlemen, that's -- that's a -- I'm --

MR. FOGLEMAN: I thought this would -- what they did is exactly what the Court had told them not to do.

MR. STIDHAM: No, your Honor, I asked the witness if there were empirical scientific studies and he was simply relating those to the jury.

THE COURT: Well, I don't care. You're still making inferences that by these statements that this particular statement was false and untrue.

MR. CROW: Your Honor, if I can interject. Yesterday I objected to questions that -- where Mr. Holmes stated that ninety-nine percent were real, or something like that.

(R 2054) That's empirical data that's -- now the shoe is on the other foot.

THE COURT: Well, no, in that particular case I think you offered it or it came up through your all's testimony and he brought it out --

MR. CROW: No.

THE COURT: -- is the way I recall it.

MR. CROW: I don't think that's correct, your Honor.

THE COURT: Well, I may be wrong on that. This is totally different. This has done just exactly what I indicated I wasn't going to allow.

MR. DAVIS: Judge, and that's what's going to happen because of this witness as you surmised. He's very astute. He's very smart, and he's going -- he's going to slip around the ground rules and we're sitting here talking to a jury in terms of percentages of cases in which there's been a false confession.

THE COURT: I'm going to sustain the objection.

CONTINUING WITH THE DIRECT EXAMINATION OF
DR. RICHARD OFSHE BY MR. STIDHAM

Generally, it's been found that individuals who are lacking in self-confidence, low self-esteem are more persuadable and also more likely to respond to coercive tactics. Individuals who are mentally handicapped are also at risk to responding to coercive and overly persuasive tactics. Analyzing a confession begins with determining whether or not the interrogation has been tape recorded. If the interrogation has been tape recorded in it's entirety,

then the analysis of the influence process during the interrogation is time consuming, but is fairly straight- forward. (R 2056)

When police agencies have not tape recorded the interrogation, it becomes necessary to try to reconstruct the events of the interrogation from the available information. When part of the interrogation was recorded and most of it was not, it is necessary to first try to identify what actually happened in the interrogation and the order in which things happen to then relate that to the statements that are undisputed. You rely on what is reported on by the police officers involved as well as the suspect. You attempt to rebuild how the interrogation progressed and the changes that occurred over the course of the interrogation. In this case the two recorded statements give us information about what happened during the interrogation and illustrate certain things about the tactics that were used and the suggestibility of the suspect. (R 2057)

It has been reported on in the scientific literature as to the kinds of ideas that develop in people's minds in response to extremely pressured interrogations.

(AT THIS TIME THE FOLLOWING COLLOQUY TOOK PLACE IN OPEN COURT)

MR. DAVIS: Your Honor, at this time, if I may -- first enter an objection. He keeps referring to "as reported in the literature". Can he be more specific about what he's referring to? I don't know if these are books he's written or if it's something from other sources.

MR. STIDHAM: Judge, that's exactly what I was trying to elicit from the witness before when he objected.

MR. DAVIS: Your Honor --

MR. STIDHAM: The scientific studies in this area that's what he was trying to testify about when the prosecutor objected.

MR. DAVIS: Your Honor, the -- if I may explain. The reason I objected was because he was going into scientific literature which as I understood it the Court has ruled was beyond his area of expertise and that's exactly why I wanted him to -- to be more specific because he keeps referring to the literature and if I don't know what it is, I don't know if it's something he has expertise in, or I don't know if it's a comic book. (R 2058)

THE COURT: Okay, I think my ruling was that it invaded the province of the jury and that it was an ultimate question for the jury that exceeded the scope of his capabilities. That was my ruling. But that was to a narrow portion of it.

I think what you're raising now -- if you're asking about he underlying data or information or scientific research that he -- he's utilizing, I think you're entitled to know that.

MR. STIDHAM: I'd be happy to --

THE COURT: However, I think you're entitled to bring that out on cross examination. So I'm going to let you develop it on cross examination. You might have him refer to any treatise or any scientific journal or -- that he's referring to and when he says "literature", and then you can develop it further.

MR. DAVIS: Judge, one other thing. He -- indicated -- as I understood it -- that his analysis would be based on a reconstruction of the period prior to the taped confession, and it's my understanding that reconstruction would require him to presume facts not in evidence and to base that upon speculation and upon statements -- out of court statements made by other (R 2059)

individuals and we would strenuously object to him being able to give an opinion or to "reconstruct" something based on such speculative premises.

MR. STIDHAM: Your Honor, there's nothing speculative about it. In fact the rule is very clear that he can base his opinion on such things. We discussed that earlier.

THE COURT: I'm not sure I'm going to allow him to reconstruct, if that's what you're referring to. I'm going to allow him to testify based upon his learning, education, publications, and so forth in the field of social -- what was the field, Doctor?

DR. OFSHE: Social psychology.

THE COURT: Social psychology. Okay, and I'm not real sure what that is, but I am real sure about what I told you I wasn't going to let in because that's for the jury to decide, and I'm not going to substitute this witness's opinion for theirs. Alright, so let's proceed. You all know where we stand.

CONTINUING WITH THE DIRECT EXAMINATION OF
DR. RICHARD OFSHE BY MR. STIDHAM

With regard to the scientific studies in this particular area, I am familiar with following with regard to influence and police interrogation tactics. The Stanford Law Review article regarding miscarriage of justice cases, there are

others as well. The book by Professional Gudjonsson, cites numerous studies by himself and by hundreds of other people that all contribute to the analysis of police interrogation. These empirical studies and theories are commonly accepted by professionals in my field.

(AT THIS TIME THE COURT BEGAN THE FOLLOWING COLLOQUY IN OPEN COURT)

THE COURT: Are they in universal acceptance?

DR. OFSHE: The empirical studies are research based studies that people do not dispute the honesty of the researchers. They provide data. I think the data is accepted. The theories are not particularly esoteric, so that these are very data based studies. They have to do with studying the conditions, for example, under which individuals make the decision to confess when in fact they committed a crime. In other words, when interrogation is effective and when it elicits certain sorts of decisions, and they have to do with conditions that lead to statements that are coerced statements and in particularly --

MR. FOGLEMAN: Your Honor, I would like to object to this speech that he's making. It's not responsive to what the Court's question was which is whether this is universally accepted and he never said yes or no, he just --

THE COURT: Well, I think I understand what he's saying, but I guess you're right. He didn't --

MR. FOGLEMAN: I didn't catch him saying that, yes, it was universally accepted. I think he's being evasive.

THE COURT: Well, that might have been a real general question, too. Can you answer yes or no and then continue with your explanation?

DR. OFSHE: Yes, your Honor, they're universally accepted in the sense that they are data based and no one disputes the honesty of the researchers who report the data. The data is accepted. I then tried to go on to explain that the theories are not particularly esoteric arise from the data. So this is a very empirically grounded line of work.

THE COURT: Is there contrary work?

DR. OFSHE: Pardon?

THE COURT: Are there contrary theories and contrary empirical data?

DR. OFSHE: The -- the disputes would be about explaining why something happens rather than whether or not it happens. (R 2062) So that there might be different theories about the impact. For example, how much is attributable to personality or how much is attributable to something else. But there are hair-splitting disputes if everyone agrees to the basic -- that the basic phenomena exists.

CONTINUING WITH THE DIRECT EXAMINATION OF

DR. RICHARD OFSHE BY MR. STIDHAM

I have formed an opinion with regard to this specific issue of the voluntary nature of the defendant's statements to the police. (R 2063)

(AT THIS POINT THE COURT ASK COUNSEL TO APPROACH THE BENCH AND THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY)

THE COURT: I'm not sure that's an appropriate question.

MR. CROW: I thought that's --

THE COURT: No. I mean, are we going to start calling sociologists and psychologists to second guess a court?

MR. CROW: How about, your Honor --

THE COURT: Are we going -- are we going -- as I mean, that -- I've already ruled it was voluntary. Now, am I going to let a witness get up here and contradict my ruling?

MR. STIDHAM: Kagebein vs State, your Honor.

THE COURT: That's not what Kagebein holds --

MR. STIDHAM: Your Honor --

THE COURT: And that is a jury issue granted.

MR. STIDHAM: Yes, sir.

MR. DAVIS: And the question is, obviously the Court's given an expert opinion regarding that and we ca not bring that out to the jury.

THE COURT: No.

MR. DAVIS: And it's based on the same thing. It's based on your review of those facts and evidence and we can not bring that out. (R 2064)

MR. CROW: Your Honor, if I -- would the question be allowed, have you reached an opinion as to whether the statement was coerced.

MR. DAVIS: That's the same --

MR. CROW: That's one of the two things we were talking about awhile ago. I'm just trying to figure out what's going to work here, your Honor.

THE COURT: Well, my notion of his testimony is that he can -- he can testify as to recognizable areas of influence, of suggestion, but to give an opinion that would totally supplant the jury's function in making that decision, I'm not going to allow it.

MR. STIDHAM: Judge, didn't we talk about this issue a minute ago when you said you would allow him to testify as to whether or not the statements were voluntary?

THE COURT: No. If I said that I didn't mean it because -- I don't think I did.

MR. CROW: Your Honor, it would appear to me -- I just want to make sure I understand what the Court appears to be saying -- is that he can lay out what he bases his opinion on, but not give his opinion. I mean --

MR. DAVIS: Your Honor, we were clear on this.

THE COURT: Well, I thing that's what he can do. I think he can talk about the general principles that are

(R 2065) applied, the general notion or concepts in that area in that field, but to allow him to testify that, in my opinion the confession was involuntary does two things. One it goes to the issue that the jury will have to decide. Two, it directly refutes the ruling the Court's already made.

MR. STIDHAM: Your Honor, an expert in a medical malpractice case testifies as to whether or not there was negligence on the part of the treating physician.

THE COURT: That's a little bit different.

MR. STIDHAM: Well, I don't see any difference at all,

your Honor.

MR. DAVIS: It is very analogous to a child abuse situation where a doctor can testify, I found these factors and these factors, they sometimes exist when this happens, but they can't say, in my opinion sexual abuse occurred.

THE COURT: It's just like the Johnson case on the rape of that child. I'm going to allow him to testify right up to the point of where he's giving an opinion or inference that it was involuntary -- that it was coerced.

MR. STIDHAM: Can he use the word coercive?

THE COURT: It's the same thing. (R 2066)

MR. STIDHAM: Your Honor, the jury is here to decide the voluntariness --

THE COURT: That's exactly right and he's not, and that's my ruling.

MR. STIDHAM: This expert is here to offer an opinion with regard to that issue. It will assist the trier of fact in determining that issue. It's for the jury.

THE COURT: I'm not going to allow him to testify on that opinion. You can make an offer of proof if you want.

MR. STIDHAM: Your Honor, please -- please tell me what it was that I could ask him a few minutes ago that I don't understand I can ask him now.

THE COURT: I just told you.

MR. STIDHAM: I can ask him what?

THE COURT: You can ask him to talk about the facts and circumstances, the conditions that he observed and that he saw these factors for what the police did, that they -- that they're suggestive techniques. Those are the kinds of things I'm going to allow him to testify to. But I'm not going to allow him to give that ultimate opinion, and I know what the rules say, and I'm saying that our Court will adopt the modification that the federal court

made, and that you're trying to get this witness to supplant the jury and to become the jury on that issue. I'm not going to allow it.(R 2067) MR. DAVIS: Judge, another thing for the record, his opinion on that is based in large part on what the defendant toldhim.

THE COURT: I understand that. That's another basis for it.

MR. STIDHAM: Your Honor, will you note our objection and allow us to --

THE COURT: Sure.

MR. STIDHAM: -- make an offer of proof?

THE COURT: Yes. You're making a record now.

MR. CROW: In that case if this is our offer, it needs to be shown on the record that his opinion would be that it was -- however the question was worded either involuntary confession or coerced confession -- that is how he would testify.

MR. STIDHAM: I want to make sure I'm crystal clear. I want to follow the Court's order to a tee. Can I ask this witness whether or not any of the tactics employed by the police in this interrogation were coercive or psychologically overbearing?

MR. DAVIS: Based on what he heard in their testimony.

THE COURT: Yes, I'll let you ask those questions. But the difference is you're asking him whether or not (R 2068) this was involuntary and allow him to say, In my opinion it was involuntary -- well, what does involuntary mean? Does that mean the State -- or the officers did something impermissible, illegal -- there are a number of things in the psychological area and the sociological area that the Psychological techniques are not necessarily improper or wrong. From a psychologist's standpoint, he might say, Well, by using these subtle techniques they caused him to -- to confess. That doesn't mean that they're involuntary. It means that they're good techniques. So it means a lot of different things, and I'm not --

MR. STIDHAM: Am I allowed to ask the question --

MR. FOGLEMAN: Your Honor, for the record, what this person is saying from a standpoint of a psychologist it might be involuntary in the sense that the person didn't want to say it, but it doesn't mean in a legal sense that it's involuntary, and for that reason we would also --

THE COURT: Well, that's what I was trying to enunciate just a minute ago.

MR. STIDHAM: Your Honor, after I ask that question we would like to make an offer of proof.

THE COURT: I told you I would let you ask that last question. (R 2069)

MR. DAVIS: Judge, that is premised on what he's read intheir transcript of that -- read or heard him testify to.

THE COURT: Yes, that's correct.

MR. STIDHAM: That's what I just asked him, Judge.

THE COURT: Alright. I'll allow that.

(RETURN TO OPEN COURT)

CONTINUING WITH THE DIRECT EXAMINATION OF DR. RICHARD OFSHE BY MR. STIDHAM

I have an opinion as to whether or not some of the interrogation tactics employed by the police against Mr. Misskelley were coercive in nature or overbore his will.

(AT THIS POINT THE FOLLOWING COLLOQUY TOOK PLACE IN OPEN COURT)

MR. DAVIS: Your Honor, I -- wait -- wait -- wait. We - - I hate to object and I apologize for this, but the Court just told Mr. Stidham --

MR. STIDHAM: That I could ask that question.

THE COURT: Well --

MR. DAVIS: He knows --

THE COURT: -- I think the question grew, but --

MR. DAVIS: It sure did. Your Honor, we would object to that question and we would object to that response. He knew what the question was and he went ahead and extended it further beyond what the Court has instructed. (R 2070)

MR. STIDHAM: I -- I asked your Honor if I could ask that question and I understood that your Honor said I could as that question.

THE COURT: Well, you lengthened it to some extent, but I'm not going to comment any further on that. I don't need to.

Alright, ladies and gentlemen, you're going to be instructed to disregard the last question and the last answer.

And, gentlemen, my ruling is, is that this witness will not be allowed to testify as to the ultimate jury issue. That's solely and only the province of the jury. He may testify as to scientific tools, methods, notions that he may

possess and it will be limited to that. I think we've outlined that enough up here that I don't need to go on any further.

MR. STIDHAM: Your Honor, can I write the question down and ask your Honor to approve it before I ask it?

THE COURT: Write it down and see if they agree to it and then give it to me, then we'll get on with it.

(R 2071) (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT OF THEHEARING OF THE JURY)

MR. STIDHAM: I hope you can read my writing.

(HANDING TO THE COURT)

THE COURT: (EXAMINING) I'll struggle through. Ithink I'll go along with that.

MR. STIDHAM: Thank you.

THE COURT: Have you got any objection to that?

MR. FOGLEMAN: Your Honor, that's exactly what you told him not to.

THE COURT: Well, not really. Let me -- just a minute.

Let me see what I can come up with.

(THE FOLLOWING HEARING WAS HELD OUT OF THE PRESENCE OF THE JURY)

THE COURT: Let the record reflect this is out of the hearing of the jury and it's for a proffer of proof.

MR. DAVIS: While we're here, can we see that seventy- eight page confess -- or statement that he has that's never been provided to us through discover?

THE COURT: Well, I think you're entitled to it, yes

-- if it's going to be used.

MR. STIDHAM: Your Honor, we would object to that.

(R 2072) It's not going to be used. The Court ruled that it wouldn't be used.

THE COURT: It will be used if he's going to use it. If he's going to refer to it and relate to it.

MR. DAVIS: Well -- well --

MR. STIDHAM: It won't be for the jury to see and have

reference to.

THE COURT: Well, I don't know.

MR. FOGLEMAN: It's part of the basis of the defense.

MR. STIDHAM: This is a proffer, your Honor, an offer of proof.

MR. CROW: The Court --

MR. STIDHAM: But the jury's not going to see it.

MR. CROW: I believe the Court ruled that he would -- basically his opinion is based on the undisputed things these officers said. So if anything --

MR. FOGLEMAN: Well, if that's the case, if it's only on the undisputed things, he's not going to have anything coercive there to do. Isn't that right, Mr. Ofshe?

DR. OFSHE: No, I think you ruled -- as I remember -- you ruled that this is part of the basis for my opinion -- the interview I did with Jessie.

THE COURT: Yes, that's what I -- (R 2073)

MR. FOGLEMAN: Mr. Ofshe, could I ask a question? Isn't it true that if you exclude what the defendant told you that you don't find anything coercive, do you?

DR. OFSHE: Not true.

THE COURT: Okay. Let's -- let's do this in some order.

Go ahead if you want to make a proffer of proof and let's be sure that I know what I'm excluding and what -- that I know what you're attempting to put in and then maybe it'll change my opinion. I don't know.

PROFFER OF PROOF

I have formed an opinion with regard to the statement of Jessie Misskelley. In my opinion the statement made by Jessie Misskelley was a product of the influence tactics brought to bear on him, and that it overbore his initial position that he had nothing to do with this crime and was not there, and that it was a process of influence brought to bear represented by the interrogation tactics that progressively changed his statements about that subject. (R 2075) I am familiar with Mr. Holmes' report on the polygraph. The polygraph had two effects. The interrogators could shift to an accusatory interrogation, where maximum pressure is brought on the suspect and they then did precisely that. Second, Mr. Misskelley was told that there was a scientific machine that was recording that he had done something that he knew he (R 2076) had not done. Mr. Misskelley reported to me that he did not believe the polygraph. However, it contributed to his sense of helplessness which developed over the course of the interrogation.

In conjunction with the other tactics of the interrogation the polygraph played an important role in swaying the influence process and culminated with the two recorded statements.

I understand police interrogations and have studied them. The circle diagram was used to reassure Misskelley that he was not a suspect and that he had a safe harbor in the police. It was an offer to join the police. He did not understand what the consequences would be. Based on the notes of the interrogation by the officers and the testimony of the officers, it is my opinion that the circle technique probably occurred early in the interrogation. It was then followed by an hour and a half of intense pressure on Mr. Misskelley. During this time he asked to go home and he was told he could not go home, which contributed to his sense that there was no way to escape these pressures. Detective Ridge's notes reflect things Mr. Misskelley was successively giving were damning to Damien and Jason. He was repeatedly being asked questions about the facts of the crime and every time he would guess something incorrect, Detective Ridge would shake his head no. This was repeated on several subjects and Mr. Misskelley wascontinually pressured in this way. Mr. Misskelley describes that he learned to feed back to the

interrogators whatthey were telling him happened and he sought to avoid making mistakes because when he made mistakes they would make himgo back through the entire story and they would not believe him when he stated he knew nothing about the crime.

The repeated refusals to believe him contributed to his sense of helplessness. (R 2079)

The purpose of using the picture was to get a response from Mr. Misskelley. It was designed to put additional pressure on Mr. Misskelley and it succeeded. Misskelley became transfixed, terribly upset by the picture, staring at it, not responding to other questions, he began to cry. That was followed by the audio tape of a little boy. Mr. Misskelley then stated "I want out." (R 2080) That was a reference to the offer contained in the circle. He is saying I'll do what you want in order to escape the pressure of the interrogation.

Then the first recorded statement occurs. It is possible to analyze the influence process contained in the first recorded statement. That is the first undisputed record in the case. It is possible to demonstrate how relentless, the leading, suggestions, and an unwillingness to accept anything other than what

the police knew the facts of the crime to be. We can chart his moving step-by-step from an inaccurate statement to a statement that was put in his mouth by the police. I am prepared to go through that step-by-step to illustrate how that happened. Even then

there were gross inaccuracies in the statement. Next, Mr. Misskelley is left alone. Gitchell discusses with Fogleman the gross inaccuracies in the statement and Fogleman sends him back in to work on these (R 2081) particular statements.

In the second statement we can show how Misskelley is conforming to the demand placed on him and is changing his statement in direct response to suggestions of Gitchell. There are interrogation tactics in the second statement that so illustrate and also illustrates Misskelley simply parroting back to the police what they told him in order not to displease them and not to be subject to additional questions. I am prepared to go through step-by -step and cite page numbers of the statement to demonstrate statements made by the police officers and statements made by Mr. Misskelley. I would classify this confession as a coerced compliant confession and I am of the opinion that (R

2082) these statements are far more likely to be the product of influence than they are based on any memory that Mr. Misskelley has of the crime.

I have experience and training with regard to cults.I have consulted internationally on an occult inspired murder. (R 2083) I have consulted on other cases in which there had been allegations of the existence of a baby murdering satanic cult which appears to be without foundation. There is no evidence that suggests that these groups exits. This is a conclusion by Kenneth Lanning of the F.B.I.

There are youth culture groups that get interested in the occult and these are the groups that are responsible for graffiti and for animal mutilations that sometimes occur.

Baby killing satanic cults do not exist, youth culture groups and the occasional occult inspired criminal groups do exist.

There is no evidence that suggests that there is an occult element to this crime. (R 2084) This is an example of a satanic hysteria that has been picked up by the police. This happens when there is a particularly heinous crime for which there is no obvious explanation. According to the testimony of Detective Ridge no one listed by Misskelley as a member of the cult

confirmed the existence of a cult. There is an absence of hard information suggesting that a satanic cult exists in this area. Nothing about the crime scene suggests that this is an occult ritual killing. (R 2085)

MR. DAVIS: I heard Mr. Ofshe talking about what Jessie told him in a statement. And, Judge, there are two things about this.

Number one, what he has done is taken these -- a statement that we've never seen, we weren't privy to, and he is now going to paraphrase that statement -- or so-called statement -- to the jury coming from a so-called expert in some official capacity to be the basis for why he finds police coercion.

Now, number one, we -- objected to him coming in as an expert in the first place, but assuming he is an expert, if he can limit his -- his testimony to what he heard the officers say in their testimony, of what he read in a transcript about what the officers said, but when he starts saying, "Jessie told me at this point the officer really bore down on him and they spent another hour and a half with him. This made him increase his feelings of helplessness."

(R 2086)

Now, your Honor, we can't cross examine Jessie if his voice is coming through the body of Doctor Ofshe, and that's what they're basically trying to do and that's clearly inappropriate. He -- there is no possible way that a person and then paraphrase it and translate it to a jury. That's hearsay. It doesn't matter whether it comes from him or whether it comes from someone else. That's hearsay testimony.

He can say what he observed. He can testify how that affects his opinion. He can list the facts that indicate coercion. If he goes beyond that, your Honor, the state feels that he's clearly gotten into a province that's -- that's the sole province of the jury -- in the area that's the sole province of the jury.

THE COURT: Alright, I've heard the proffer of proof and it can be submitted as a proffer of proof, and it would be my finding that the information elicited and the testimony proffered not only embraces the ultimate issue or facts for the jury to consider, that it in effect tells the jury what their finding should be.

And I'm -- I'm going to apply the rule in Gramling v. Jennings, 274 Ark. 346. I'm going to apply the additional phrasing adopted by Congress in

1984 to Rule Eight Oh Four that says explicitly, (R 2087) "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereof."

And I think that applies here and I think the term -- just reading Rule Seven Oh Four alone, it says, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of the fact."

The question is: What does embrace mean and our court tried to define it in two or three cases. One of them was that Gramling case. Another one is Aetna Casualty -- that was a civil case.

I just think under the facts and circumstance of this case, to allow him to testify in the fashion tendered would be eliminating the jury and accepting an expert's opinion. The opinion of the jury is what's significant to me.

There are some things that he testified to such as the occult activity that he might properly testify to. There are other things that I would allow him to testify to that would be in the general nature of his expert (R 2088)

knowledge, but to give that final and conclusive opinion in -- in the fashion that it's elicited -- says, Jury, you must find this way -- and I'm not going to allow it.

MR. STIDHAM: Your Honor, I understand the Court's ruling.

THE COURT: I everything you've just said, however, I submit would be an appropriate argument that you may make to the jury at the proper time, and that an expert in his capacity normally is employed to consult with and discuss trial strategies and techniques with counsel. And if I allowed him to testify based upon a -- you say a seventy-five page statement taken from the defendant would be doing just exactly what the prosecutor says -- allowing him to testify as a surrogate.

MR. STIDHAM: That's why we did it as a proffer, your Honor.

THE COURT: Yes. Well, I'm not going to allow that.

MR. STIDHAM: Your Honor, I understand your ruling and we would just ask the Court to note our objections pursuant to Rule Seven Oh Four with regard to our interpretation as we discussed earlier with regard to Rule Seven Oh Four. (R 2089)

THE COURT: Where do we stand now?

MR. STIDHAM: Your Honor, I think that we're at the point where I can -- we can ask the jury to come back in and I can read the question that -- that the Court permitted. At least that's my understanding of where we're at.

MR. FOGLEMAN: Your Honor, my only concern is whether or not this gentleman is going to base his opinion on -- on what this defendant told him because from what he testified to in the proffer he adopted the defendant's version versus the officers' version.

THE COURT: I think that's what he said.

MR. FOGLEMAN: Alright, and I think that that's an improper basis of his opinion and if he's going to purport to testify now about coercive tactics and adopt what this defendant's told him and say things that aren't in accordance with the evidence, I think the jury is going to be --

THE COURT: I don't think that's the way I worded it. I -- I -- allowed him to ask a question using the two statements, the files and testimony that he reviewed and whether or not he had an opinion as to whether or not the tactics employed were suggestive or that would lead

(R 2091) Misskelley to make a statement.

MR. STIDHAM: And the basis of his opinion is the statements and tapes that he's heard of the defendant's statements to the police.

THE COURT: I'm going to allow him to do that. And, of course, everything he just said you may use in an argument to your jury if you want to.

MR. DAVIS: But the question would be restricted and would not include whatever statements -- his opinion would have to be based on everything except those statements he received from the defendant.

THE COURT: I think he said he could do that.

MR. DAVIS: I want to be sure of that because then in cross examination when I ask what specific police misconduct or police coercive tactics are you talking about, I don't want him to go back and say, "Well, Jessie told me" -- or -- even through the back door because, your Honor, at least the last few hours I've come to respect the witness. I know he can certainly catch you when you make questions that give -- THE COURT: Tricky, isn't he.

MR. DAVIS: -- give him an opportunity to answer, and -- (R 2092)

THE COURT: He's an expert, you know.

MR. DAVIS: If he doesn't understand very clearly that he is not to refer to that statement as a basis of his opinion, then I think we're going to end up getting it in one form or another.

MR. STIDHAM: Do you understand, Doctor Ofshe, that you're not to refer to the defendant's statement.

DR. OFSHE: I understand.

CONTINUING WITH THE DIRECT EXAMINATION OF DR. RICHARD OFSHE BY MR. STIDHAM

Yes, I have an opinion based on the transcription of the statements made by this defendant to the West Memphis Police Department and listening to those tapes of the statements made to the West Memphis Police Department by the defendant and the testimony of the officers that I've heard, that the interrogation tactics used by the police against the defendant, Jessie Misskelley, were suggestive and lead Mr. Misskelley to make the statements. I also relied on the notes that were produced by the officers and also certain other facts I've been informed have been testified to by various witnesses in this courtroom. (R 2093)

The contents of the statement was shaped by the of the officers. (R 2095)

CROSS EXAMINATION OF DR. RICHARD OFSHE BY MR.

DAVIS

With regard to this case, I did not find physical coercion. (R 2101) The questions that the officers used against Mr. Misskelley were more than leading. The questions were very directly specifying what the answers should be. I did not formulate an opinion in this case prior to having heard or having examined the testimony from the police officers. I had a preliminary opinion, but I needed to hear the testimony from the officers to find out much more information. At the hearing that I attended, I observed the officers and listened to their testimony and in fact changed my opinion very substantially because of the testimony that I heard. (R 2115)

The opinion that Mr. Misskelley's statement was a coerced statement can be supported from the records that were available. (R 2116) More than half of the time I evaluate interrogations my opinion is there is no coercion. I have testified to coercion in thirteen separate cases. As to fee's I have testified without being paid and I have never been paid my full hourly rate. Once I reached the conclusion that there is coercion I will testify for nothing if necessary. (R 2118)

REDIRECT EXAMINATION OF DR. RICHARD OFSHE

BY MR. STIDHAM

I believe every time that I have testified in a confession case it has been for an indigent defendant. I was told that Mr. Misskelley was indigent. I haven't received any money in this case. Police officers usually do not yell at suspects when the tape recorder is on during an interrogation. When the tape recorder is on, one gets behavioral statements that are tailored to the fact that the tape recorder is there and so one would not expect the yelling to happen. (R 2120) In my experience the yelling and the other improper activities happen when the tape recorder is off.

(AT THIS POINT THE FOLLOWING COLLOQUY TOOK PLACE IN OPEN COURT)

MR. STIDHAM: The prosecutor kept wanting you to ask question -- or asked you questions about the coercive nature of the statements on -- the questions and answers on page seven that he pointed out to you on the transcript, and I kind of got the impression when I was sitting over there in that chair that you wanted to talk about other examples of leading and

suggestion that was employed by the police. Would you like to talk about those?

DR. OFSHE: Yes, I would.

THE COURT: How long are we going to be talking aboutthem?

MR. STIDHAM: We're all tired and we know you're tired and the jury looks tired --

MR. FOGLEMAN: Your Honor --

MR. STIDHAM: -- so we won't be long.

MR. FOGLEMAN: -- we don't mind Mr. Stidham asking questions but to try to elicit some narrative, we don't think that's proper. (R 2121)

THE COURT: I'll object -- I mean I'll sustain your objection to the invitation for a narrative. This witness is capable of answering questions in question form and answer rather than a narrative and that objection will be sustained. The Court Reporter is not going to be able to go much longer.

CONTINUATION OF REDIRECT EXAMINATION
OF DOCTOR RICHARD OFSHE BY MR. STIDHAM

An example of the police being coercive and leading or suggestive is the eight revisitings of the question of the time at which the crimes occurred.

The first example occurs on page three (R 2122) and this is the point at which Detective Ridge says, "Alright, when did you go with them?" Misskelley says, "That morning." Detective Ridge, "Nine o'clock in the morning?" Jessie says, "Yes, I did. I went with them and then." There is no follow-up at that point. Nine o'clock in the morning is grossly inaccurate.

The next time the subject of the time comes up is on page nine of the first transcribed interrogation and Ridge asked Misskelley "I'm not saying when they called you. I'm saying what time was it that you were actually there in the park?" Mr. Misskelley says, "About noon." (R 2123)

Ridge now in my opinion attempts to manipulate Mr. Misskelley's statement about the time. Detective Ridge says, "Okay, was it after school had let out?" This is immediately after Jessie saying, "It's at noon." He is now suggesting it must be later by saying, "Is it after school let out?" Jessie says, "I didn't go to school." Ridge now has to clarify and say, "These little boys." Jessie says, "They skipped school." Ridge says, "They skipped school?" with a question mark.

We know it's impossible for these boys to have been there at noon. The third example on page nineteen. Gitchell revisits the question of time again

because the time is inaccurate. He says, "Now, did you say the boys skipped school that day? These little boys did?" Said in that way, it is a suggestion that you should change your answer indicating, I'm displeased with this. (R 2124)

The detectives refused to allow Jessie's inaccurate statement to stand and directly manipulated Jessie's statement through skillful interrogation tactics. On page eighteen of the transcript they for the fourth time revisit (R 2125) the timing and this time Detective Ridge says, "Okay. The night you were in the woods, had you all been in the water?" Jessie replies, "Yeah, we'd been in the water. We were in it that night playing around in it." This is the first time in the record that it is directly suggested to Jessie that the correct answer is, "This happened at night." Upon that being suggested, Jessie accepts it he starts to use the word "at night". Previously, he said it was during the day. It is in direct response to Detective Ridge's substitution and introduction into the interrogation the correct fact that this happened at night. That is an influence tactic. This is a way of getting someone to accept something out of pressure and out of suggestion.

Ridge now seeks to stabilize that by saying (R 2126) "Okay, they killed the boys. You decided to go. You went home. How long after you got home before you received that phone call -- thirty minutes or an hour?"

There had been previous reference about a phone call to Jessie at home at nine P.M. Ridge gives Jessie the choice of having arrived home either thirty minutes or an hour before the phone call occurred. Those are his only choices. Jessie chooses an hour. That is a tactic of influence. That is posing the question in such a way that you only have two choices. In either choices, the detective wins. Next, is the second interrogation. (R 2127) According to Detective Gitchell no one spoke with Jessie between the two statements. The last two times Jessie said that anything about time, Jessie had been successfully moved to the evening. Now Gitchell begins with, "Jessie, uh --when you got with the boys and with Jason Baldwin when you three were in the woods and them little boys come up, about what time was it when the boys come up to the woods?" Jessie replied, "I would say it was about five or so -- five or six."

Jessie is now moving in the direction of later but he has not gone far enough because five or six is too early for the boys to have shown up at the

woods. (R 2128) Failing to get the time moved enough, Gitchell says (R 2129) "Alright, you told me earlier around seven or eight. Which time is it?" Again, he gives Jessie a choice. Gitchell can live with either answer and he has giving Jessie only those two choices. Nowhere in the record, including the record of what the detectives say, the notes, the specific statements by Detective Ridge, the transcript of the first interrogation, is there any indication that Jessie ever said seven or eight.

It's a very effective tactic. Jessie says, "It was seven or eight." He does not even make a choice. That is an indication of someone who is willing to comply and does not want to take any chances of making a mistake and therefore being punished for it through pressure.

That's just one example, there are many other examples of illustrations of manipulation on important points throughout this record. (R 2131)

RECROSS EXAMINATION OF DR RICHARD OFSHE BY MR. DAVIS

The scientific literature on the subject of when one gets a coerced compliant confession is when the individual feels that they have no choice, cannot escape the situation (R 2132) can no longer resist and therefore simply

gives up resisting and complies. (R 2133)

(AT THIS POINT IN THE TRIAL, THE DEFENSE RESTED IT'S CASE AND THE FOLLOWING ARGUMENTS WERE MADE IN CHAMBERS WITH REGARD TO THE DEFENDANT'S RENEWED MOTION FOR DIRECTED VERDICT)

THE COURT: Do you have anything to add to your original motion for Directed Verdict at this point?

MR. STIDHAM: Not really, your Honor. I just want to be real careful -- (R 2136)

MR. CROW: --There was a case recently where a guy said, "I renew my motions," and the Court said that wasn't enough, and that scared us to death.

THE COURT: I'm familiar with that case and that's what I'm getting ready to say. Do you have any new matter that you want to add to your original motion for a directed verdict?

MR. STIDHAM: Just the same arguments that we made previously.

THE COURT: Let the record reflect that defense counsel has reannunciated and reaffirmed all of their motions, all of their reasons and

justifications for a directed verdict, and the Court has considered those motions again at the close of the defendant's case and the motion is denied.

MR. STIDHAM: I hope that's sufficient, your Honor.

THE COURT: I don't know why it wouldn't be. There isn't any point in your rehashing them. What I've done is give you an opportunity to state any matter --

MR. STIDHAM: --We would like to very briefly say that we don't feel the State has met its burden of proof on capital murder because of the intent required of Mr. Misskelley. We don't think that has been established.

We would also state that we don't feel the State has met its burden with regard to accomplice liability. (R 2137)

We'd also submit the State hasn't met its burden with regard to first degree murder.

And again, we'd like you to consider all those arguments that we made at the close of the State's case --

THE COURT: -- I think you made those at the close of the State's case as well. I will reconsider them now, and it will be the Court's finding that the

State has made a prima facie case as to Jessie Misskelley, Junior's liability as an accomplice clearly. (R 2138)

MR. STIDHAM: Your Honor, are you satisfied with -- I don't want to waive any motion for a directed verdict. If the Court feels I need to go out and --

THE COURT: No. I think you've made your motion. THE STATE'S REBUTTAL CASE

(PRIOR TO THE REDIRECT EXAMINATION OF GARY GITCHELL, THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY)

MR. STIDHAM: Gitchell was in the courtroom yesterday during the testimony and I understand that he watched some of the testimony. We would submit that's a violation of the Rule.

THE COURT: He is a rebuttal witness. He had been released from the Rule by the Court and by agreement with both parties and, therefore, I'm going to allow him to testify.

GARY GITCHELL

REDIRECT EXAMINATION OF OFFICER GARY GITCHELL
BY MR. FOGLEMAN

I am the Inspector Gitchell who previously testified in this case. (R 2142) I was in the courtroom yesterday during some of Ofshe's testimony. Ofshe's remark was incorrect insomuch as on page twelve of the transcript Jessie states, "Well, after all this stuff happened that night." That's the first time that night is mentioned by Jessie himself. Neither Ridge nor myself ever mentioned to Jessie prior to that, that the crime had happened at night. (R 2143)

No pressure or intimidation was used by either myself or Detective Ridge during the interrogation of Jessie Misskelley. We knew due to the type of coverage that this case received that whomever would be picked up, we would have to talk with this person and use the utmost care and treat them with kid gloves as if we were talking with one of our own children. (R 2145)

RECROSS EXAMINATION OF GARY GITCHELL
BY MR. STIDHAM

Jessie's statement was not videotaped. (R 2147) I did not take notes during the statement. I really don't know exactly what questions were asked and what questions were answered when the tape recorder was not on. If we had a videotape we would know for sure exactly was questions were asked

and answered. (R 2148)

With regard to the second taped statement, I don't know exactly what time it begin, it was approximately five o'clock. The gaps in the second tape of the second interrogation are from me leaving the room and going back and talking with Mr. Fogleman because he had some questions for me to ask Jessie. (R 2150)

It is customary in this type of statement to announce what time and date it is on the tape and when the tape is turned off to announce what time it ended, however, the only reason that I did this tape was to verify some information, and I was sure nobody would believe what I would be saying, so that's why I carried the tape in with me. (R 2151)

VAUGHN RICKERT

DIRECT EXAMINATION OF DR VAUGHN RICKERT

BY MR. DAVIS

My name is Vaughn Rickert. I'm employed by the Department of Pediatrics at the University of Arkansas for Medical Sciences and also affiliated staff with Arkansas Children's Hospital. I'm employed as a clinical psychologist more known as the pediatric and adolescent psychologist and an

associates professor of pediatrics.

My role there is threefold. I provide clinical service where I diagnose and treat children and adolescents who may have diagnosable disorders of substantial psychological difficulties in terms of both evaluations and treatment.

My second role is to do and conduct research and my research interests are in adolescent medicine issues particularly revolving around adolescent substance use.

(R 2152)

My third role is to do teaching to provide education to pediatric residents and medical students surrounding child and adolescent development and treatment. (R 2153)

There is a general difference between psychology and sociology. In psychology your are typically taught and evaluate children, particularly in a clinical area, looking at mind-body relationship and more particularly psychological processes. Sociology, while they may be concerned with individual behaviors, are more recognized as looking at groups of people. So within both fields there are some overlaps but within the areas of clinical

psychology particularly, you are trained to treat and diagnose individuals which is not something that sociologists would be trained to do. (R 2154) I have reviewed Dr. Wilkins psychological report and also I've reviewed an attached transcript that he was testifying to in November and December, I believe. (R 2155)

I have never done any work as a professional witness before. I receive zero dollars as a professional witness last year. I have not been promised anything to come and testify here today. Some of the tests that Dr. Wilkins referred to in his report are based on scientific methods.

(R 2157)

I listened yesterday, to the testimony of Dr. Ofshe.

(AT THIS POINT THE FOLLOWING COLLOQUY TOOK PLACE IN OPEN COURT)

MR. DAVIS: Okay. And you listened to the testimony of Dr. Ofshe yesterday. Did you hear anything that he testified to that related to or indicated (R 2158) there was any scientific methods from which he drew his opinion?

DR. RICKERT: No, I did not hear any such ---

MR. STIDHAM: Your Honor, I would object to that. I don't of any -- this witness is not an expert in the same field as Dr. Ofshe is and now he's going to get up there and say things about Doctor Ofshe -- not scientific methods not being there. He doesn't know anything about that.

MR. DAVIS: Your Honor, I think he -- I can clarity this.

THE COURT: Alright.

MR. DAVIS: Does the science -- no matter what field you're working in -- scientific methods in order to determine the accuracy of your results is the same whether it's in biological science or whether it's in psychology, correct?

DR. RICKERT: That's correct.

MR. STIDHAM: Your Honor, again, my objection is this witness is not qualified to challenge something outside his field. He shouldn't be allowed to testify about things he has no knowledge of. This is the same witness who was on the stand yesterday saying he'd never heard of the (R 2159)Gudjonsson Scale of Suggestibility. And again I would submit that he knows nothing about that area.

MR. DAVIS: Excuse me. But if he's going -- if he's going to give a dissertation to the jury, then we're going to need to go back in chambers. If he's going to make objection, then I can respond.

MR. STIDHAM: I just made my objection, your Honor.

THE COURT: Alright, respond.

MR. DAVIS: Your Honor, my response is that he has testified that the scientific methods upon which any theory the reliability of any theory is based is the same no matter what field it's in.

THE COURT: Alright, ask him to describe what we mean when we say "scientific methods". Alright, and then --I'm going to overrule your objection temporarily.

MR. DAVIS: Doctor, what is scientific method or can you describe that for us as simple as possible?

THE WITNESS: Basically what you're looking at is the reliability and the validity or the accuracy of getting the same results time over time and being recorded the validity, that is the truthfulness of a response or a particular result. (R 2160) In the case of biology making sure that when you treat someone with an antibiotic that in fact that they get better. If you would do

that over and over again, you would get the same results. Generally that's accepted scientific methods.

MR. STIDHAM: Your Honor, again my objection is this witness doesn't know anything about what Doctor Ofshe was testifying about yesterday. He stated on the --this is the same guy who was on the stand yesterday I do believe and said he had never heard of the suggestibility scale by Doctor Gudjonsson. That's --

MR. FOGLEMAN: That's because it's not scientifically recognized.

MR. STIDHAM: No.

THE COURT: Okay. You all have editorialized enough now. I think I've got the picture. Alright, Doctor, based upon your education, training, and experience, do you have an opinion as to the scientific reliability of --what did we call that?

MR. STIDHAM: Gudjonsson Suggestibility Scale.

THE COURT: Yes.

MR. FOGLEMAN: Your Honor, that wasn't the question

that was asked. The question that was asked is whether during the -- Mr. Ofshe's testimony what was --

MR. STIDHAM: Doctor Ofshe. (R 2161)

MR. FOGLEMAN: Can you treat a broken arm with your mind? MR. STIDHAM: Is this gentleman --

MR. CROW: Is this gentleman --

THE COURT: -- Alright, I'm not going to put up with that. We've been here too long for that kind of stuff now. State your objection.

MR. STIDHAM: Your Honor, may I voir dire the witness about his knowledge --

MR. FOGLEMAN: Your Honor, I'm --

THE COURT: In just a minute maybe. Go ahead.

MR. FOGLEMAN: Your Honor, the question was: Is whether or not during the testimony of Mr. Ofshe that there was any scientific basis given for the conclusions that he drew.

MR. STIDHAM: He don't know that, Judge.

MR. FOGLEMAN: Well, he heard the testimony.

THE COURT: I'm going to allow him to give his opinion in that regard.

DR. RICKERT: I did not hear any report as to if the same procedure was applied by himself or someone else that he may have trained, that he would arrived at the same conclusions.

MR. DAVIS: And in the scientific community if you want to have your theory accepted as valid, what do you do?

(R 2162)

DR. RICKERT: Typically what is done and it's the customary procedure that you write up the results of your study. You describe what you did, what results you're having, what you believe are the implications, and you submit that paper to a scientific journal in your field or in a related field where it is reviewed by other peers, that is, other colleagues with similar training -- not necessarily similar views -- and based upon that review your paper and your results are either accepted or rejected.

In addition what one typically does as well is send in a very short description of your paper and your findings to professional societies who have people who review to determine whether or not the scientific method is worth reporting and the results worth reporting and they might invite you or may choose not to invite you to present your findings at a scientific meeting.

MR. DAVIS: Was there anything in Doctor Ofshe's testimony yesterday that indicated that his theories had been published in any accepted peer review articles?

DR. RICKERT: I did not hear any evidence of that.

MR. DAVIS: Now, is a Pulitzer Prize, does that have any -- is that an award given for scientific achievements?

DR. RICKERT: No, it is not.

MR. DAVIS: And would that have any more to do with the qualifications of a sociologist than the Heisman Trophy?

DR. RICKERT: It would not. (R 2163)

MR. DAVIS: Now, you have reviewed the tests and the report of Doctor Wilkins and I would first like to bring your attention to the I.Q. test that he'd used. Which one was that?

DR. RICKERT: That was the Wechsler Adult Intelligence - MR. STIDHAM: Your Honor, may counsel approach the bench?

THE COURT: Yes.

(THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY) MR. STIDHAM: Has this doctor

examined my client, your Honor? THE COURT: I don't know that he needs to. He can refer tothe report and give his opinion based upon a report and data. You made that same objection the other day. I'm going toallow him to do that and that's what he can do.

MR. STIDHAM: Your Honor, we would ask that the jury be instructed to disregard his testimony regarding Doctor Ofshe. He's not an expert in the same field as Doctor Ofshe and his stuff about scientific methods in biology have nothing to do with the testimony.

THE COURT: A scientific method is a concept and it's used in mathematics. It's used in engineering. It's used in every field. A scientific method is something that any educated person that employs (R 2164) the scientific method can give an opinion and in my opinion this conforms to the norm of the scientific method and that's really all that he's done.

MR. STIDHAM: Thank you, your Honor.

CONTINUATION OF DIRECT EXAMINATION OF
DOCTOR VAUGHN RICKERT BY MR. DAVIS

The performance pattern that was reported in Dr. Wilkins report of the I.Q. test indicated that Mr. Misskelley's ability to solve problems using his eyes and hands was in the average range whereas when he was asked

questions of a verbal nature such as defining words or telling how two words or concepts are similar, was markedly below that and in the borderline range. (R 2166)

I would expect that a lower score on the verbal portion could indicate a number of things. It could indicate someone who had difficulties in recalling information that was presented in school, that if they probably didn't -- may not be doing well in school. It could also be due to emotional difficulties. We sometimes find that scores are suppressed in the verbal because of emotional difficulties as well as language difficulties. (R 2167)

(AT THIS POINT IN THE TESTIMONY OF DOCTOR VAUGHN RICKERT THE FOLLOWING COLLOQUY TOOK PLACE IN OPEN COURT) MR. DAVIS: And it is -- is the real goal of therapy to persuade them or convince them in a clinical setting that they should modify their conduct?

DR. RICKERT: Yes, it is.

MR. DAVIS: And modify their behavior?

DR. RICKERT: Right. If they want to experience those kinds of ---

(THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY)

MR. STIDHAM: What does that have to do with anything?

MR. CROW: Doctor Wilkins was not his therapist.

MR. DAVIS: Do what?

MR. STIDHAM: What does that have to do -- any relevance to this case?

THE COURT: Are you making an objection to relevancy?

MR. CROW: Yes, sir, I'm making an objection to relevancy.

THE COURT: I don't know. What is the relevancy of that line of questioning?

MR. DAVIS: Your Honor, I think he's experienced with people in a therapeutic setting where his very goal was to modify and change and suggest changes in their (R 2171) attitude and I think he can describe what the reaction of even low functioning people are. That they can react belligerently, they can deny any effort at changing their mind or their thought processes or actions. We've been given the impression that just because you have a low

I.Q. that if somebody suggests something to you, you dive out the window to try to do it.

THE COURT: Alright, I'm going to allow it.

MR. CROW: Your Honor, our objection would be that all the testimony has not been that everybody with a low I.Q. is that way, it's just what possibly these people are more---

THE COURT: --He's -- well, I know it, but I think he can give the different possibilities and that's what he's trying to do.

CONTINUATION OF DIRECT EXAMINATION OF
DOCTOR VAUGHN RICKERT BY MR. DAVIS

The people that I deal with in therapy frequently had I.Q. levels about the same as Jessie Misskelley. My goal in therapy is to suggest to them a change in behavior many times. (R 2172) People's I.Q.'s do not necessarily correspond to how they will react in terms of being persuaded to change a particular behavior that they might be engaged in. In other words a person with a low I.Q. may be just as belligerent and stubborn as the person that's a genius. (R 2173)

There are several things that I think would be important in determining if a person at a particular period of time was being influenced or manipulated

or subjected to suggestibility. One, I would want to have evidence of the person's ability to recall information. Second, to have some kind of permanent product or documentation of that interaction. That is a videotape. Certainly at least an audiotape because influencing and persuasion is not only verbal information that's being given andreceived, but it's also non-verbal cues as well that need tobe examined and the value of it. (R 2174)

There is some evidence that huffing gasoline has an affect on the brain. Specific impairment we are unclear about, but it is generally recognized that individuals who huff or inhale solvents of one sort or another can do tremendous damage to the brain. Whether or not these damages are reversible is unclear at this point. (R 2176)

There is not a great correspondence between some of Dr. Wilkins' descriptions and some of his diagnosis of the defendant and also the test results. He would report findings and then on some occasions he would make elaborate details on what appeared to be a relatively benign result. (R 2178)

CROSS EXAMINATION OF DR VAUGHN RICKERT
BY MR. STIDHAM

I'm a licensed psychologist, I am not a social psychologist. I do not know anything about false confessions and police interrogation techniques

and influence. I do not have any opinion as to whether or not a police station is a coercive setting or a tranquil setting. (R 2178)

I testified earlier that I thought it was important to videotape, it would be hard to determine out occurred without a videotape. (R 2179) I did not spend any time talking and visiting with and or evaluating Mr. Misskelley. (R 2180)

(UPON THE CONCLUSION OF THE STATE'S REBUTTAL CASE, THE DEFENDANT AGAIN RENEWED HIS MOTION FOR DIRECTED VERDICT. MOTION WAS HEARD IN CHAMBERS OUT OF THE PRESENCE OF THE JURY) ARGUMENTS AS TO DEFENDANT'S RENEWED

MOTION FOR DIRECTED VERDICT

MR. STIDHAM: Your Honor, again, we would renew our Motion for Directed Verdict and we would submit that the State has not met its burden of proof with regard to the defendant having committed the offense of capital murder, three counts of capital murder. More specifically, we would submit that there is no evidence that Mr. Misskelley with the premeditated and deliberated purpose of causing the death of another person, caused the death

of any of the three victims.

Secondly, your Honor, we would submit that the only evidence the State has offered is the defendant -- is the defendant's statements to the police in which if you assume that they are true -- and we say that they're not -- he said that he was only present and that he did not hurt or kill anyone. The Supreme Court has ruled that (R 2200)

mere presence at the crime was not sufficient to attach accomplice liability.

Your Honor, there's no proof that Mr. Misskelley acted as an accomplice to the capital murders or any homicide to the capital murders or any homicide or any level of homicide. In order for the State to prove Mr. Misskelley was an accomplice they must show that he aided, assisted, or abetted in committing the offense. Secondly, that Mr. Misskelley himself had the required intent to commit the charge of capital murder.

We would respectfully direct the Court to the nineteen ninety-three decision of the Arkansas Supreme Court in Fight v State. It's cited at 314 Ark. 438, and which provides "Our interpretation of the accomplice liability statute, Five dash, Two dash, Four Oh Three effectuates the policy that an accomplice's liability ought not to extend beyond the criminal purpose that he

or she shares. Because accomplice liability holding an individual criminally liable for actions done by another it is important that the prosecution fall squarely within the statute."

Your Honor, we would submit that there is nothing that has been introduced by the State against the defendant to suggest that he had the intent to commit any homicidal act or aid or assisted in any homicidal act. (R 2201)

Again, your Honor, we would submit that there's nothing without adding conjecture and speculation that would make Mr. Misskelley an accomplice to this homicide.

THE COURT: Is the Fight case the one that involved the loaning of an automobile to a person that --

MR. CROW: Yes, your Honor.

THE COURT: -- killed a person while -- while intoxicated? MR. CROW: Yes, your Honor, that's the case.

THE COURT: Well, I think that --

MR. STIDHAM: Your Honor, we would also --

THE COURT: --considerably distinguished from the present facts.

MR. STIDHAM: Your Honor, I think there is also some logic that we could direct this way in regard to the Fairchild decision in talking about the intent of an accomplice, and we'd like to bring that to the Court's attention as well, and when we submit our arguments for each level of homicide that we anticipate the Court will instruct the jury on.

THE COURT: Well, I think you've pretty well enunciated the same objections at the proper stages previously.

Does the State want to make a -- a response for the record? (R 2202)

MR. DAVIS: Your Honor, for the record, the mental intent required -- as the Court's well aware that mental intent is something that can only be proved by circumstantial evidence, and in this case basically what the defense is arguing is that there -- the defendant is not credible individual in that what he said to the police was a lie.

But basically what he said to the police that was introduced is that he knew they were going out there to hurt someone the night before, that he went out there, that is clear from the record that at a very minimum -- even looking at the evidence in a light most favorable to the defendant -- which is not what

the measure is -- that -- that Steven Moore -- or Michael Moore, excuse me -- would not be dead but for the defendant's actions in aiding and assisting in bringing him back.

In addition to that, there's evidence that there were three weapons used. There was evidence that there were three weapons used. There was evidence that there was different type injuries caused. There's evidence that a different type injuries caused. There's evidence that a different type of knots on the ligatures which would be consistent with more than one individual, and I certainly think the jury can infer just from the very nature of three eight-year-olds being killed that there was more than one person actively involved in that, and I think all of those things together -- primarily what the (R 2203) defendant has said himself to police officers indicates that he had that mental state necessary to amount to capital murder.

THE COURT: Motion for Directed Verdict will be denied.

The Court's of the opinion that a jury question has been established. (R 2204)

(THE FOLLOWING ARGUMENTS WERE MADE WITH REGARDS TO THE SUBMISSION OF INSTRUCTIONS TO THE JURY)

THE COURT: These are the ones I'm going to give in the first batch then these are the verdict forms that accompany it. They're exactly like yours with a exception of that one language and I did add Two Oh Two. The only reason I'm using that set rather than yours is because you included manslaughter and I'm not going to give manslaughter.

MR. STIDHAM: You are or you're not?

THE COURT: Not. I don't think there's any -- any factual scenario at all that I've heard that would justify giving the manslaughter charge as a lesser included.

MR. CROW: Your Honor, I have reviewed the instructions which the Court will submit. The objection I have, I have as to the A.M.C.I. Four Oh One, Accomplice Liability, in and of itself it's appropriate if accompanied by another instructionwhich the Court is refusing, I have no objection.

However, without the accompanying instruction I do object and that I will submit my accompanying instruction. The accompanying instruction I would request has been labeled Defense Instruction Number One (R 2206) and proffered as follows: I would also like to proffer it in the alternative, too, your Honor. First off, the proffer I have -- I'm submitting now.

An accomplice is criminally responsible for the act of others only to he extent he has a shared criminal purpose with the others. If you ultimately find that Jessie Lloyd Misskelley, Junior was an accomplice you may find him guilty only of a crime you determine that he had a conscious object to engage in or a conscious object to cause such a result. And I've cited the case of Fight versus State. That would be Arkansas cite 314 Ark. 438 -- I do not have the Southwest cite. It wasn't on there.

THE COURT: Okay. The Court has considered defendant's offered instruction number one and refused it. (R 2207) MR. CROW: My contention is this: The jury is not required to find that he had those intentions. I think the jurycould by the statements that have been given in testimony earlier could find less. It is critical that the juryunderstands that if they do not find that he had that intention, that he personally had no intention, I don't (R 2209) w a n t the jury confused that the intention of Damien orthe intention of Jason was Jessie's intention. Arguably theycould find that was --that he had this intention at all --up to this point. But I think it's critical that if the jurybelieves the story to some extent but takes the lesser casescenario --that's what they decide --they're back in the juryroom, your Honor, and they decide, "I think

the story is somewhat credible. I think he was there. I don't think he intended to do any of this. I don't think he did anything thathappened to these boys, but I know Jason and Damien intended, therefore, we are going to find him guilty of capital murder."

If that's their thought process, your Honor, I think that's an incorrect statement of what the thought process should be.

THE COURT: I think everything you're saying are reasonable inferences that can be argued from the facts and argued to the jury. However, the law on accomplice liability states simply and simply put. We've done away with --

MR. CROW: Yes, your Honor.

THE COURT: -- accessories before and accessories after the fact and we have one broad statute on accomplice liability and what a jury must find in order (R 2210) to find that one was accomplice of another in any criminal event is that it was their purpose of promoting or facilitating the commission of any offense. And that they aided, agreed to aid, or attempted to aid the other person in the planning or committing of the offense.

So the gravestone of the offense of accomplice liability is the purpose to aid and facilitate --

MR. STIDHAM: The offense, your Honor.

THE COURT: -- the offense. That's exactly right.

MR. CROW: So if the offense is capital murder he has -- he has to have the purpose and aid -- to facilitate capital murder.

THE COURT: Well --

MR. CROW: If the offense is first degree murder he has to have a purpose to aid or facilitate --

THE COURT: Well, I'm not sure that that's an accurate statement. I think that if it can be shown that one's intent -- intends to aid and assist another person in a criminal endeavor and it results in death, that the element of transferred intent applies and that's not something that we normally argue by way of jury instructions to a jury. I mean it's a concept of law that you know and I know --

MR. CROW: Yes, your Honor.

THE COURT: It's also the concept of a felony murder(R 2211) rule.

MR. CROW: That's my response to that, your Honor. I apologize for -- I don't meant to cut you off.

THE COURT: Yes.

MR. CROW: Is that if we want to get the transferred intent in -- if you want to say there was a crime going on here and a murder -- and a death resulted, therefore, you're guilty. That's felony murder. The prosecution has not chosen to bring felony murder. He could have chosen to do so. He did not.

THE COURT: You know, felony murder used to be the capital murder statute and it would be my finding that there is basically no difference.

MR. FOGLEMAN: Your Honor --

THE COURT: The transfer of intent still applies.

MR. FOGLEMAN: --- the accomplice liability instruction

covers exactly what Mr. Crow's talking about and I don't see what would prevent him from arguing exactly what he's arguing to the Court based on the accomplice instruction.

THE COURT: Well, that's what I just said. I said he could argue those and those are reasonable inferences that could be argued, but they're not

subject to -- to a specific jury instruction. In fact it would almost be a comment on the evidence -- or the weight of the evidence. Alright, anything else?

MR. CROW: Your Honor, we also -- we also proffered -- you know -- I'll get it back to the Court -- on the lesser included offense all the way down to manslaughter and for the -- object to that not being submitted --

THE COURT: Are you making a generic objection to manslaughter not being --

MR. CROW: Yes, your Honor. We would -- we would request that manslaughter be given and the statute on manslaughter --

THE COURT: Are you objecting to manslaughter being given?

MR. FOGLEMAN: (NODS HEAD)

THE COURT: Can't get the nod. We're on the record.

MR. FOGLEMAN: Yes.

THE COURT: Okay.

MR. STIDHAM: Your Honor, on manslaughter -- a person commits manslaughter if he causes -- that's the wrong one. Okay. He recklessly causes the death of another person. I think possibly the jury could

confirm under the circumstances that he didn't know what was going to (R 2213) happen. That maybe he was reckless in bringing the child back if that was the situation. I think he can --the jury could find that he recklessly caused the death of the child that he was alleged to have brought back.

THE COURT: Do you want to respond to that?

MR. FOGLEMAN: Your Honor, I thought influence was exhibited. That what he said was untrue.

MR. CROW: That's certainly our defense, your Honor. But we have to take into consideration the jury may not chose to believe our defense. I mean --

MR. FOGLEMAN: He also said out of his own mouth, your Honor, that he knew they were going to hurt --

MR. CROW: No, your Honor, I didn't say that. I said --

MR. FOGLEMAN: I didn't say you said that. I said the defendant did.

MR. CROW: Your -- as your Honor is well aware that the jury can pick and choose what it chooses to believe. Somebody can believe some evidence and not believe other. That is what it's going to have to do in this case. You can't believe all of the evidence.

THE COURT: Well, the evidence to the Court is that if he did anything based on his statement that whatever his conduct was, was certainly intentional and therefore not reckless. (R 2214) Reckless conduct is I guess the fourth level of conduct -- what is that -- knowingly, --purposely, knowingly --

MR. FOGLEMAN: Negligently.

THE COURT: -- negligently, and recklessly.

MR. FOGLEMAN: Well, then recklessly and then negligently.

THE COURT: Okay, reck -- okay. Alright, I just don't seeany fact or circumstance that could be interpreted as reckless conduct so I'm not going to give that.

MR. CROW: Thank you, your Honor. For the record we would also submit the affirmative defense of capital murder. I recognize that the affirmative defense is normally be submitted only on a felony murder situation, but by the Court's ruling that there's basically no difference between felony -- it's not the transferred intent of doctrine between this capital murder and a felony murder situation, then we would offer the affirmative defense that would be offered in the felony murder situation.

THE COURT: Do you object to this instruction on the affirmative defense?

MR. FOGLEMAN: Yes, that's not applicable unless we have charged felony murder. We have not charged felony murder.

(R 2215)

MR. CROW: I acknowledge they have not charged felony murder, your Honor.

MR. FOGLEMAN: It's only applicable to felony murder.

THE COURT: Well, you've charged strictly that he wasan accomplice in the commission of capital murder, first degree murder, or second degree murder.

MR. FOGLEMAN: Right. Premeditated.

THE COURT: One of the elements of this affirmative defense is that he did not counsel or aid in its commission. And I think the facts of this case -- again, if his statement is believed is that he did just exactly that.

MR. CROW: Well, your Honor, I understand --

THE COURT: He counseled with and he aided.

MR. CROW: I understand that that's something the jury

could get from the facts, but, again, your Honor, we're talking about jury instructions. We're not -- this is not the worst -- we're not looking at this like we did the directed verdict from a most favorable benefit to the State.

THE COURT: I'm not going to give it.

DEFENDANT'S PROFFERED INSTRUCTION NUMBER 1

An accomplice is criminally responsible for the act of others only to he extent he has a shared criminal purpose with the others. If you ultimately find that Jessie Lloyd Misskelley, Jr. was an accomplice, you may find him guilty only of a crime you determine that he had a conscious object to engage in, or a conscious object to cause such a result. Fight v. State, 314 Ark. 438, ___ S.W.2d ___ (1993).

Refused. 1. Covered by 401. 2. Not an approved modification. 3. "with the purpose of promoting or facilitating the commission of an offense. 4. Distinguished form Fight v. State, 314 Ark. 438 (1993)

EXCERPT FROM STATE'S CLOSING ARGUMENTS

BY MR. FOGLEMAN

Now, these alibis - - being in Highland Park and wrestling. (R2232)

this was a parade of defendant's friends. You saw the yellow ribbons. It's a - - the Judge tells you in judging credibility you judge demeanor, the way the witness testified, whether - - and I'm not getting this word-for-word, so rely on what the instruction tells you, not what I tell you it is - - whether there is any reason him not to be telling the truth; any bias, anything to be gained from the outcome of the case. And when you look at the people with the yellow ribbons the bias is obvious. They're here to try to help the defendant.

Now when you analyze their testimony - - and this isn't a real impressive professional diagram I've got here - - but, when you analyze their testimony in regard to Highland Park - - and, of course, you can't see this, (R2232-2233) but I'm just going to refer to it because it helps my memory - - the testimony about where the defendant was up until about five-thirty is really pretty consistent. (R2233) But when you get to the crucial time around five-thirty or six o'clock, these witnesses have this defendant in three or four different places at the same time. You look at about - - see, Susie Brewer, she's got at six - - around six o'clock - - between five-thirty and about seven, she's got her and the defendant on the street together and at Stephanie Dollar's house.

You move down to Jennifer Roberts. She's got at six o'clock the defendant and Christy Jones on the defendant's porch. Christy Jones says that from beginning about five-thirty or six she and the defendant are on her porch by themselves un - - for about an hour or an hour and a half. So anywhere from five-thirty to seven or six to seven-thirty she's saying that they're sitting on the porch all by themselves.

You go down to Mr. Hoggard, he puts at six-thirty Jessie by himself out in front by Stephanie Dollar's house, not on the porch at the defendant's and not with Susie Brewer down the street.

Mr. McNease says that about that time that he sees the defendant at this police car which is down the street (R2233-2234) from the defendant's house and finally, Jessie, Senior says that he sees the police there when he gets home from D.W.I. School - - well, D.W.I. School doesn't leave - - doesn't begin until almost eight o'clock and if you'll look at this radio log you'll see that the officers checked off the scene there right before seven o'clock - - or eight o'clock. (R2234) Anyway, it was at a time when - - hey had already left by the time Mr. Misskelly, Senior got home - - or even left where he was. So this is all totally inconsistent.

And then when you go to the wrestling alibi, that was a total total mess. You have Fred Revelle, the only one - - the only person who comes to the police and says, "Look, I think I may have made a mistake. He was with me and here's why he was with me. We had gone wrestling. It was me and Jessie and" - - one other person, I believe he said and - - in his first statement to the police - - "and I know it was that day because that's the day we paid the money." So the police naturally doing their job, they go out and investigate to see if he's right. Was - - you know–was the defendant somewhere else? And lo and behold, what do they find out? The money was paid a week before that, and they get a receipt to prove that.

Well, then when Mr. Revelle comes into court and (R2234-2235) testifies, this story is completely different. (R2235) He hadn't told anybody about it with law enforcement.

Then you have Dennis Carter come in here and say, "Yeah, I went with him May the fifth. I know it was May the fifth as sure as I'm sitting here." But that's the gist of his words. And then what did he tell the police? Shortly after - - keep in mind, this is when it was still fresh in memory - - shortly after the arrest of the defendant what did he tell them? He said, "I didn't go

wrestling then. I didn't go wrestling until after the murders that happened - - days after" - - just a mess.

And then finally after witness after witness gives these confusing and conflicting stories about wrestling or not wrestling, you have this Johnny Hamilton come in. And he testifies that, "Well, I'm sure it was that day. Kevin Johnson was at search and rescue. Keith Johnson went. That was the only time he went."

Keith Johnson says, "Yeah, I went wrestling one time and some specific events happened, but I don't know when it was." Keith Johnson, I think, told the truth. He didn't have any idea when it was, but, yeah, he had been wrestling with them one time. How do we know that's not true? Not about Keith Johnson but about that it was May the fifth.

When they went wrestling they signed this document. Keith Mercier - - I hope to say that right - - he came in today and testified, "I only went one time." (R2236) I went one time, signed the form, and it was before the murders." He was the last person that signed. He had to have signed after Keith Johnson, after Johnny Hamilton. Keith Johnson only went one time. So Keith Johnson had to have gone before the murders because Keith Mercier

signed after him.

Also, on Mr. Hamilton Keith said, “Well, I’m not going to drive six hundred miles for nothing.” He would drive six hundred miles to testify but he won’t go three or four miles from Highland Park to the police department to tell them, “Hey, I think you made a mistake.” He didn’t tell anybody. He didn’t even tell the defense. He didn’t tell anybody. Somebody goes and talks to him last Sunday and he says, “Oh, yeah, I remember vividly - - May the fifth.” Where were we May the fifth? I even got this flu.

The defense then moved from alibi to Mr. Bojangles. Remember Mr. Bojangles? Remember that? Is there any evidence that suggests that Mr. Bojangles had anything to do with this? You have a sheet with a single Negroid hair fragment. A single one. So they pick out Mr. Bojangles to present up here as this must be the person who did it. Well, let’s think about that a moment. Well, there’s blood and he came in and kind of uncoherent. (R2237) Is there something to that? Could it have been Mr. Bojangles? Well, let’s think about it. What about the crime scene? Picture in your mind the crime scene and then picture in your mind Bojangles. The crime scene - - not a drop of blood. Not one - - couldn’t find one. The bodies were hidden. The

kids' clothes were hidden. They were crammed down in the mud. The blood was washed off the bank and the scuff marks. Contrast that with Bojangles. He goes in there and he leaves blood all over the place - - down the hall, on the wall, on the floor, on the commode - - all over the place. Do you really believe that a guy is going to go to the trouble of cleaning up the crime scene, hiding the kids' bodies, hiding their clothes, hiding any evidence of this crime that's taken place there, and then he's going to walk down through a field to Bojangles Restaurant, a public place, and leave blood all over the place. Give me a break.

The defense in their opening claimed that there was going to be proof that this is Damien tunnel vision. No evidence to that. None. The testimony was that yes, Damien was a suspect, but he was one of a number of suspects. Just one of a number.

Let's talk about these experts that were called by (R2237-2238) the defense. (R2238) As the Judge has instructed you because somebody is labeled an expert - - and that applies both to the experts that testified on behalf of the State and experts that testified on behalf of the defendant - - you're entitled to weigh their credibility and to judge what you hear from them,

decide whether you think it's of any value or not.

Let's start with Mr. Holmes. What makes Mr. Holmes an expert? He said why he had thirteen years of law enforcement experience. He worked for the Miami Police Department thirteen years and since that time he's been a lecturer and witness. Detective Gitchell's had nineteen years of experience.

Now, let's talk about it. Actually - - you think about it - - now, Mr. Holmes is a good witness as far as presentation. But when you sit back and really think about it and analyze what he said. He said the police didn't do anything wrong. He had some problems with the content of some of the questions and some of the responses. But as far as the police being coercive, he said the police didn't do anything wrong. In fact if you'll think back and use your own memory - - do you remember Mr. Holmes saying, "I would have done the same things myself." Do you remember that?

Mr. Holmes' complaint is time and ligature - - the (R2238-2239) knots - - and in his - - but his testimony he says he complains because they didn't clear these things up. (R2239) Well, as the testimony has been and Mr. Holmes himself admitted, when you're interviewing somebody you don't stop all of a sudden and start cross examining them about something they said that

may be wrong. The goal is to keep the person talking. And then he says in his testimony. "Well, they did go back later and clear up the time, but not the ligature." And actually when he says that, if you will look and listen to these tapes, there's nothing said about how - - or what they're tied with until the second statement anyway. They didn't clear it up after the first one because it wasn't in there. It was in the second one and that was not cleared up.

Now, I want to go through some of the things that Mr. Holmes said that you looked at in determining whether you've got a - - a coerced confession or true confession - - I think that's the way he put it. He says on the problems of time and the ligature, he gave a few possible explanations. You know, he had to have been doped up or he had to have been - - have a faulty memory, or maybe just wasn't - - that he wasn't telling the truth.

Now, what we have in this case - - you know - - the evidence doesn't show whether Mr. Holmes is familiar with Doctor Wilkins' examination or not. So what do we have? We've got a defendant who huffed gas, smoked pot, abused alcohol, and he found significant memory gaps. (R2240) The very thing that the defense's own expert said could account for these problems.

He also said the most important thing - - I wrote this down - - that the person sounds and looks like they're telling the truth. Yet Mr. Holmes admitted that he had formulated his opinion before he even heard the tape of the defendant. He had had a transcript, but how do you judge how they sound if you don't hear the tape? And he had already formulated his opinion.

He gave a number of factors. The indication of relief was finally out. The - - some indication of relief. Well, what was the testimony? The testimony was that after the defendant - - or about the time the defendant finally admitted that he was there when these crimes occurred, that he cried. Is that not an indication of relief? It's over.

He also says that one of the factors if you are wrong in a supposition in questioning the person he will correct you. Well, let's see if you find any of that. The factors the defense's own expert says to look for. If you're wrong in a supposition he will correct you. On page three of the transcript Inspector Gitchell asked, "Whose car were you all in?" Suggestful question, isn't (R2240-2241) it? Leading question, isn't it. (R2241) Well, does he buy into the - - does the defendant buy into the suggestion? Does he go along with these suppositions? No. He says, "We walked." He corrects him, "No, we

didn't go in a car. We walked."

Then on page ten of the transcript. If you're wrong in a supposition he will correct you. Detective Ridge says, "Did they take like one picture of one boy?" The supposition is there's one picture of one boy. Did he go along and agree with this supposition–this suggestful leading question? Right? No, he says, "They were in a group." He corrects him. "No, it was not one boy in one picture. The boys were in a group."

Then on page eighteen. Detective Ridge, "Besides just playing, the little boys, had they been in the water? Did they get into the water with you all?" The supposition was that the little boys had got into the water. Is that an incorrect supposition and did he correct him? He says, "No, they did not get into the water with us." He corrects him. Just the very thing that the defense's own expert says that you would do when you're confessing and not a coerced confession.

He then says that in a confession uncoerced that you have - - why in there they relate conversation with co-defendants. Do you have that in this case? Well, the (R2241-2242) proof was that before the tape - - before he admitted that he was present and the tape was started - - that there was a

telephone call from Jason Baldwin to this defendant. (R2242) And in this phone call Damien is in the background saying something to the effect of, "Tell him we're gonna get some girls." And he says, "Hey, I know what I'm going - - what's going on." Do you think that the guy is going to make up something? He's going to make up a dialogue of something like that, or would Mr. Ofshe stated they manipulated him into saying that.

On page three–again, remember one of the things the defense's own expert says is, "You'll have conversations between the co-defendants." The defendant on page three says, "He called me, asked me could I go to West Memphis with him and I told him no, I had to work and stuff. And then he told me he had to go to West Memphis. So him and Damien went." Conversations between the co-defendants.

On page six - - conversations. He said, "They took off running, went home, then they called me. They asked me how come I didn't stay. I told them I just couldn't." Again, the very thing that the defense's expert says that you find in a uncoerced confession.

And then page twelve. You've got the telephone call where he says, "We done it. We done it. What are we (R2242-2243) going to do if

somebody saw us?" All conversations with co-defendants. (R2243)

He then says another factor is that there's something that corroborates the confession. Now, is there anything in this tape that corroborates the confession? Anything at all? Think about it. Number one, Tabitha Hollingsworth. She testifies and her testimony was not challenged one iota. She testifies that her mother and the rest of her family are going to pick up her grandmother, aunt - - whatever - - some relation - - and on the way there between - - or about Blue Beacon Truck Wash - - you know, the woods are just to the side - - you all know all about the crime scene - - that they see walking along the service road Damien and his girlfriend, Domini. And do you remember how she described the clothing? She said they were muddy. She also said that they were wearing black and that Domini had holes in her knees. Do you remember that? If you've got any notes, refer back. Think about that - - holes in the knees.

Now, what did the defendant say about what Jason was wearing? All black. One of these shirts with the skull on it. And it's in the tape about what he's wearing. And how did he describe the pants that he's wearing? He said he had holes in the knees.

At night along with service road Domini's got red hair. (R2244) Jason Baldwin - - slight –slightly built, long hair, and pants with holes in the knees. That's one thing that corroborates the confession.

You've got Damien. You've got him at the scene by Tabitha's testimony and you also have the testimony of Lisa Sakevicius - - if that's the right pronunciation - - about the fiber. The fibers that were taken from one of the victim's clothing that were consistent with having come from this one shirt - - this one shirt out of Damien's house. The testimony was that she checked fibers from the victims' houses, checked fibers at Jason's, Damien's - - the defendants. And out of all that one article of clothing that fibers matched. Sure they can say, "Well, those fibers" - - as the witness said, "Well, it could have come from a similar type of garment from the same batch of dye", but out of all of those houses you get one garment that matches.

Then from Jason, again, you have a fiber. A fiber that matches. The only match - - only match out of all of the clothing in all of those houses - - the only match. Is that a coincidence? Is it a coincidence that the defendant described Jason as having pants with holes in his knees and wearing all black and then Tabitha saying, "Well I seen Damien and Domini, his girlfriend, and

it (R2244-2245) just so happens she's got holes in her knees." (R2245) Is that a coincidence?

Then we get something that corroborates it which is another thing Mr. Holmes says about some inconsequential matter. I think the way he described it, somebody walking by or some conversation or something. You remember what the defendant said in his statement about what he did with his tennis shoes and what kind of tennis shoes they were? He said that he gave them to a guy named Buddy Lucas, and he describes in his statement that they were white and blue Adidas. Detective Ridge testified that he went to Buddy Lucas' and lo and behold what did he get from Buddy Lucas? The white and blue Adidas'. Is that a coincidence? I think not.

Then you get to further corroboration - - the injuries. When in discussing - - and listen - - you have a right to listen to those tapes as many times as you all want you (sic). Listen to those tapes. Don't relay on what I say they say or what Mr. Stidham or Mr. Crow says or what Mr. Davis says, you go back there and listen to those tapes. Listen for the inflection in the voice. Listen for the yawns that shows the tremendous pressure he was under in this interview. But when you listen to it, what you're going to find is they

ask him - - it said something about a boy and where was the person cut? He said, “In (R2245-2246) the face.” (R2246)

Now, in all of this stuff that Mr. Stidham put on about his knowledge - - the stuff in the paper about they were all sexually mutilated and that kind of thing, nothing in there about a boy being cut in the face. They were beat up real bad, but nothing - - nothing in there about somebody being cut in the face. He says, “Yes, one of them was cut in the face.” And then they say, “Well, was - -where was another boy cut?” “At the bottom.” It ends up he says, “In the area of the groin area.”

Now, is all of that just coincidence that he says that or is it as Mr. Ofshe said that somehow these devious officers manipulated this defendant into saying things that weren’t true.

You’ve also got some other factors that they used. The defendant tells about the kids being grabbed by their ears. And you heard the medical examiner’s testimony whatever the purpose for grabbing the ears this defendant in his statement says they were grabbed by their ears. And if you’ll look at that you’ll see that’s exactly what he said. And Inspector Gitchell testified but before he actually said it he was even demonstrating it. And what

do we have from the medical examiner? He's got damage to his ears. Bruised ears. Consistent with being - - having been grabbed.

You've got three guys supposed to be involved in this - - the defendant, Damien and Jason. (R2247) How many weapons did the medical examiner say that he could put a minimum number on? Three. At least two club type weapons. And you don't have to be an expert to look at these photographs and know that those injuries were not caused by similar type things. It's obvious that these were caused by a smaller object. (INDICATING.) These by a larger object. (INDICATING.) And you have the knives. Is it a coincidence again that we've got three weapons?

He also said that - - and this is a sense corroboration of what he says in his statement - - Mr. Holmes says it's natural for a person to try to lessen their involvement. Out of all three of these kids for the defendant to associate himself with as far as the one that he dealt with, which one did he pick? He picked Michael Moore, right? Which of the three boys didn't have any torture type of mutilation to him? Michael Moore. Is that a coincidence? Or did the police somehow say, "Well, this would be a good scenario here. We'll get him to admit to it but we'll only have him involved with the one that wasn't

hurt too bad." It's not a coincidence. It's not an accident. It's not a guess. He's telling what he knew despite his faulty memory and (R2247-2248) his gas - -gas huffing and alcohol abuse. (R2248)

And while we're talking about that, do you recall Doctor Rickert testifying about the effects of the faulty memory and the things you'll remember are the significant things. This was over a month later or, excuse me, it wasn't over - - it was about a month later. Which details is he right on? The most traumatic and terrible event. Which one is he wrong on? Two things - - time and rope. Are those the significant things that a person with memory deficits are going to remember and have branded in their mind? I think not.

In regard to time and it was somewhat pointed out this morning in Inspector Gitchell's testimony, there's an interesting statement in here by the defendant. He's saying this noon stuff and nine o'clock in the morning, and all of that. On page twelve and listen to this - - when you get - - get back there - - again, make sure that you ask to listen to the tape and get it to this spot and you'll look and you'll see that nobody has said anything about "Hey, it happened at night" or anything like that, and you're going to hear Jessie say,

"Well, after all of this stuff happened that night that they done it, I went home about noon." Absolutely makes no sense at all, but you'll hear those words come out of his mouth. Is it (R2248-2249) because you've got somebody that doesn't have any concept of noon? (R2249) It's not words put in his mouth. That's not anything from a question that was asked to him. Those are his words - - "Well, after all of this stuff happened that night." Was that some kind of a slip? Why did he say that? He's the one who first says about it happening that night.

Then we get to Doctor Wilkins. He described the defendant as a gas huffer, heavy alcohol user, pot smoker and then you see the defendant throughout this trial and you ask yourself and you listen to these experts and you say, "Who's being objective?" Is it Inspector Gitchell and Detective Ridge when they say, "Look, we just talked to the guy. We let him talk. We took his information, and when we found out and when we realized that he was identifying injuries to particular people that only a person that was there involved knew, we knew we had our man."

Now, are they the ones being deceptive? Who's being deceptive? This is the person that was there on May the fifth. The bright eyes. The clear eyes.

That is a person that was there on May the fifth, not the person that you've been observing - - allowed to observe throughout this trial. Who's being deceptive in this case?

Doctor Wilkins claims that this defendant is suggestible. (R2250) Do you remember when he was asked, "Well, did you do some kind of test?" or "Was there any tests that showed that?" There is no basis for his opinion other than his general conclusion that he's suggestible.

And remember what Doctor Rickert said - - about being suggestible? And how you would need to know whether the person had a memory problem because that could affect whether they're being suggested to or they just don't remember. Do you remember that? Doctor Wilkins himself testified that this defendant had significant memory deficit.

Then we get to Mr. Ofshe - - or Doctor Ofshe - - whichever you prefer. But Doctor Ofshe or Mr. Ofshe - - he can't treat a broken arm. He can't treat your mind. He's not a licensed psychologist. You can't be licensed as a social psychologist. He's a professor and a professional witness - - an expert at testifying. You observed him. Do you believe that he would have even agreed that Mr. Davis' shirt is white if you had asked him? He probably

would have wanted to explain his answer.

Just because you hold yourself out as an expert in (R2250-2251) something, it doesn't make you an expert. (R2251) Just because you come in with a lot of degrees and a Pulitzer Prize, but if you heard Doctor Rickert it may as well have been the Heisman Trophy. The Pulitzer Prize has no relevance to scientific testimony. Non. He's from Berkeley, California, and he came and put on a show, and it was from my table, pretty entertaining. It may not have been too entertaining for Brent, but it was pretty entertaining to watch this expert at testifying testify. Last year he earned Forty Thousand Dollars just going around testifying. And how many times could he recall ever testifying on behalf of the prosecution? No one.

Now, if you'll recall Kermit Channell from the crime lab said that on - - in his tests - - on the little boy's pants that he ran screening tests ran one screening test (R2264-2265) and it came back positive - - positive for semen. (R2265) He ran a second screening test - - positive for semen. He looked under a microscope and the pants are all muddy and everything and he couldn't see any sperm but he had these two positive tests for semen. So he sent those cuttings from the pants to Genetic Design in North Carolina and

that was the man from North Carolina. And what did he tell you? We boil it all down - - if I can boil it down - - he tells you that in his opinion the DNA that he found from those cuttings was from sperm. Did he see any sperm? No. Because he doesn't look at things under the microscope. His are DNA tests. He says they ask - - Mr. Stidham said, "Are you saying positively that there is sperm there?" He said, "Well, no, you can never say positively unless you look under a microscope and are able to see it. But if I had done that it would have used up part of the sample and we were trying to preserve the sample." But with his opinion, with the test that he ran, if you'll remember there's the epithelial - - what he calls the fractions - - and the male or sperm fractions. Remember the way he was describing how you split out the two and you've got more than one suspect and you split it out so you'll be able to divide them up? The epithelial fraction is the non-male fraction. If it's something other than sperm it's going to show up in that - - like (R2265-2266) blood. (R2266)

Well, when you got the DNA test back and the epithelial back, nothing. No DNA. On the male fractions - - the sperm fractions - - it was positive for DNA and he stated that in his opinion that this indicated the presence of sperm

on those pants. So despite not enough - - not enough to connect in his opinion but it wasn't enough to connect to anybody. It's not as if you had something that just didn't connect to this defendant. It wasn't enough to connect to anybody because there's just not enough of a sample. So despite this clean crime scene the forensic people at the lab and through the work of the police department they were able to come up with that corroborating factor, the fibers that matched Damien and Jason, and then you've got the Judge and back to the duties.

BY MR. DAVIS

Now, he tries to couch in in different terms and to put it in a different form or fashion but that's what it boils down to. (R2282) Personally I find it repugnant with this evidence that Mr. Stidham would make such allegations.

...the DNA guy said that there was DNA consistent as coming from a source of male sperm on the pants of one of the boys. (2285)

Mr. Holmes also told you that in situations - - I asked him, I said, "Mr.

Holmes, does it worry you if a defendant recants and says after he confesses all of the sudden he said, 'No, not me. (R2286) I didn't do it. I lied to the police.'" And he says, "That doesn't worry me at all. In ninety-nine percent of the cases when that occurs the defendant is guilty. "If there are admissions in that first statement that go to show his guilt that no one else could know" - - and I put to you those are what we have in this case - - and that is why this defendant is guilty.

Now, he also talks about Jessie's alibi and I nearly laughed at this - - seriously. He said - - you know - - he said the State - - for him to commit this murder - - must think that he could be in two places at one time. Well, as you listen to his alibi testimony, he was. Because there were people that testified and I - - you go back and look at your testimony - - that he's sitting on the front porch for an hour and a half with somebody, and at the same time, he's with his girlfriend, and they're two different people, and then all of a sudden at the time that the Sheriff's Deputy got there, he's with Dennis Carter, and you remember Dennis Carter got up here and testified when he talked to the police the first time he gave them a statement and said he hadn't seen Jessie all (R2286-2287) day. In fact he said he hadn't been with Jessie all day.

(R2287) The second time he talked to him he had been with Jessie all day and this is right. A week - - ten to thirteen days after Jessie's arrest. This is his friend. This is the guy that's in jail and he's concerned about him, and where is the yellow ribbon? That close in proximity he never says a word about being with Jessie that day. Never says a thing about it. One of them was a handwritten statement now, and only to say Mr. OfShe would say they coerced that out of him. He wrote it out himself. And yet he never mentions the same until he gets up here, and the reason - - go back and look and see why these people - - and some of them - - some of them I'm putting to you are just flat liars. Some of them I think after a month had elapsed and the Misskelleys came and approached them and they came in with these police reports and said this happened on this day, and they came in with these things that they wanted to help their friend and neighbor, and they wanted to do what they could. And so when they are told, "Don't you remember this? Don't you remember that?", they bought into it. But when you listen to it, if they were telling the truth, there would be consistencies. And if they knew where Jessie was on the fifth, they would have told it when they talked to the police the first time, not nine (R2287-2288) months later. (R2288) And if they knew

where he was and those that didn't talk to the police, they would have reported it.

They talk about Bojangles. (R2293) Do you think if the blood sample that was obtained at Bojangles had indicated in its examination that it belonged to somebody or some thing or would have any evidentiary value, don't you think you would have heard some evidence about it from the defense? Don't you think they would have put something on? The reason that - - and that's one of those things - - one that we call a red herring - - and I think the reason they call it a red herring is because it's something if you throw it in the jury box and leave it there long enough it's going to create a big stink. And that red herring is thrown in there to try to throw you off, but like Mr. Fogleman said, the person that was in Bojangles - - I don't know if they investigated him - - whatever happened to him - - whatever caused him to be bleeding - - that person was not the same person who meticulously cleaned this area, who jammed the clothes down in the water, who submerged these three little victims and left no trail of blood anywhere in those (R2293-2294)

woods. (R2294) That person is not the same person that was in Bojangles. And you all agreed with me during voir dire you'd apply your common sense. And common sense tells you that that is - - is - - I guess - - blowing smoke on the part of the defense because it's just not something that makes any common sense whatsoever.

ABSTRACTED EXCERPTS FROM ECHOLS-BALDWIN TRIAL

BRYN RIDGE

CROSS EXAMINATION BY VAL PRICE

On May 6, 1993, Detective Allen and I went to the Bojangles Restaurant. We talked with the manager, Marty King. He told that a black man with blood on him had been at the restaurant the evening before. I don't remember a pair of sunglasses Marty King gave me. I found some trace remains, possibly blood in the ladies' bathroom. I don't think I took blood scrapings from inside the door to the woman's bathroom. I don't think I took blood samples from the entrance hall in the bathroom or the sitting area at Bojangles. (BETR 1723) That area had been cleaned to the best of my knowledge. Detective Allen was talking with the manager as I was looking through the area. The blood scrapings were never sent off to the Crime Lab to be analyzed. The blood

samples are lost. If they were blood, they are lost. I took samples of something and the purpose was to send them to the Crime Lab. (BETR 1724) They are just lost. That's my mistake. I lost a piece of evidence (BETR 1725).

DR. FRANK PERETTI
DIRECT EXAMINATION BY BRENT DAVIS

I am a medical examiner for the State of Arkansas. (BETR 1813) I received some specialized training in the field of forensic pathology. Forensic pathology is a subspecialty that deals with pathology. And pathology is the study of disease. A forensic pathologist is someone who has had training in anatomical pathology but specializes in interpretation of patterns of injuries in determining cause and manner of death. What I do on a day-to-day basis is perform medical legal autopsies, generate autopsy reports, and testify in court. (BETR 1814)

I performed autopsies on the bodies of Michael Moore, Stevie Branch, and Chris Byers. The first thing we do is we take the height and weight. Then what we do is we take photographs as the body comes in. Depending on the type of case it is, what we do is we take the as is photographs of the body as it

presents. After we have documented by the photography, we clean the body off, clean the body up, and we take additional clean photographs. We document any and each of the injuries situated on the body. After that, we do an external examination. (BETR 1815)

I followed the general procedure for autopsies in performing autopsies on Michael Moore, Stevie Branch and Christopher Byers (BETR. 1816). As a part of that procedure, I took photographs as I went through the process of performing the autopsy in order to preserve the evidence that I found in conducting the autopsies (BETR 1817). State's Exhibits Nos. 59A, 61A, 62A, 63A, 64A, 65A, 66A, 67A, 70A, 71A, 72A, 73A, 68A, 60A and 86 are photographs of James Michael Moore. These photographs are true and accurate representations of the body of Michael Moore at the time I performed the autopsy in May 1993. (BETR 1818).

(State's Exhibit Nos. 59A, 61A, 62A, 63A, 64A, 65A, 66A, 67A, 70A, 71A, 72A, 73A, 68A, 60A and 86 are admitted into evidence without objection.)

State's Exhibit Nos. 70B, 72B, 71B, 69B, 66BB, 67B, 65B, 64B, 63B, 62B, 61B, 60B, 59B and 78 are the photographs of Steven Branch. (BETR

1819) Those photographs are fair and accurate representations of the condition of the body of Steven Branch at the time I performed the autopsy.

(State's Exhibit Nos. 70B, 72B, 71B, 69B, 66BB, 67B, 65B, 64B, 63B, 62B, 61B, 60B, 59B and 78 are admitted into evidence without objection.) (BETR 1820)

State's Exhibit Nos. 59C, 62C, 61C, 63C, 64C, 65C, 66C, 67C, 68C, 69C, 72C, 70 and 71C and 73C are photographs of Christopher Byers. They are fair and accurate representations of the body of Christopher Byers at the time I performed the autopsy.

(State's Exhibit Nos. 59C, 62C, 61C, 63C, 64C, 65C, 66C, 67C, 68C, 69C, 72C, 70 and 71C and 73C are admitted into evidence without objection.) (BETR 1821)

I performed the autopsy on Michael More on May 7, 1993. Michael Moore weighed 55 pounds and was 49 1/2 inches in height. As for the injuries I observed on the body, I have these divided up into head injuries; neck, chest and abdominal injuries; anal-genital region; lower extremities; back injuries; upper extremity injuries; internal evidence of injury; and evidence of trauma. (BETR 1822).

States Exhibit 65A shows a frontal view of Michael Moore. Here we can see different injuries. We have a laceration on the scalp region here. We have an abrasion or laceration -- mots people think of a laceration as a cut. Here, we have an abrasion. When I use the word "abrasion," I mean a scrape. When I use the word "contusion," I mean a bruise, like a black and blue. So I will try to use laymen terminology. (BETR 1823)

We have an abrasion on the top of the right side of the scalp. On the left, we have a laceration. Here on the face, on the nose, we have a lot of abrasions and scrapes. And on the lips, we have some injuries which you can see in an additional photograph closeup. On the side of chest, we have some abrasions. We have a pattern of serration on the front of the chest near the right clavicle region. On State's Exhibit 61A, we have two impact sites or abrasions, scrapes.

State's Exhibit 62A is showing three lacerations over the scalp region. In this photograph, we can see some abrasions on the left side of the face and the nose, or scrapes, where I have my finger pointed. I can tell what differences between the type of injuries we see in 61A and the lacerations on the side of the head that as seen in 62A, what could cause the difference in the

type of injuries. On State's Exhibit 61A, we have an injury that consistently being caused by an object with a broad surface area, an irregular surface area. (BETR1824) On 62A, we have a laceration in here. These type of injuries could be caused by an object with a small surface area, such as maybe the handle of a broom or a piece of wood or a two-by-four or an edge of a log. That is why we have the difference in the type of injuries. There's two different patterns of injuries.

In photograph 62A that would be caused, either by some item that's smaller in circumference, in the surface area. The injury in 61A would be caused by a broader surface, an object with a larger surface area. Based on my experience and expertise and training, I would say that two different weapons or two different items caused these injuries.

State's Exhibit 63A is showing the ear. Down here we can see some abrasions, a faint area of contusion over the forehead region towards the back of the ear. We can see some abrasions or scrapes. State's Exhibit No. 64A is a closeup of the ear showing the abrasion, contusion or bruising behind the ear, and this abrasion situated on the scalp. (BETR 1825)

State's Exhibit 65A is showing on the upper inner aspect of the lip

which is contused and has overlying superficial cuts. The dark discoloration is the bruising. State's Exhibit 66A is showing the lower lip and the bridge in the nose, the bridge of the nose. The bridge of the nose, we can see the abrasion, scrapes in here on the lower lip. If you look very carefully you can see that discoloration there, that faint discoloration, that is bruising or a contusion.

In my experience as a medical examiner, those types of injuries to the ears and mouth we generally see in children who are forced to perform oral sex. The punctate scratches to the nose and to the upper ribs, you can get the lip injuries by putting an object inside the mouth. You can get those type of injuries also from a punch or a slap, or you can get those type of injuries from the hand over the mouth and pressing the hands very tightly up against the mouth. (BETR 1826)

State's Exhibit 67A shows the hog-tying fashion of the hands that are hog-tied to the feet behind the back. This is the photograph showing the shoelaces. State's Exhibit 70A and 71A show abrasions. 71A shows abrasions or scrapes over the back region. State's Exhibit 71A shows an abrasion or scrape on the side of the neck. 72A shows the washerwoman wrinkling of the hands. By washerwoman wrinkling, when the hands are submersed in water,

you put your hands in the water, you know how your hands wrinkle. That indicates the bodies were in water for a prolonged period of time. State's Exhibit 73A also shows the hands, but on the left finger, left second finger, you can see the cut here on the hand. (BETR 1827) Generally when we see injuries on the hands and on the forearms, those are the type of wounds we call defense type wounds, when people try to defend themselves. If someone is coming at you with an object, your reflex would be, the first thing you do is you to put your hand up; or if you are on the ground, you put your feet up. You want to try and protect your body.

I found defense wounds in regard to Michael Moore; he had defense injuries of the hands. State's Exhibit 68A is a photograph of an abrasion that's padded and has a serrated appearance to it, and that is 68A.

State's Exhibit 60A is a photograph of the body before it has been cleaned up. The blackish-brown material on the front of the body is mud and debris. But up here are abrasions and apparently serrations here on the front of the chest. You can see some injuries to the face and to the lips. State's Exhibit 86 is a photograph of the back of the arm showing abrasions or scrapes. (BETR 1828)

The autopsy does reflect kind of a list of my findings as far as injuries are concerned on Michael Moore. My findings were multiple injuries with evidence of drowning. So the multiple injuries consisted of the head injuries, which consisted of the multiple facial abrasions or scrapes, contusions or bruising. We have multiple scrapes and contusions of the lips. Multiple scalp lacerations and contusions.

There were multifocal subgaleal contusions and edema. By "subgaleal," at the time of autopsy, we reflect the scalp back. We are looking at the scalp from the inside out. And underneath it, we found edema or swelling, and hemorrhaging. Also there are multiple fractures of the caladium. That is the top of the skull and the base of the skull. There was subarachnoid hemorrhage and contusions or bruising involving the entire brain. The skull fractures, in conjunction with those obvious outward signs of head injuries seen in the photographs. (BETR 1829)

Underneath those injuries that I pointed out earlier were skull fractures. Then the other findings including binding of the wrists and ankles in a hog-tied fashion. There were multiple bruises, scrapes, and lacerations of the torso and extremities. We have the defense type injuries of the hands. There

was also anal dilatation with hyperemia, hyperemia or redness of the anal-rectal mucosa. "Anal dilatation," in laymen's terms means that the, anal orifice was dilated. Hyperemia of the anal-rectal mucosa, in laymen's terms means reddening or congestion of the mucosa. That is the internal lining of the anus and rectum. Dilation of the anus and reddening of the rectal mucosa could be from putting an object in the anus. It could be due to the fact that postmortem relaxation and the fact that the body was in water. And that would alter things, also. (BETR 1830)

We have evidence of drowning. And we have the wrinkling, the washerwoman wrinkling of the hands and feet. We had petechial hemorrhages of the heart, lungs and thymus. There are little hemorrhages that are caused by lack of oxygen that may be seen on most people who die. It is truly a nonspecific finding. But we do find this in drowning victims. Pulmonary edema and congestion. In laymen's terms, the lungs are filled with fluid, water. We have aspiration of water into the sphenoid sinus. The sphenoid sinus is a little cavity at the base of skull. When he was in the water, he was breathing, and he sucked water up through his nose into the sinus area.

There was no evidence of any disease which would have contributed to

death. There was evidence of terminal aspiration. Terminal aspiration is when you have regurgitation of the stomach contents due to postmortem relaxation of the esophagus. (BETR 1831)

Instead of the bowel working correctly, at the time of death, it loosens and gastric contents back flow into the esophagus and other passages. That's a very common finding in most people who die. The aspiration indicates that Michael Moore was still breathing at the time he was placed in the water.

As part of my job, I formulate an opinion as to the cause of death of the individuals I do an autopsy on. My opinion as-to the cause of death of Michael Moore was multiple injuries with drowning. The head injuries that he sustained alone, would have been life threatening and would have caused his death had he not drowned. (BETR 1832)

I also performed an autopsy on the body of Steven Branch. (BETR 1833) Steven weighed 65 pounds and was 50 inches in height. When his body was presented to me at the crime lab, it was still bound in the same fashion as it was when the body had been recovered. The body was bound right hand to the right ankle with a black shoelace. The left hand was bound to the left ankle with a white shoelace. In my visual examination of the body of Steven

Branch, I discovered head injuries. There were chest injuries. There was genital-anal injuries, lower extremity injuries, upper extremity injuries, and evidence of submerging.

State's Exhibit 70B shows abrasions or scrapes overlying the facial area, the eye, the lips and the chin. (BETR 1834). The injuries in 70B are to the right side of the face of Steven Branch. Also Exhibit 72B shows a confluent area of abrasion, scraping involving the face. Also overlying this area, we have multiple irregular and gouging type cutting wounds. Those cut marks would be consistent with some sharp object such as a knife.

We generally see these type of injuries when an object such as a knife or glass or any sharp object is put into the skin and either the person doing the stabbing is twisting and pulling the knife or a combination of the person being stabbed -- and they are not standing still, they are going to be moving around. So, as they are moving, the knife is going to twist. And as the knife is being pulled out, it's going to pull out all the soft tissues, the fat, in the cheek region. And also in this photograph, you can see that the ear is abraded and it is contused, like it was scraped, the bruising and its overlying scratches. And we can also see abrasions and superficial cuts involving the scalp region. (BETR

1835)

State's Exhibit 71B is a close-up. In this photograph, you can see the scraping and we can see the gouging type injuries here. What is important to note is that on the forehead region, we have an abrasion or scrape that left a pattern. Inside the pattern it's almost like a dome shape. It has this little area of square abrasion inside here, right on top of the forehead.

That injury is typical of a belt injury. The belt has a little buckle. That buckle has that little one that goes back and forth, left and right, and the base of the latch. That type of injury we typically see with belts. Also, if you look very closely, you can see on the face overlying the area of the abrasions, you notice a pattern here, but a lot of them are obscured by the scraping.

State's 69B is showing some scrapes on the lower extremity and the binding abrasions from the ligatures, this darkened area at the ankles where the ligature was fastened.

State's 66B is showing an injury that could be caused either by a serration from a knife or another type of object.

Exhibits 68B and 67B show the washerwoman wrinkling of the hands. (BETR 1836). On 67B, you can also see the wrinkling of the hands. But you

can note the abrasions from the ligatures being tied to his wrist. That is the area of dark discoloration n the wrist here.

Exhibits 65B and 64B show a penile injury. Here on Exhibit 65B, all we can see is we have a photograph of the head of the penis and mid-shaft of the penis. You can note here, the dark discoloration is bruising. Overlying the area of bruising, if you look very closely, you can see a small area of bruising and fine linear scratches.

State's 64B is showing the under surface of the penis. Here we can see the injury and part of the head and shaft of the penis. What is important to note is that we have a clear line of demarcation here. Where we have this area which is involved and we have this nice circumferential band going around the penis, which you can also see on the front of the penis, the anterior part of the penis, this line of demarcation which is separating the injury from the uninvolved skin. (BETR 1837)

You can see those type of injuries in two situations. One, if an object, like a belt, for example, is wrapped tightly around the penis. Or those type of injuries are more characteristic when you see young children who have oral sex performed on them because the little scratches are the teeth marks.

In Exhibits 63B, you can see all the abrasions or scrapes. You can see the darkened discoloration. That is the bruising of the ear. If you look very, very closely, you can see the fine little scratches, which are fingernail marks. Exhibit 62B is showing the back of the ear showing the bruising and the abrasions and the fine linear scratches.

The bruising to the ears and mouth injuries that I described in Michael Moore's case are similar in this situation. (BETR 1838) On 61B, the photograph of the back of the head on the Moore child, there was a similar type injury to the back of the head, a big area of abrasion type of injuries that you see inflicted with an object with a broad surface area. In association with that, the base of the skull, the back of the skull, showed a three and 1/2 inch fracture that had multiple extension fractures.

In layman's terms, if you have ever dropped an egg, and you see how you have the fractures of the egg, that is basically what happened. Also the brain showed multiple focal areas of hemorrhage, contusions and bruising. You need a lot of force to cause skull fractures and brain hemorrhage. State's 60B is a photograph showing the back of the neck, showing an area of abrasion, irregular type abrasion and scraping of the back of the neck.

Exhibit 59B is an area of the inner aspect of the thigh, where we see a band. You have a pattern here of a band. (BETR 1839) It is diagonal, and you have these two areas and you can see a darkened area, the contusion, and an area of pallor or paleness, inside. That indicates some sort of object.

If you get your finger and keep it up on the wrists, what happens is, as soon as you pull your finger off, you are going to see an area of blanching. On the sides, you're going to see the redness when the blood is pushed out of the vessels. So this the general principle that we see here where an object has left this pattern.

Exhibit 78 is a photograph of the back which shows a small area of abrasion or scraping.

The anus was dilated. There were no injuries noted on the anal and rectal mucosa. The lining of the rectal and anus showed mild hyperemia or reddening. But not other evidence of injury was noted. There were no injuries noted to the testes or the internal aspects of the scrotal sac.

I found evidence of drowning in regard to Steven Branch. The hands and feet showed the wrinkling. There was fluid in the lungs or the pulmonary edema, congestion. (BETR. 1840) There was lots of bloody, frothy fluid; that

is the fluid in the lungs that has no place to go. So what would happen, it just backs up into the trachea or windpipe. We have the watery fluid was aspirated into the sphenoid sinus.

The cuts to the left side of Steven Branch's face would be consistent with some knife or sharp object. The skull fractures to the back of his head would be consistent with a larger blunt type object.

My opinion of the cause of death of Steven Branch was that he died of multiple injuries with drowning. The head injuries, in and of itself, had he not been submerged in water, would have caused death. (BETR 1841)

I also performed an autopsy on Christopher Byers. Christopher weighed 52 pounds, was 48 inches tall. He was also bound at the time I performed the autopsy. The right wrist was bound to the right ankle with a black shoelace, and the left wrist was bound to the left ankle with a white shoelace.

Christopher also had head injuries, neck injuries, genital-anal injuries, right leg injuries, left leg injuries, back injuries, right arm injuries and left arm injuries. (BETR. 1842) 59C is a facial photograph. Here you see there are abrasions. But also note that you can see here and here you have a pattern

type injury. See this curvy linear or half moon, these little round areas right here. These round areas have the appearance of like a stud on a buckle, one of those round studs, and sort of bell shaped here under the nose. State's Exhibit 62C is a closeup photograph of an injury I just described. It is very faint. You can see it here, in this photograph this little round area this little punched out area on the skin. State's Exhibit 63C is showing injuries to the ear, the scratches, the bruising of the ear. But also you can note the eyelid here that has a contusion or black eye.

State's Exhibit 61C is showing a little abrasion or scrape, a small one to the back of the neck. State's Exhibit 64C is showing the ear again. It is the right ear showing the bruising and scrapes and little, overlying scratches. (BETR 1843) Those were injuries to the ear in regard to Chris Byers and those similar to the injuries that I found to the ears of Michael Moore and Steven Branch. He also have the comparable injuries to the outside of his mouth and the mouth area that the other two had.

State's Exhibit 65C is a photograph of the inner aspect of the thigh. And here these areas, this darkened area here, all the bruising, contusions on the outer thigh. We have injuries that are antemortem, injuries before death.

We have perimortem injuries, injuries around the time of death; and you have postmortem injuries. A lot of the injuries that you see, the hemorrhaging that means your heart is pumping, your heart is beating and you are able to bruise. Some of the injuries have the yellow discoloration to them and a lack of hemorrhage. (BETR 1844) And those injuries are injuries that we normally see in the postmortem period, after death.

Then you have the perimortem injuries. Those injuries when you look at the underlying fatty tissue there is a slight amount of hemorrhage. That means that the heart is still pumping blood, but it's not pumping to full capacity.

There are postmortem injuries. State's Exhibit 66C shows the inner aspect of the upper lip. And you can see all the bruising and dark discolorations inside the lip. State's Exhibit 67C is showing the lower lip. And here you can see there is a laceration with the hemorrhage. There is hemorrhage around the gum line.

State's Exhibit 68C is a photograph showing the back of the skull. We have a laceration right here. That type injury to the back of the scalp, could be consistent with the broad blunt object that you described in regard to the other

injuries to the other boys. (BETR 1845) But, it's more consistent with an object that is narrower. And sometimes we see this type of injuries, for example, like a piece of wood like this railing here, the sharp edge can give that type of injury. Or an injury with an object such as a broomstick could cause that type of injury.

State's Exhibit 69C is a photograph of the genital region showing genital mutilation. Here it is important to note here that you can see where the, there is a closeup photograph of that. Here's where the penis and scrotal sac and testes should be here. We have all these gouging type injuries that have been described similar to the one that we saw in the face. But also it is important to note here that we have contusions and bruising of the inner aspect of the thighs. These type of injuries we commonly see in the female rape victim. And also there you will note on the feet, you can see some bruising, contusions on the ankle, and you can see where the ligature was tied, these marks here.

State's Exhibit 72C is also showing the back, the side of the left thigh and the right thigh. Here is a pattern here and it's a diagonal. Here we have all this bruising. Here we have gouging type wounds, and we have these cuts

around the anus. (BETR 1846)

State's Exhibit 70C is a close up of the genital region. Here we can see that the skin of the penis has been literally removed or carved off. And what we have here is the shaft of the penis without the skin on it. And all around it, we have all these cutting, gouging wounds. The scrotal sac and testes are missing.

State's Exhibit 71C is showing the anal orifice which is dilated. And below, we can see cutting wounds here on this side and this side here. We can see, if you look very closely, you can see all the hemorrhage indicating that he was alive at the time. You have all this bleeding here in the soft tissues.

State's Exhibit 73C is a closeup view of the injuries, the gouging type wounds, cutting wounds that we have in the inner aspects of the thigh. This red area here that we can see is the shaft of the penis. There is a serrated type pattern here. (BETR 1847) When I say , "serrated," I mean, for example, a typical serrated knife is a steak knife, that pattern of serrations. And in this case, the items that I marked there seems to be, those three or four wounds, there is a distance between those wounds. And that would be consistent with the serration of the blade that inflicted that wound, providing there is no

twisting and turning. The surface that we are looking at where I circled the indications of serrated injury, that is the inner aspect of the thigh; so, it is curved. When you look at the thigh, it's rounded. It's not completely flat.

The top of the skull, there were no fractures. The caladium is the top of the skull. However, the base of the skull, back of the head here, the base of the skull, that showed a fracture that measured three and one-half inches in length. (BETR 1848) And extending from this fracture are multiple smaller fractures which involved the entire base of the skull.

So, it goes back to what I explained earlier. It is like you have an egg and you drop it. You see those fracture lines. And that is what has happened to the base of the skull. And associated with this., we have hemorrhage of the brain, contusions, bruising of the brain. But also on the left posterior medial cranial portion -- the base of the skull is divided into regions. We have the anterior portion where our eyes are. We have the middle portion basically where the ears are attached. And we have the posterior portion, or the back of the skull. So if you divide it up, the symmetrical right side and left side. So on the left posterior side medial -- by "medial," I mean toward the midline, towards the spinal column not away from the spinal column, we have a

one-quarter inch ovoid punched out fracture. That fracture was punched out. It was round, measured a quarter of an inch and was punched out into the brain. (BETR 1849)

I have indicated in my testimony regarding more than one of the boys that there were injuries to their scalp that was consistent with an object approximately the size of a broom handle. Looking State's Exhibit Number 53, an object this size and this diameter be consistent with those injuries I noted were consistent with a broom handle type object. An object of this type is capable of causing those type of injuries. (BETR 1850)

(State's Exhibit 53 is received in evidence.)

In my testimony regarding the three victims, I indicated that certain of the head injuries were caused by what I described as a larger surfaced blunt object. An object of this nature would be consistent with that. (BETR 1853)

(State's Exhibit 55 is received in evidence.)

State's Exhibit No. 77, I have had a chance to look at that knife and examine that knife. I referred in my testimony to wound patterns on the three victims that were serrated in nature. There are injuries consistent with a type of serrated pattern. (BETR 1854)

State's Exhibits 82, 81, and 80, the sacks indicate they are the ligatures. I removed the ligatures from the body, the shoelaces off the bodies of the three victims when I performed the autopsy. And then I sent those items to another area of the crime lab for further analysis. There is a process that I follow whereby I make sure that it's identified by case number and the proper chain of custody is maintained. I did that in this case. (BETR 1855)

In performing the autopsies on these three victims, there was no evidence of animal activity, insect bites. If an insect such as mosquitos, those types of things, if the children had received insect bites prior to the time of their death, then, you should see them prior to death. That would be different if insect bites were received after death. After death I don't think you would see them for the simple reason you need to be alive to have the reaction so it can swell and itch. I did not find anything, any insect bites on any of the three victims that I did autopsies on. (BETR 1856)

I did not deal with the issue of time of death or mention that in my autopsy report. Determining the time of death is more of an art, not a science. I mean, on TV, they can tell you someone died at 2:30. Realistically it is not possible unless you were there and witnessed the person who died. So what

we do is you have to give ranges, intervals to the time of death. And even then when one gives, ranges or intervals, it is basically an estimate. There are a lot of factors, but one that is most important is you need to know when the person was last in the light and when the person was found dead. (BETR 1857) So you have the postmortem window period. And in that window period, there are many other factors that come into effect such as, for example, the temperature outside, humidity, if the bodies were found buried underground, if they are on top of the ground, or if the bodies are in the water.

These are all factors. The modality in which, the way in which a person who died is also in point. Now, if a person, for example, loses a lot of blood, it puts a different interpretation on it as if someone was just to die walking down the street and collapse.

All of these factors, most of them are environmental factors that need to be taken into consideration. I was not at the scene when the bodies were found. Arkansas has a coroner system. And the coroner of Crittenden County went to the scene. He pronounced the three boys, and he issued his report, based on his findings when he arrived at the scene. (BETR 1858) And in order to make an estimation as to time of death, I would need to know the

temperature of the water that the children were submerged in. And I would need to know what type of clothing, if any, they had on. And I would need to have a rectal temperature taken. You can use body temperature, but it's not as accurate as people make it to be, but that's one of the factors that are taken into consideration.

All of those things are information that I would need in being able to give an estimate, along with the rigor mortis, the rigidity of the body. In this particular case, the factors that were provided to me was the lividity when the coroner arrived at the scene. Now, there are some I would like to explain so the jury will understand what I am talking about. There are some terms. You have rigor mortis which is a stiffening of the body. (BETR 1859) We have livor mortis or lividity. Lividity is the postmortem settling of the blood into the capillaries or blood vessels which have lost their tone after death. So that happens on everybody. When we die, we all go through rigor mortis. We all develop lividity. There are factors that I take into consideration when trying to give an estimate or a range for the time of death. Lividity is one of the major criteria to see if the body has been moved. Now, one thing I think didn't explain and I would like to clarify. Lividity goes through different stages. We

have lividity which is called unfixed. Then we have lividity that is fixing and lividity that is fixed. Unfixed lividity means up to a certain period of time if someone dies on their back up to normal environmental conditions, if I was to die in this room right now and I was lying on this floor eight to ten hours, all my blood would settle to the back of the body. Now, if you were to examine my body two hours after I die, the lividity, if you were to touch it with your finger, it would blanch. (BETR 1860) In other words, you would be able to push the blood out of the blood vessels. So it is called blanching. But if I was to still be the floor and around eight hours you would come in and you would press the lividity, you would see it's fixing. It is in that stage where it is beginning to fix and unfix. And fixed lividity is when you go there and no matter how much you press it, it is going to stay in that one spot. So we use lividity, for example, if someone was to die, if you would find someone in the field and he's found on his back, and all the lividity is fixed on the front of the body, we know that the person died in some other location and was dumped there because the lividity is not consistent with lying on its back.

The time at which lividity becomes fixed is dependent upon environmental factors. Environmental factors and the state of health of the

individual is very important also. The degree of the fixed, or the degree that the lividity is fixed is based on also the extent to which the body has remained in a single position. (BETR 1861) The cooling, if the body is quickly cooled such as being submerged in water, that would retard the fixing of lividity.

I said that part of my job is to prepare an autopsy report. In this particular case, I was particularly cautious about who I released that information to and when I released it. What we do in the crime lab is the day we do the autopsy we issue a sheet. It is called a "Cause of Death" sheet. This sheet automatically goes to the prosecutor of the county of death, the coroner, and the investigative agencies handling the death investigation. We do that so they will have immediate feedback. Because a lot of times they don't, the agencies don't have the time to call us back to get the autopsy results. So what we do, as soon as we do the autopsy, that day, we fill out the sheet, and it is mailed to those three agencies. I changed that procedure a little bit in this case in order to insure that the information obtained in the autopsy report wasn't disseminated in the general public. (BETR 1862)

But because this case generated, such intense media coverage, and there was rumors, a lot of rumors, people calling for all of these circumstances, I

elected on the cause of death sheet just to put the causes of death on the sheet. I did not say anything about any of the injuries. I didn't tell the prosecutor. I didn't tell the police, and I didn't tell the coroner. I just kept it to myself. And with an ongoing investigation, it was important that only as few people as possible had access to that type of information. I didn't want to disseminate that information to the media and the community. (BETR 1863)

CROSS EXAMINATION BY VAL PRICE

Defense Exhibit Number E6 is a Kershaw knife. This appears to be a lock blade folding knife. (BETR 1865) I made a comparison with this knife E6, and compared that with some of the wounds that I found on Chris Byers. This is a serrated knife. Some of the wounds that have the smallest serrated patterns could have been inflicted with a knife having this type of serration. This particular knife may have caused some of the small wounds on the buttocks of Chris Byers shown in Exhibit No. 71. (BETR 1866)

This picture is of the buttocks region. Law enforcement officers ask the crime lab to perform certain tests on pieces of evidence. I received that particular lock knife from the Genetic Designs Laboratory in North Carolina. It was mailed to me directly. There were instructions by Detective Gitchell of

the West Memphis Police Department to compare that knife with some of the wounds. There appears to be some type of red fabric inside that knife. (BETR 1867)

I opened it up, and I noted that there was a piece of red fabric in there, and I properly submitted it to the appropriate section of the crime lab. There were items that I took at the time of autopsy that I sent to the appropriate sections of the crime lab. (BETR 1868)

On the autopsy of James Michael Moore, on page 2, in the paragraph of description of injuries, the last sentence indicates that a strand of fabric-like material was clenched in the left hand. (BETR 1869) To my knowledge, this fiber was sent it Lisa Sakevicius who is with the trace evidence section of the Crime Lab. FP1 was the number that was assigned by the trace section to this particular fabric I took out of the hand of Michael Moore. (BETR 1870). Based on my autopsy of Michael Moore, this is the only fabric that was sent to them. It was received by Trace Evidence on May 7, 1993.

When the bodies were sent to the crime lab, they were wrapped in a white sheet. A laboratory case number was assigned to all three of the bodies. Christopher Byers' laboratory case number was 93-05618. (BETR 1871). On

May 11 the white sheet that Christopher Byers was wrapped in was sent to the trace evidence section. Trace evidence assigned the number FP-10 to the white sheet.

I found several old scars on the body of Christopher Byers. A three-quarter inch old scar was present on the right forehead region, generally in this area here. (BETR 1872) A one-quarter inch old scar was present adjacent to the bridge of the nose, generally in this direction here. An old hypo-pigmented scar was present on the front of the chest. It's on the midline of the chest. These were the only old scars.

As for whether there was any evidence that I could tell from my examination if there were bruises or abrasions on the buttocks area that may have been caused by some type of spanking that he received that day, on the injuries on the back of the left buttocks was one-half by one-quarter inch bruise, or contusion. And there was a one and three-quarter inch linear abrasion, or scrape. Either of those could possibly have been consistent with a belt spanking.

On the back of the right buttocks, there were two very faint contusions or bruises that measured about one-half by one-half inch. (BETR 1873).

CROSS EXAMINATION BY PAUL FORD

In my career I have performed well over 2500 autopsies. Some of those autopsies are on children. The majority were adults. Some of those adults had been victims of beatings, similar to the beatings that occurred in this case. Some of those autopsies have been for abusive or sexual assault. (BETR 1875).

Since I have been in Arkansas, no one has ever called me to go to a crime scene. I am routinely called upon and I am qualified to render opinions as tp the manner of death. I am routinely called upon to give opinions as to the cause of death and is a part of my normal job, on a daily or weekly basis. There was no evidence of strangulation. If you were to find evidence of strangulation you would expect to find injuries to the strap muscles, of the neck, the muscles of the neck and the larynx, hyoid bone. (BETR 1876) A hyoid bone is a little bone called the hyoidibone, and it is shaped like a "u," and that sits above the larynx, and it is connected to the larynx by muscles. I found no damage to the hyoid bone. No damage to the larynx and no damage to the strap muscles. I found no exterior evidence on the neck of strangulation. There were a few little abrasions, or scrapes, on the neck, but no evidence of

strangulation.

I made an attempt to determine whether or not there were sperm cells present. I did a rape kit in an attempt to determine whether there had been oral sex or anal sex. (BETR 1877) When we do a rape kit, we take the swabs, we swab the inside of the mouth, the lips, and the back of the mouth. Then we swab on the female, the vaginal area; and on the male, the anal area. We try to get all around the lips and as far back as we can to swab up against the linings of the mouth. And in the anus, we try to go up as far as we can around the anal orifice region to make sure that we pick up any material that was there. We make a glass slide, and we send it to the serology section of the laboratory. And they look for the presence of sperm. It was done in this case. (BETR 1878)

There was no sperm detected. I may be wrong, we would have to check with a serologist, that if it is positive for sperm, they will run the P30. P30 is looking for the antigen for the sperm to see if there is any detection of any sperm or acid phosphatase. I don't know if P30 was run. I would have to check with the serology report.

Injuries to the mouth of three boys could be caused by a punch or by

slap or by something firmly being placed over the mouth. (BETR 1879) The contusions, the superficial cuts inside the lips may be caused by a gag, but not the cutting wounds on the outside of the lips. A gag would cause those type of injuries to the inside of their lips. Sometimes you may see damage to the tongue. Other times the tongue, you may not. If the penis or object was inserted into the mouth and it was forceful, I would expect to see some injuries. If the penis was inserted way back into the back of the mouth, I would expect that you should find some injuries. (BETR 1880)

But then again, you may not. There are a lot of factors involved, the size of the penis, how forceful the sex is, and things of that sort. If the oral sex was forceful enough to cause those bruises on the outside of the mouth, I would think you would expect them to also cause them on the inside of the mouth. The only damage I found inside their mouths was some superficial bite marks on one of the boys inside the cheeks. But there was no injuries noted to the back of the mouth.

Based on what I have seen in my examination of these boys, and based on my experience and my training, and based upon a reasonable degree of

medical certainty, it is difficult to give an opinion that these boys were not forced to perform oral sex. They have injuries that are consistent with that, you know. They had the ear injuries. They had the mouth injuries. It could be another modality how those injuries were sustained, but we see those type of injuries in people who are forced to perform oral sex. But then again, there are no injuries to the back of the mouth. And one way you can explain that is that the mouth wasn't totally opened, the teeth were clenched.

They had injuries that we normally see in people, especially children, especially the ear injuries, who are forced to perform oral sex. Injuries to the ear, they can also be caused if those boys are tied up in the fashion that they are and if someone wants to grab them and pull or pick them up, that can cause those same type of injuries. (BETR 1882)

I submitted it to the serology section of the laboratory, and they examine them and they issue a report and no semen was identified in all three boys. In my experience, someone who is forcibly sodomized, I have always seen injuries to the anal and vaginal regions and you expect to find lacerations, contusions and abrasions. Hyperemia is reddening of the mucosa, congestion. If a capillary is filled with blood, that would be hyperemia, more

blood than normal. It's that the vessels are filled with blood. Part of that depends on its position. (BETR 1883)

A hemorrhage is when those small microscopic capillaries break. I examined them and made microscopic efforts to determine whether or not there was hemorrhage to the anal areas. On the slides I took, there was no hemorrhage identified. So if one did conclude that there was any -- there was not enough force to break and damage a microscopic capillary. There was no injury noted to the anal-rectal mucosa. And in my experience and in my training, if someone was sodomized, I would expect to find injuries. In a child, definitely, and that was not found. I found the injuries on the ankles and the feet to which the ligatures, where they were tied. I found no evidence of being tied with a rope. (BETR 1884)

There was some abrasions there, maybe -- I can't put a pattern to them. There were no foreign fragments such as wood fragments, glass or debris in the wounds. If someone were to be hit with a stick like this that had bark that just crumbled and it comes apart, I would expect there to be some evidence of that left behind in the wounds. Unless it was washed off being in the water. I think I would expect to find some fragments. I found no fragments on any of

the three boys. I testified that some of these injuries could be caused by being hit with an object of this size. (BETR 1885)

The same injuries also be caused by a baseball bat. A baseball bat would have a different type of pattern of injury, but you could get a similar pattern. A baseball bat could clearly cause a skull fracture and could clearly causes a bruise to the top of the head. So could a rolling pin or a flat part of a shovel. There are hundreds of items that could be wielded as a weapon to cause these types of injuries. A piece of wood, a two-by-four could have done it. (BETR 1886) Or a broom handle, a mop handle, a shovel handle, or objects similar to that appearance, such as a tire iron. Even possibly a jack handle or flashlight. There is any number of items, hundreds of items located in almost any household that could be wielded as a weapon to cause the types of injuries I saw. I am not telling this jury in my opinion those are the murder weapons. Objects such as this type are consistent with causing those type of injuries. I never said these objects caused those injuries. (BETR 1887)

These sticks went directly to the trace section of the laboratory. And after they were through looking for trace evidence, they were submitted to me; so, all the analysis on these sticks were done by the trace section of the lab,

not me. Both of the knives have serrated edges. The only way a serrated knife can leave a pattern is if it is rubbed across the skin. If you have two knives, this knife, for example, and this knife here, and you would stab someone, by looking at the stab wounds, the both, both knives go in straight down, you cannot tell the difference if a straight-edged knife did it or a serrated knife did it because they both have similar appearance. The only way you can tell. a serrated knife has been used is by looking for the serrations that rub across the skin. (BETR 1888)

If that serrated knife was used, the elasticity of the skin, the angle that the blade is being used, and the reaction of the body that's being scraped, all three of those factors can make the abrasion pattern different from the actual serrated pattern of the knife. If the serrated pattern of one knife has a one-eighth gap, and then a one-quarter inch, one-eighth and then one-quarter inches or three-eighths inch and a half an inch, whatever the pattern is, those three factors could make two knives with obviously different serrated patterns cause the same type of injury. Any serrated knife could cause these kinds of injuries that you saw, but if you have a larger serration, you usually differentiate that more from a smaller serration. But, if the bodies do move,

there will be distortion on the skin. (BETR 1889)

I hate to use the word "speculation," but you can see the pattern. You can tell the difference between a small serration and a large serration. And sure, there are distortions when the skin is moved like the elasticity of the skin. I never said that knife caused those injuries. I said a knife of this type, of these types are consistent with causing those types of injuries. But I never said that these two knives sitting here caused those injuries. Any number of knives that have serrated patterns could cause these injuries. Any number of items that have these diameters could cause those other injuries. (BETR 1890)

State's Exhibit 70C is the genital region. Here on the thighs, you can see all the superficial gouging type wounds and some of them are deep. They go into the soft tissues. This is all this area around here on the thighs. Now, here, this red area here. This is the shaft of the penis, and here is where the scrotal sac and testes should be. So, what we have is that the skin overlying the penis, the head of the penis, has been carved off. It's gone. It's not there.

Around here, this large opening here, are multiple cuts. Here's the large cutting wound around here to cut this out. This is the cutting here, and the red is the shaft of the penis. (R 1891) His penis has been not cut off, the skin has

been taken off the penis. A man's penis has glands in it, and those are contained in the shaft of the penis. When you get to the head of the penis, the glands stop. And in this case, the skin off the penis was actually dissected off. The glands in the shaft of the penis are relatively intact. I would think it would take some skill and precision to do that. Well, I don't know if it would take someone who had some medical knowledge. (BETR 1892)

Someone who had some knowledge of anatomy. If this was to be done, this dissection where the skin is cut off, that would take a very sharp instrument, such as a razor or sharp knife. If I were asked to do this back in medical school in gross anatomy, it is not something I think I could do in five or ten minutes. I would think it would take me longer than five or ten minutes in my lab with a scalpel. (BETR 1893) It would be difficult to do it in the dark. It would take longer than if you were doing it in your lab under ideal conditions. It would be very difficult to do in the water. If I were in the water and it was dark, it would take even longer. If I were doing it in the dark, in the water, with mosquitos all around me, that would make it even much more difficult. I would think it would really be a tedious task to do it in the dark, in the water, with mosquitos all around. It would be a very tedious task for a

skilled pathologist. (BETR 1894)

The boy who was mutilated who has just been described bled to death, he exsanguinated. He bled to death along with his other injuries. My autopsy reflects that the internal organs were pale. They become pale when the blood is gone. People have a little bit more than five pints of blood. If you pour out five pints of blood out here on the floor, it would make a big mess. (BETR 1895) You could clean it up, but not very easily. It's not easy to clean blood. Blood soaks into the ground, blood soaks into wood. The homicide we are talking about I would agree that this could have happened in one of three ways, in the water, on the bank there by the side of the ditch, or it could have happened somewhere else. I agree those are the three possibilities of how this could have happened. It would be very difficult for it to happen in the water. (BETR 1896)

I don't know the absorption rate of blood at the scene and in soil. But I just would like to clarify one fact for the Court, that I am not a prosecution witness. The crime lab is an independent agency. We don't work for the defense. (BETR 1897) We don't work for the prosecution. We are an independent agency; so, I'd just like to clarify that.

Based on my skills, my education, my training as a forensic pathologist, the experience that I have had over the years, with my knowledge of the amount of blood that was lost from not only Chris Byers but these other boys -- they will bleed as well. With the amount of blood that you would expect from those injuries, it would be quite difficult to clean up that amount of blood at a scene in the dark. (BETR 1898)

So of the three possibilities that I agreed with you on, in the water, on the bank, or somewhere else, the most plausible is it happened somewhere else, of those three. What I understand, the scene is bloodless, the information that was provided to me. I don't know if I am interpreting that information correctly. I just think it is difficult to have injuries of this nature without having any blood. I would question that about the blood unless it happened in the water or it happened at some other place. I stated that I couldn't do this in the water personally. I have had an opportunity to review the coroner's reports and read them. (BETR 1899)

I examined the bodies and made my findings. I remember the prosecutor asked me about generalities about the time of death yesterday. We have had multiple discussions. I can't pinpoint a number. A half a dozen

would be fair. Based on my skill, and my training, and my experience, and my review of the bodies themselves, the information contained in the coroner's report, taking in all of the factors of the environment, manner of death, I can give you an estimate of a range. (BETR 1900)

With the bodies being in the water it makes it much more difficult, especially with the fact that the lividity fixing, being fixed compared to being unfixed, you know. Based, I assume you are asking me to base my opinion just on that one factor in the coroner's report.

Well, given a very wide open range for the fixation of the lividity, calculating back, it is very, very difficult to do just based on lividity alone. But, based on the other factors that I would have to take into consideration, you could say that the lividity was fixed up to 12 to 15 hours. It could be longer, and it could be shorter. (BETR 1901)

In my opinion based on what I have read, my opinion as to the time of death, it would be a very broad range between 1:00 a.m. to 5:00 a.m., Thursday, May 6. That opinion is based upon the facts that I know. Determination of the time of death is more of an art and not a science. And it's very subjective. And I am going by one fact that was put in the report. I wasn't

at the scene. I didn't have the opportunity to review, to examine the bodies at the scene. But, based on the information that I have, it could be a little shorter. It could be a little longer. That's my opinion, in that range. (BETR 1902)

REDIRECT EXAMINATION BY BRENT DAVIS

I told Mr. Fogleman when he came to my office that it would be difficult to give an accurate estimation as to the time of death. I said the best thing to do would be to have the coroner, based on what he has in his report. I told you at that time that I could not give an accurate estimation as to time of death based on one factor alone. In that coroner's report, the only factor I had was one. That one factor was lividity. I am familiar with an author, Vincent DeMayo. Vince and I are on a first name basis. (BETR 1903)

This book on forensic pathology is an accepted text in the field. I have read that portion of Dr. DeMayo's book regarding the estimation of the time of death. He is a noted forensic pathologist. There is a portion that indicates how significant lividity is in making a determination at the time of death. I will read the sentence regarding the single factor of lividity in terms of estimating time of death. There are two sentences. It says, "Fixation can occur before eight to 12 hours if decomposition is accelerated, or at 24 to 36 hours if

delayed by cool temperatures. (BETR 1904)

Thus, the statement that rigor mortis becomes fixed at eight to 12 hours, is really just "a vague generalization." Dr. DeMayo, a renowned forensic pathologist, indicates that eight- to 12-hour time period is just a generalization. One of the factors which would throw that off would be the cooling of the body. The estimate of the water temperature was approximately 60 degrees. I don't know if that would mean that it the bodies were immediately submerged in water, that they would cool by degrees just like that; but they would cool. We would see a significant cooling simultaneously with their bodies, or nearly simultaneously with their bodies being submerged. (BETR 1905)

The book says livor mortis is not very important in determining the time of death. Livor mortis is more important in determining the position of a body. When determining time of death, you look for two other factors, or you need two other factors to even make an estimate, algor mortis and livor mortis, which is body temperature and body stiffness. Without the three factors or information regarding three, any estimation would be very difficult to estimate. The coroner's report reflects he didn't make any determinations as to

rigor. The reason was because to do that would require him to manipulate or mess up the bindings that were binding the children. (BETR 1906)

For the rigor mortis in the extremities. So he couldn't make that determination as to that factor, in the extremities. To determine algor mortis, you would need, the best thing would be to take a rectal livid temperature. To take a rectal temperature could possibly affect evidence of a sexual or sodomization of the children. I didn't have that information to work with. I did indicate yesterday that there were no mosquito bites or any such bites on the children. The sexual mutilation, basically, the skin was peeled off the penis and the head of the penis was removed, along with the scrotal sac and testes. (BETR 1907)

I believe I saw a photograph of where the crime scene occurred as far as the configuration of the ditch bank, what the ditch bank is like, what the creek banks are like near the water. There was one weapon used on these three boys that was a sharp object such as a knife. One weapon that would be consistent with the size of a broom handle (BETR 1908).

Another injury caused by a weapon that is large and blunt. My testimony is not that these two particular items caused the injuries, but I found

injuries consistent with three different type weapons. No sperm was detected either in the anal area or the mouth of the children. The effect of the bodies being submerged in water, number 1, and anal dilation of the anus, the water would enter into the body cavities, and it could wash the sperm away (BETR 1909).

When we talk about serrations, we are basically talking about the same thing as saw teeth, like on a saw. If you take a saw, you move it back and forth, you are not going to be able to tell that that is a serrated injury. It's just going to be a straight-line cut. If you take a saw and slap it down across your arm, you are able to see where the teeth or the points of that saw come in contact with the skin. The injuries that I determined were serrated, those are no injuries where the blade moved. They are injuries of the blade rubbing against the skin. One way that you would see serrated patterns would be if the serrations were dragged crossways across the skin. And if the serrations were slapped down on the skin, then you would also see a serrated pattern. (BETR 1910) But if the serrations are moved, you end up with a straight line. The smaller the serration or the distance between points, then the less distance you have to move that knife to end up with a straight-line incision.

I am familiar with medical literature regarding injuries from sodomy to small children which indicates that there may not be any lacerations inside the anal area. There is literature to that effect. The injuries that you look for inside the anal area would be consistent if there was forced penetration of a large object. (BETR 1911)

With attempted anal penetration, you would not expect to find the lacerations unless the object did not enter into the anus. Lack of sperm both in the anal area and the mouth, would indicate ejaculation. There could be sexual assault and sexual attack without the presence the sperm. The lacerations and the degree of trauma to the anal area would be based on the size of the penis or object if the person was sexually attacked.

One of the boys that I indicated yesterday had a round type circular abrasion to the forehead that looked like another abrasion in the center was consistent with a belt buckle type injury. (BETR 1912) It was to the boy's forehead. As to the time of death, that was based on when they were last seen, when they were found dead, and what was found, the lividity when the coroner arrived at the scene. My opinion was not based on all those factors. It was based on the lividity and the two factors that I just mentioned I would

have to take into consideration. They couldn't have died before they were last seen or after they were found. And the only medical factor that I based it on was lividity, which was information I obtained out of the coroner's report. (BETR 1913)

In day-to-day business as a forensic pathologist, presented with the one factor of lividity and no other information in terms of body temperature, amount of rigor, anything of that nature, I wouldn't be too comfortable with just that one factor, lividity; making estimations regarding time of death. The coroner's report wasn't written to the standards that it should have been written to. After I received the bodies, the coroner contact me requesting information concerning my conclusion that he had failed to get the information that a coroner would normally get prior to sending the bodies to your office. (BETR 1914)

RECROSS EXAMINATION BY PAUL FORD

The coroner report indicates what the temperature of the water was, approximately 60 degrees. I was aware of that fact when I gave my opinion here today and I took that into consideration. I took that into consideration, my experience, and knowledge that I have gained over the years of being a

pathologist. I took into consideration factors like how hot it was that day, the ambient temperature, and the air temperature. (BETR 1918) I took into account the water temperature, when they disappeared, when they were found, the cause of death, and the manner of death. I also indicated that I had two other doctors that work with me. I discussed my opinion with them. They were in agreement with my opinion. (BETR 1919)

REDIRECT EXAMINATION BY BRENT DAVIS

In the coroner's report that I referred to which provided the one factor upon which my opinion is based, indicated no differentiation between the lividity in either of the three boys. The coroner's report states lividity, blanches with pressure. It doesn't mention the amount of lividity, where the lividity is. We are building a house starting with the roof and -not with the foundation.

It just says lividity, blanches with pressure. I don't know where he is measuring that from, what part of the body. I have no idea. It would be best to ask him. (BETR 1920)

REDIRECT EXAMINATION BY VAL PRICE

I believe, I would assume you would find blood on the clothing if the

boys had been beaten with their clothes on. (BETR 1921)

KERMIT CHANNELL

DIRECT EXAMINATION BY JOHN FOGLEMAN

I'm a forensic serologist. A forensic serologist is someone who examines evidence for the presence of bodily fluids such as blood, semen, or saliva which may have been transferred from one individual to another, or from one individual to an object.

In the course of my duties with the Arkansas State Crime laboratory, I examined a number of items at the request of the West Memphis Police Department in the case where the victims were. Michael Moore, Steve Branch, (BETR 2104) and Chris Byers. State's Exhibit 80 is listed as ligature/ shoestring, medical case examiner case number 32993. This item is Q44

which is also marked as ligature shoestrings, Christopher Mark Byers. These items were submitted to me for examination in the course of your duties at the Crime Laboratory. After examining these two items, I received a possible tissue recovered from both Q-4 and Q-39 (BETR 2105) These items were submitted to Genetic Design Laboratories in Greenville, North Carolina.

State's Exhibits 45, and 48, I can identify these items. It has my case number, and it's marked as my item Q-10, which is a pair of pants. This item also has my serology case number, my Q-5 and Q-6 which consist of a wallet, and Q-6 is blue jeans. Q-6 is Exhibit Number 48. And my Q-10 is Exhibit Number 45. I examined both sets of pants for the presence of blood and semen. For the blood we use a screening test called phenolphthalein. I took the items of clothing with a swab and went over them carefully, and tried to determine if there could be blood on these items. On both sets of pants, (BETR 2106) the items were negative. I could not determine if there was any blood present. The effect of these items being wet, especially being submerged in water or even being dirty or soiled, has a very detrimental effect on any type of biological materials that you might find. Being in water can make it virtually impossible at times to identify any type of material.

Regardless of water temperature still it will deteriorate the sample.

I examined these items for the presence of semen. The first test that I used was basically a screening tool. I laid the clothing out, and because of the nature of the (BETR 2107) clothing being very dirty and soiled, I used a laser which emits an ultraviolet light which helps to pick up any possible stains that you might not be able to see with the unaided eye. I did find some areas, I made cuttings of those areas, and further tested them for the presence of acid phosphatase. Acid phosphatase is the enzyme which is found in semen. It is also found in other items for instance.

However, it's not in the same quantity. We can not quantitate the amount of acid phosphatase present. Therefore, we use it again as a screening tool to tell you whether or not there could be semen present. I then took those cutting, and looked microscopically to see if I could identify any sperm cells present, which I could not from either pair.

And I further examined those cuttings for the presence of what is termed p30, which is prostatic antigen which is specific to the male prostrate. In this examination, I did have some positive controls along with my cutting samples which indicated to me that there could be some interaction with the

material that was hindering me getting a proper answer.

Therefore, I had to conclude that I could not determine based on my testing that semen was present. And because of that reason, I then took these cuttings, and submitted them also to Genetic Design where they could employ DNA testing which is far more sensitive than my testing. (BETR 2108)

I ran the laser screening test, and also the acid phosphatase as a screen and these reactions were positive. For those specific screening test. If one screening test is positive, that lets us continue with our testing. If it was however, negative, then we would stop the analysis at that point. Both test were positive as a screening test for the presence of semen.

On my P30 test, I had a positive reaction upon my samples. However when I did further work

with controlled areas which were just as dirty or slightly soiled as the other questioned areas, I received a reaction in my opinion which could be considered consistent with a positive control--with a positive P30. (BETR 2109) I couldn't tell whether semen was present or not present. Because of that I submitted it to Genetic Design where they could run more sensitive test. Areas cut from the pants. Each area that I've circled areas oh the blue jeans,

and cut out those specific areas, and that was what I submitted. the effect of the body being submerged in water would have a very detrimental effect. With the water, it'll have a tendency to flush out anything that could be there, and very well hinder any identification that we could make. State's Exhibit 87, I can identify. It has my serology case number, and my Q-85 which is listed as State's Exhibit 87. (BETR 2111)

Exhibit 45 labeled E-3, pair of blue pants. (BETR 2120)

Here is the area of the cuttings for my control samples here. And inside the left side, reflects my E number and laboratory case number. The circled area here is part of my cuttings here. And here's my second cutting. These cuttings that were submitted to Genetic Design. My questioned item number here reflects my control sample cuttings here. One on the back side is the one that Lisa Sakevicious did. It reflects her initials. The one that I took and submitted to Genetic Design that the screening tested positive for was this cutting from this area. This is my questioned area here. I looked under the microscope to see if I could (BETR 2121) see sperm cells. As part of my duties in this case, I went out to the crime scene.

CROSS EXAMINATION BY VAL PRICE

On the report dated June 1, 1993 certain items were sent to Crime Lab to my serology section, and there were various tests that were requested by the West Memphis Police Department with your section on these (BETR 2122) items. Some items that we got directly from the medical examiner's office, and there were some miscellaneous clothing items, and some other items that came from different individuals. The items that were initially received in the lab on May 7, 1993.

On the items received from the medical examiner's office, and the West Memphi.s Police Department. This particular report would have been dated June 1, 1993. (BETR 2123)

This knife right here which has been listed as E-169 and the exhibit sticker is Exhibit 77. I performed an analysis for blood on that knife and assigned it a different number, a Q-133. (BETR 2161) This is a photocopy of a report that I performed on this knife in which I concluded that no blood was found on Q-133. So this knife right here, Q-133, is my Q number. That's correct. (The report was introduced as Defendant Echols' Exhibit 10 without

objection.) On May 26, 1993, I received a 3 page letter from Gitchell of the West Memphis Police Department requesting answers to questions he had about certain pieces of evidence. (BETR 2162) Question 14 states, "Is there anything which would indicate a black male involvement?"

CROSS EXAMINATION BY PAUL FORD

The third page of that letter dated 5-26-93 states: "Anything you can think to give us would be greatly appreciated. We need information from the Crime Lab desperately. Today is the third week the boys are missing. Tomorrow, 2-27-93, will be the actual third week. We feel like we have not gotten sufficient information from the Crime Lab. (BETR 2163) We realize that you have other cases coming in and must go to court on other matters. However, this case has received national recognition and without the Crime Lab's information, our hands are tied. The efforts of everyone in the Crime Lab is greatly appreciated. The officers investigating this matter and myself need this information. We feel as though we are walking blindfolded throughout the case at this moment. Please answer the above questions as soon as possible and fax it to my attention." With respect to the tests that I conducted, I dId not find one thing to link Baldwin to this crime.

REDIRECT EXAMINATION BY JOHN FOGLEMAN

With the limited amount of evidence, I did not find anything to link anybody. Gitchell also was asking questions to Peretti about not having any information on time of death. The ability to find blood on the knife, State's Exhibit 77, would be effected if it was submersed in water. (BETR 2164) The submersion of a knife in water would be detrimental to any blood that could possibly be on a knife along with the surface tension of the blade itself. I would find it highly unlikely on any object like that being submerged in water, whether it is a knife or basically any item. Surface tension is the area of the knife. I would not expect to find any blood if it were submersed. There was nothing that I did that indicated the involvement of a black male. (BETR 2165)

MICHAEL DeGUGLIELMO

DIRECT EXAMINATION BY JOHN FOGLEMAN

I am a director of forensic analysis for Genetic Design. Genetic Design is a genetic testing company that specializes in human identification. We do testing primarily in three areas. I am responsible for a forensic lab which tests primarily criminal cases and some cases involving parentage where there are

deceased individuals. We also have a parentage testing lab which does primarily parentage testing for Social Security for the agencies and also we do bone marrow tissue typing for transplants. (BETR 2166)

In the course of my duties with Genetic Design I received a number of items from either the Arkansas State Crime Lab or th& West Memphis Police Department for analysis. Among those items I received samples of the victims' blood which would be James Michael Moore, Chris Byers, Steven Branch. I also received what were labeled by the Crime Lab as Q-4 and Q-39 - as possible tissue from some ligatures. Our lab does DNA testing specifically in criminal cases, and there are two basic types of DNA testing. Those two types of testing are decided based upon the evidence in any given case and the amount of evidence that we actually have to work with. (BETR 2167)

The first type is what is referred to as restriction fragment length polymorphisms or RFLP, and that's the more conventional DNA testing that as things stand right now we would prefer to do in every case because we can gain more information from it. However, we require a certain amount of DNA in order to be able to do that test. In this case these items in particular contain very, very small quantities of DNA, if any detectable DNA.

Because of that, we used the second type of DNA testing called PCR analysis. It works where there are small minute amounts to work with, but unfortunately it is not quite as informative as the traditional type testing. In this case we performed two separate PCR based tests to try to differentiate between the various items of evidence.

There are results of the tests performed on the items Q-4 an Q-39, the possible tissue from the ligatures. Those two items failed to reveal the presence of any detectable amounts of DNA. The first portion of the analysis is for us to remove the DNA from the items and to try to get an idea of how much is there that we have to work with. The quantitation that we do is a rough approximation. It gives us a general idea, but in this particular case there was no detectable DNA there from those items. (BETR 2168)

There was no detectable DNA from this possible tissue which means several things. First, it might not have been a human specimen. It might have been any number of things that you would find on items of evidence that are exposed to the environment, or it could have been human tissue that was either too small and degraded so that we were not able to obtain DNA from it. unfortunately, any biological material when exposed to various conditions will

start to decompose and degrade, and the DNA contained in it will decompose and degrade as well. And if that occurs, especially in very small specimens, sometimes it's not possible to detect anything that would have been there.

We also examined some cuttings submitted by Channel which were labeled as Q6, which came from Exhibit 48, and Q-10 coming from Exhibit 45, some pants or jeans. We performed the same type of tests on those items that you did on the possible tissue. Those two particular items were submitted to us as what we considered questioned stains. (BETR 2169) In evidentiary specimens when we're dealing with questioned stains, we do a slightly different procedure because many times in cases those, stains will contain a mixture of seminal material and other potential biological evidence so we do a differential extraction. The purpose of a differential extraction is to separate sperm cells from any other biological material that might be there. To give you the best example, in a typical sexual assault case the evidence will most likely be an item of clothing or vaginal swabs from a female victim. The material contained there will be comprised of two things, epithelial cells from the victim and sperm cells from a potential perpetrator in the case. Our goal would be to separate those two types of cells, and that can be accompiished.by

taking advantage of certain physical properties of sperm cells that make them different from other cells. In doing so it enables us to more accurately compare those specimens to the various people we are going to test down the road.

We performed the tests on cuttings from the pants. The results of the tests showed that we did recover a small amount of human DNA from those two items. (BETR 2170) Particularly, when we do this differential extraction, we separate them into sperm and nonsperm components, and in this test detected small amounts of DNA in the sperm or male component of the two specimens we were testing. It was what we considered to be a marginal amount, meaning it was basically at the threshold of what we might be able to detect using the analysis, but it was definitely DNA that was there. From that we would proceed then with the remainder of the PCR based testing to try to get a type from those particular specimens. Unfortunately, with those items, we were not able to do that. Blue jeans in particular contain, depending on the variety of brands, a number of sizings and different dyes that roughly half and half times will interfere with the enzymatic activity that is required to do the test and when that occurs and we are not able to remove that material from the

blue jean that we've gotten the cutting from, what happens is that we are able to get no result from it. Even though the DNA is there, it becomes impossible for what we refer to as amplification to occur because the enzyme can't function in the presence of those inhibitors.

When we run these tests, we end up with two what are called fractions. (BETR 2171) Epithelial fraction and the sperm fraction. When we ran the tests, we did not find any DNA in the epithelial or nonmale fraction. What I found in the sperm fraction was a small amount of DNA. By a small amount, to be specific, the threshold of limitation for this particular quantitation or measurement of how much DNA there is, is set at what is 50 picrograms of DNA. Now, to give you an idea, a picogram is part of a metric measurement, just like meters or kilometers or kilograms, and the best way to envision this is that the basic unit of measurement is a gram. That is approximately the size of a dime. When we're talking about DNA, we measure it in micrograms or nanograms or picograms. And a picogram is approximately one trillionth of a gram. The threshold for detection in this test is 50 picograms, or fifty trillionths of a gram. It is an extremely small quantity, but you have to consider that that has to fit inside the individual cells in our body so it by

necessity has to be small. (BETR 2172)

Based on those tests, I have an opinion of the source of the DNA based on the parameters involved in the extraction process. Most likely that the DNA that we were detecting did come from sperm cells, because it showed up in the portion of the analysis where we would expect DNA from sperm cells to show up.

Defendant's Exhibit 6 is in one of my boxes. I recognize this knife, because my lab ran tests on that knife. I ran tests on material that we recovered from the knife that looked like this knife that we packed in a box like that. When the knife was received by my firm, we looked at the substance before it was removed. When we received the material on this knife, it was related to us that there was a small amount of what appeared to be blood that was dried or tissue in a crevice in the knife where the knife folds when it locks, and there was definitely a material there. I can't personally say it was blood or tissue or that it was dirt from actually looking at it. (BETR 2173) Somehow we removed the substance and then we ran some tests on it. There was DNA present on the knife and that we were able to get a type using a test called HLA DQ Alpha from that particular specimen. The DQ Alpha is the

most sensitive test that we run. When we are using PCR based testing, HLA DQ Alpha is the first PCR based test that we use and because it is more or less a threshold. It sets a sensitivity level for us as far as what we can detect. We made an attempt to run a test called D-1S-8O. We were not able to obtain a result from the specimen when we ran that test on the knife. The DQ Alpha type on the blood from the knife was 1.1,4. (BETR 2174) We also have a blood sample from Melissa Byers, Ryan Clark, John Mark Byers, James Michael Moore, and Chris Byers. John Mark Byers had the same DQ Alpha type that was detected from the specimen from the knife. The DQ Alpha type fqr Chris Byers was also the same type. As far as the DQ Alpha analysis, the blood on the knife and Chris Byers' blood..and John Mark Byers' blood all had the same DQ Alpha type.

CROSS EXAMINATION BY VAL PRICE

On my July 13, 1993, report it stated that May 24, 1993, we received 10 items of evidence. (BETR 2175) Item four, was a blood sample from Echols. We performed an liLA DQ Alpha on the blood sample of Echols and he had a 2,3 HLA DQ Alpha type which is different than the 1 . 1 , 4 that I mentioned earlier. The January 27, 1994, report states that on January 10, 1994, we

received the knife that I referred to a few moments ago. The number that was previously assigned to that knife was E-178. That was a number that the Arkansas Crime Lab assigned to it before I received this knife directly from Gitchell. My lab did not assign the E-178 to it. (BETR 2176) The knife that I referred to came out of this bag which has previously been marked for identification purposes Echols as E-6. The knife that I looked at is the knife when I testified on direct examination that I examined. The box that we returned has been opened so I am under the assumption that is the same knife. It is like the one we packaged. (The State stipulates it is the same knife.)

I testified that the small amount of what I thought was either blood or tissue was found on the hinge of the knife. (BETR 2177) When the blade is closed, there is a recessed portion of the knife back where the blade actually makes contact with the casing portion of the knife, and the portion that we removed was from that recessed part of the knife where the two come together. We did not find any substance that we tested on the blade of the knife. When we test the items for the DNA testing, that is use specific for human or higher primates. It's generally accepted that it's specific for humans. All the probes are actually specific to higher primates. Based on the test that

we did, the item that we found on the knife would not have come from an animal such as a deer.

CROSS EXAMINATION BY PAUL FORD

We did not find one thing to connect Baldwin to this homicide. Baldwin was a 1.2,4. (BETR 2178)

RECROSS EXAMINATION BY VAL PRICE

My lab charges a certain amount for each test that is performed. We performed 13 tests the initial time. On May 24th and mine 7th. The total bill of the lab would have been $4,550.00. There were some other items we sent throughout the rest of the investigation, and the bill for the remaining items was about $3,800.00. Besides those amounts, I charge for testifying in court.

RECROSS EXAMINATION BY PAUL FORD

After all that $7,000.00 of reports, we found nothing to connect Baldwin to this crime. None of the things I tested matched Baldwin. (BETR 2179)

REDIRECT EXAMINATION BY JOHN FOGLEMAN

None of the things matched anybody else's blood type that was submitted other than the item on the knife matching both the victim and John

Mark Byers other than a tee shirt that is not involved in this case. There were 2 other items, two different shirts, Q-52 and Q-85, that matched other people. That is the tee shirt not involved in this case. I do not know whose shirt, Q-52, the blood matched. Other than those things, nothing matched anybody, until the knife and the hair specimen.

RECROSS EXAMINATION BY VAL PRICE

None of the items I tested matched Echols. (BETR 2180)

LISA SAKEVICIUS

DIRECT EXAMINATION BY JOHN FOGLEMAN

I work at the Arkansas State Crime Lab. I'm a criminalist at the Arkansas State Crime Lab and I do hair and fiber comparisons. (BETR 2241) I am an expert in my field. I received items from the Medical Examiner's Office for examination. State's Exhibits 80 is the ligature from Michael Moore. (BETR 2242) State's Exhibit 82 is the ligature from Chris Byers. State's Exhibit 81 is the ligature from Steve Branch. I examined the ligatures for the knots for hairs and for fibers. State's Exhibit 80 is the Michael Moore ligature. The left wrist consisted of a square knot, and I also removed a skin tag from inside the loop off the left leg. The right leg knot was a series of four

half hitches, and the right wrist knot was a series of three half hitches. (BETR 2243) On the left wrist of Michael Moore, we had a square knot and on the left ankle of Michael Moore there was a square knot. The right wrist had three half hitches. The right ankle had four half hitches. The left side had a particular type of knot, square knot, and on the right side was a different knot. The only difference between the wrist and ankle was an additional half hitch.

On State's Exhibit 81 of Steve Branch, the right leg knot was a series of three half hitches and a loop around the leg was tied twice. The right wrist was a half hitch with a figure eight. The left leg knot was a series of three half hitches. The left wrist knot was a series of three half hitches. On Steve Branch on the left wrist we had three half hitches. (BETR 2244)

On the left ankle we had three half hitches. On the right wrist we had a half hitch with a figure eight. Then on the right ankle we had three half hitches with an extra loop around the leg. On the left side on the left wrist we had one type of knot and on the left ankle you have the exact same knot. There were three half hitches in both places. On the right side on the wrist we had one half hitch with a figure eight. On the ankle we had three half hitches with a loop on the leg. On the right side we had something a little different. (BETR 2245)

State's Exhibit 82 of Chris Byers on the left the knots were a series of two half hitches on the wrist. On both the left and right ankle and wrist you had double half hitches on all~knots. On Chris Byers, every knot was the same.

In my duties with the Crime Lab I also test for fibers. Generally we have two sets of clothing, sometimes involving bedding. I will use a piece of tape to collect fibers from these items, and I will attach the tape to a glass slide. I'll clip a standard from all the applicable items, ones that have good colors or fiber types in them. I will take this standard and smear it across a glass slide also, and then I will compare my questioned slides with the standard to see if I can find any that are like that. (BETR 2246) After I find something that looks good, I will take it off the slide and do a microscopic on it to make sure it looks similar and it looks like the basic fiber type involved. If it passes this test, then I put it on a microspectrophotometer. Here I look to see that they have the same curves. If thdy pass this test and they are a synthetic type fiber, then I will put them under an instrument called a fourier transform infrared spectrophotometer. Here I see if the basic polymers that make up the fibers are the same. Polymers are synthetic material usually made

out of petroleum products, like plastic. Primary transfer is if I touched one of you and then did a tape lift and I found fibers from my item on you, that would be considered a primary transfer. A secondary transfer would be if you touch someone else and then tape lifts were done on that person and fibers from me were found on that person, that would be considered a secondary transfer. You get secondary transfers when you have got clothes hanging together in the closet. I examined some items that were submitted by the West Memphis Police Department. (BETR 2247) State's Exhibit 45 is clothing that I examined. In the lab we examine our, items on clean sheets of white paper, and then we fold them back up and put them back in the sack. I have noted on the condition of the clothing items when I received them at the lab. E-3, Exhibit 45, is a pair of blue jeans. They were found inside out and they were heavily soiled. They were still, slightly damp because we took all the items out and left them on white paper, and we covered them with white paper for them to dry over the weekend before I started my analysis. (BETR 2248) The same sacks were used that they were received in. I examined that' clothing, E-3, State's Exhibit 45, for fibers. I examined Exhibit 8 and Exhibit 44. I examined all those items of evidence.

On June 3, 1993, Kermit Channel and I helped search Echols residences. (BETR 2249) As a result of my prior examination of fibers found on the victims' clothing, there were particular fiber types that I was looking for I had examined the slides from the victims and trying to find similarities in fiber types which could have come from the constituents of the clothing they were wearing -- which could have come possibly from an assailant. I had in my mind a number of fiber types that I had seen. I recovered the item in State's Exhibit 85 from Echols' residence. State's Exhibit 88 is a bag. I recovered that item from Baldwin's residence.

After those items were recovered, I made a comparison with items from the victim's clothing. (BETR 2250) I used these items as the standard and I compared them against the slides of the victim. When I found fibers that looked similar, I took them off and did the microscopic examination and then I did the microspectrophotometer examination. Then I did the fourier transform for thread analysis.

On Exhibit 45, the blue pants, I found a green polyester fiber from E-79 which would be Exhibit 85. They were similar fibers not that it came from them. E-5, State's Exhibit 8, is the Cub Scout cap. A green polyester that was

microscopically similar to the fibers used in the construction of E-79, a shirt. The shirt that was recovered from the Echols' residence. (BETR 2251)

State's Exhibit 92 is a photograph of this shirt. I recovered the shirt. The fiber content of that shirt is cotton polyester blend. On State's Exhibit 8, the Cub Scout cap, I found one green polyester fiber which was microscopically similar to this shirt. (BETR 2252) On State's Exhibit 45, E-3, I found a green cotton and a green polyester fiber microscopically similar to this same item. On the pair of blue pants, State's Exhibit 45, I found one cotton and one polyester which were microscopically similar to the fibers contained in the same shirt. I participated in the search of Baldwin's residence. State's Exhibit 88, a bathrobe, was found at the Baldwin residence. I am not suggesting that Echols wore this little shirt or that Baldwin wore the bathrobe. (BETR 2253) This is where secondary transfer may come into play.

I found a single red rayon fiber on Exhibit 44, which is E-2, microscopically similar to that used in the construction of the robe, State's Exhibit 88. Being submerged in water is very detrimental to the recovery of fibers, hairs, and other trace evidence.

There was a single Negroid hair recovered off of a sheet used to cover

the Byers child. (BETR 2254) There were no other Negroid hairs recovered.

The fibers in State's Exhibit 88, were found on E-2 which was a black and white shirt which is State's Exhibit 44. After I recover something on the tape, I use a stereoscopic examination. This magnifies the fibers 20 times their normal size. If I feel they look similar to the standard, I recover them off the slide and d do a microscopic examination. Here my examinations were run from 100 times to even 400 times magnification of their normal size. I will look at the diameters, the shape if the fiber, their color, I will see if there are delustrants there. A delustrants is a compound called titanium dioxide. They are small particles that are placed into the polymer before the fibers are made and these will cause the fiber to have a duller appearance. (BETR 2255) They won't be so bright in the garment when it is finished. I also look at optical properties of the fibers. Under cross polarized light, the background that I will see in the fiber will be black. The fiber itself if it has any birefringence characteristics at all, it will have a color to it. It should be different for different generic fiber types such as rayon, polyester, nylon. I'll study the sign of inlongation. The sign of inlongation is another optical property that some low birefringence fibers have.

If the fibers pass all the tests and are similar in all these manners, then I will take them and do a microspectrophotometer analysis. We'll look at the dye characteristics and where the dyes absorb light and it will give me a curve. If these curves from the standard and the unknown match and if they are synthetic types, then I will go ahead and do the fourier transform analysis. If the polymers match, then I consider the fibers similar. We don't do the fourier transform infrared analysis on the one cotton because cotton is cotton. (BETR 2256) On the other 3 fibers, the results were the same or similar.

CROSS EXAMINATION BY VAL PRICE

My June 29, 1993, report contains a paragraph that states:

It is pointed out that fibers do not possess a sufficient number of unique individual microscopic characteristics to be positively identified as having originated from a particular item to the exclusion all others.

This means that if you were to go to Wal-Mart, you'd see a rack of clothing and all the clothing on it is the same. It could be that all these fibers were made at the same time, and they'll have the same characteristics. (BETR 2257) And any number of people might have that garment in their house. So

if I find a fiber similar to another item, then it doesn't necessarily mean it came from that item. It could have come from one of these other items that was hanging on that same rack. All fiber reports contain this statement. The FBI recommends that this paragraph be included in reports. I am familiar with a book, "Forensic Science Handbook" by Richard Saferstein. I suggested that the defense attorney purchase this book to pick up some additional information about hair and fiber comparisons. This is an accepted text in the field. (BETR 2258) On page 211 of his book it states:

The limits of human hair comparison should be explained to the jury even though the questioned hairs even though the questioned hairs may be similar in all respects to the questioned hair and dissimilar to moat other hair, the forensic examiner can never say with certainty that there might not be another individual who possesses similar hair.

Although this is a paragraph on human hair comparisons it also applies to fibers as well. The two are similar in nature although hair is a different analysis. That book recommends that the limits of hair analysis should be explained to the jury. So the same concept should apply with fiber evidence.

Although this deals with hair, the same general information applies to fiber evidence.

There was the one green cotton fiber and this was recovered somewhere on E-3, the pants of Moore. (BETR 2259) The E-3 item, the pair of blue pants were inside out. This was microscopically similar to item number 79, the blue shirt that was recovered at Echols' house. This is a size 6 Geranimals shirt. There were 2 green polyester fibers that were recovered from the Cub Scout hat. (BETR 2260) One was recovered from the E-3, the pants, and one was from E-5, Moore's Cub Scout hat. These were microscopically similar to the polyester fibers that make up that Geranimals shirt. If there is any type of Geranimal shirt that has the same cotton/poly blend, the same colors, the same company, the same dye lots, it would also be microscopically similar to this shirt. If there were other clothing made by the same company by the same dye lots of a different size, then that also could be microscopically similar to the questioned fibers. (BETR 2261)

Three red cotton fibers microscopically similar to those used in the construction of E-92, a tee shirt found at Echols' house, were recovered from E-l, the Boy Scout shirt, E-3, the same pair of pants, and BR-1, a bag found

out at the crime scene. My notes indicate that there were several items found in this bag including a pair of blue jeans, a black thermal undershirt, pair of white socks, two BIC razors, one plastic bag and one tan short sleeve shirt. (BETR 2262)

On June 3, 1993, the day Echols was arrested, I went to his house and searched for fibers. After I performed tests and issued my report on June 29th, I discovered that these 3 red cotton fibers were microscopically similar to the red tee shirt that I found at the home of Echols on June 3, 1993. It is not common practice for me to the homes of the victims to see if there is any items there that might possibly match questioned hairs and fibers that I find. Actually, none of this. case has been common practice for me. This is the first time I ever participated in a search of Defendants' or victims' homes.

I indicated that on June 3, well, the report was issued on June 29th. On December 20, 1993, I went to the former homes of the victims, Byers and Moore. At that time, I took possession of an item at the Moore home, MM-1, which would have, been one red shirt, this is listed in my January 17, 1994, report. (BETR 2263) I tested the fibers found on the red shirt MM-1 and compared these to the 3 questioned cotton fibers that I referred to earlier. They

were also similar to the questioned fibers. I cannot exclude MM-1 as the source of those red fibers. The red tee shirt found at Echols' house and the red shirt found at Moore's house and these three red cotton fibers that were found at the crime scene are all microscopically similar. If there are other red cotton fibers in which the dyes are similar that are out there, they could also be 'microscopically similar.

I do not know if the West Memphis Police Department ever asked me to check any possible fibers that may have been on a Kershaw knife. I have examined a lot of knives. If my initials are not on this particular knife then I probably did not examine it. (BETR 2264)

In addition, there was one Negroid hair that I came in contact with in connection with this case. This hair came from FP-10 which was a white sheet that was used to cover the body of Byers. When I received that particular Negro type hair, I have not been able to compare it with any other hairs that I might have been sent during this examination. Sometimes in performing hair comparisons I receive a hair that belongs to a police officer that might be out at the crime scene to rule out that particular police officer as the source of a particular hair. I did in this case. I never received any Negro type hairs from

any West Memphis police officers to compare with this questioned hair. (BETR 2265)

CROSS EXAMINATION BY PAUL FORD

State's Exhibit 44, E-2, is a polka-dotted shirt. When I received that shirt, it was inside out. I do not recall where I recovered the fiber from. I do not know whether it was on the inside, outside, front, back, sleeve. I don't label my tapes as to the exact area only that they came from a particular item. With respect to the pair of pants that I testified about the fiber, it could have come from inside the pocket. I don't believe I pulled the pockets inside out. I just taped the outsides of the garment. I previously gave to Baldwin's attorneys the slides that I prepared and that another examiner prepared. (BETR 2266) I can identify the markings that are on slides E-2 and E-99. It has a case number, the item number, the fact that it is a questioned fiber. It is a red rayon, and I have it labeled as a match with E-99 which is the fiber that you found on this shirt. I believe that this is the entire fiber. (The fiber was introduced as Defendant Baldwin's Exhibit 1 without objection.) (BETR 2267)

I can identify this next slide by the case number, the item number, the

fact that it is a known fiber from the item that is listed. It is identified as red rayon and I have it mounted in permount. That is one of the slides that I prepared after taking fibers from this bathrobe. I took some of the fibers off of the robe and mounted them under this slide. (The slide was introduced as Defendant Baldwin's Exhibit 2 without objection.) Where the 2 circles are on the end is where you actually need to look. (BETR 2268) So those exhibit stickers will not affect the ability to look at them.

A comparison microscope is two microscopes that are bridged together with another optical instrument that has mirrors. It takes the image from each microscope and puts them in the same field of view so that you can examine the fibers side by side so that you can look at them at the same time. When I compare these two fibers together, I would slide one end on one side and one end on the other side and you can look through the eyepieces of the microscope and see both fibers at the same time. When I did that in this case, they looked the same to me. At that point I am looking at their. color and their diameter. I don't believe there is a pattern of delustrants in these. (BETR 2269)

Titanium dioxide is something that you add to the fiber to take some of

the sheen out of it. I did not see any of those in these fibers. If they were there, the pattern that they would have in the fiber, would be important. Sometimes you can see differences in pattern. I'd have to look at a great number of the standards to determine if there is a followable pattern.

If there had been testimony in this case that someone went to a grocery store and got a whole bunch of grocery paper bags and people started putting clothing directly from the water and into these bags at the scene, I do not know if there is any way to determine if there is a fiber inside the bag that could attach to the clothing. I do not know about the manufacturing process or packaging of grocery bags. We use a clean piece of white paper to put the clothes back in. I want to make sure that the paper does not place any fibers on to the garment itself. (BETR 2270) The Crime Lab takes great care to make sure that that-paper is not a source of evidence. Nothing was done by me or my lab to make sure there was nothing inside the paper sack itself. All evidence submitted to the lab is in paper sacks like this. We take it for granted that they are clean.

When I looked at the hairs under the visual medium of the comparison microscope, where I could see them both at the same time, they looked the

same. At that time, I looked at the qualities of color, shape, and striations that made them seem the same to me. In this particular fiber the cross section is not completely round. It is sort of cloud or daisy shaped, and under the microscope this will look like lines or striations. Both fiber types were striated. (BETR 2271) It is that sort of like if I took one little piece of carpet from a rug and I could untwist it then there are several different things twisted around it to make one piece. It is more like looking at a six-sided pencil lengthways and you can see lines going down it. I will see these lines that when you look at the end you can see that the pencil is not completely round. It has got sides to it. The way that is done with a manmade fiber is by putting it through some type of extrudent where they press it through little bitty holes, and the shape of the hole will affect the shape of the string. On rayon the drying process also imparts some of the striations to the fiber.

I altered both fabrics during my testing. What I do when I do my fourier transform infrared analysis, I flattened the fiber. This causes my spectrum that I get to be much cleaner. It helps me to see the peaks a lot better. I do this process to the standard and to the questioned fiber. I used a scalpel to flatten them. (BETR 2272) I placed the fiber on a glass slide, and I squished it.

Baldwin's Exhibit 1, was the questioned fiber. We do not have one that is unsquished. The only one we have left is one that I altered. After I used the comparison microscope and I saw they had the same shape, the color and striations. Then I put them under the microspectrophotometer, and examined the color in more detail to see if the dye is blue or red. That is polarized light. You can make it polarized, but that is not the purpose of that instrument. I used the microscope where you can put the slide and turn it around, where the slide spins. That test is covered in the microscopy. (BETR 2273)

I used polarized light. I used polarized light to look at the birefringence and the sign of inlongation. When I put the questioned fiber on the microscope that spins, I don't recall if the fiber changed color. Every time I put two slides of fibers on the microscope and spin them both around to see if they change color because it is standard procedure. I took both of these slides and put them on a microscope that uses that type of light, spun them around to make sure they change color. In this case that was exact. They changed colors in the same pattern. (BETR 2274)

I put the fiber through two processes to draw a graph. In order for them to be similar, you would want to find a graph pattern like that. I can draw the

type of graph one would expect to find if they had the same dyes and colors. I have the infrared graph and microspectrograph I did. The top one is E-2, the standard, while the bottom one is the questioned. In my opinion, they are identical. This one is after I altered the fiber. This other one is before. I am not testifying that the fiber that I found on this shirt came from this robe. (BETR 2275)

I went to the crime scene and saw the ditch. There was no water in the ditch at the time I was there. I would not agree that water itself, with the stuff that floats in water, could be the source of this red fiber. I can't say what the source of the red fiber is. I can not say it's from this robe. Only that they are similar.

I do not have any evidence that Baldwin tied those knots. I do not have any evidence of who tied those knots. I'm not saying that I found a fiber on this shirt that came from this robe. (BETR 2276)

REDIRECT EXAMINATION BY JOHN FOGLEMAN

The graph before I flattened the fiber is marked as Exhibit 93. The after graph is marked as Exhibit 94. These are two different analyses and two

different tests. The microspectrophotometer is the particular type of analysis here which is for the dye analysis. I can write "after" infrared analysis on State's Exhibit 94. That is for the polymer, not polymer in this case, but the chemical structure of the fiber. If the fiber is not flat, sometimes it can scatter the beam as it goes through the fiber, and it gives you a noisy spectra. It's easier to read and you get a crisper spectra if you flatten it. (BETR 2277)

On State's Exhibits 94, the top graph relates to the fiber from the standard. "KF" stands for known fiber. "QF" stands- for questioned fiber. The bottom is the questioned fiber which I got off of this shirt which is State's Exhibit 44. I don't recall if I flattened the whole fiber or just a portion of it. When I flattened the fiber, it lightened the color because you spread the color out sort of like a glass of water versus the ocean. The more color that you put in one spot the more you can see it. When I flattened it, that spreads it out making the color thinner or lighter.

I am not saying that Baldwin tied those knots. (BETR 2279) I am not saying that he didn't tie the knots.

There was a question asked about the cotton fiber and the match and then also about some red cotton fibers found that match not only a shirt from

Damien but also a garment from the Moore's house. There's not a difference in the ability of a match of cotton fibers as opposed to a synthetic fiber but there's less significance of the match. There is less significance in a match of cotton fibers. Cotton is much more common. In fact there are some types of cotton very light colors or blue denim we don't examine or analyze for, because they are too common.

A fiber like that found in State's Exhibit 88 the robe, is not as common in my experience in examinations in the lab as cotton fibers. On the known slide that has been introduced in evidence, you can see a little red spot which contains more than one fiber. (BETR 2279) Baldwin's Exhibit 1 contains fiber.

I came to West Memphis at the request of the police department to get some fibers for comparison from the victims' homes. I got those from the Moore's house and the Byers' house. I did not get any rom the Branch's house. I believe their residence was not intact anymore or they were not in town. The disposable razors and a number of items were listed as BR-1. According to my notes, I have one razor, has a broken head. All items packaged together in a brown paper bag. No attempt was made to discriminate where the fibers

originated, meaning which particular item, because they were all packaged together. They were wet and moldy. This clothing in BR-1 was moldy. (BETR 2280) None of the victims' clothing that I got was moldy. The red cotton fibers originally reported matched the garment from Echols' home but after further investigation I concluded that it also matched the garments from the Moore's home. I can not say which home that came from.

The microscopic characteristics are similar. The red cotton fibers were similar in characteristics to a garment from Echols' house. (BETR 2281) After further investigation I found that those fibers could also have come from a garment from the Moore's house. In looking at the fibers from clothing from the Baldwin's house, the Echols' house, the Misskelley's house, the Moore's house and the Byers' house, I did not find any other garments with fibers that were similar in characteristics to Exhibit 88, the robe. I did not find any other fibers that were similar in characteristics to the shirt.

RECROSS EXAMINATION BY PAUL FORD

There were two partially broken razors in the bag. I don't recall if the bottom part of the guard or the handle was broken off.

I work in Little Rock. (BETR 2282) I drove from Little Rock to West

Memphis to two homes but I didn't drive to Blytheville to check the residence of another home. I never went to Blytheville to look in the home that Branch lived in. I never did go to the residence of Branch's father, whose mom and dad are divorced, who still lived in West Memphis. I only went to two of the four residences of the victims' families. There are two Branch households. This is a woman's robe. I think I found that robe in a closet in the bedroom. (BETR 2283) I do not know if it was hanging, folded, laying on the floor. I believe Baldwin's Exhibit 1 is the entire fiber. Although I flattened part of it, this is it in its entirety. I never looked to determine if there was a red fiber in this knife that might be microscopically similar to the one you found in this shirt. I have not labeled that item as being looked at. If there had been testimony previously that there had been a red fiber visible in that knife then I never looked at that red fiber to see if it matched the fiber in Baldwin's Exhibit 1. If it was visible to the naked eye, it probably did not match, but I did not look. (BETR 2284)

In the secondary transfer of fibers, when clothes are washed together fibers are redistributed around. That is another way of getting secondary transfer of fibers to wash the clothes together and then get fibers from another.

If I had a fiber from some other of my clothing that got on this shirt and came in contact with someone else it could transfer. (BETR 2285)

It is also possible that the red fiber could have been on that young rnan's's'hirt that morning when he put it on and went to school because it could have gotten in the dryer from some other source in his own household. I can not say what the source is of the fiber. That shirt being washed and dried with another shirt could be the very source of the red fiber transfer depending upon which household was that from. They never identified what shirt that came from. Washing and drying could be the source of the fiber, and he could have had the red fiber on that shirt. Some of the households were examined for this fiber type. If this is one of the households examined for that fiber type, I would say it didn't come from washing his clothes there. If it came from the other household, it could have. Then that could be the source. If that person was from one of those households. (BETR 2286)

REDIRECT EXAMINATION BY JOHN FOGLEMAN

State's Exhibit 95 contains my item BR-1 which is clothing that was recovered from the pipe near the scene. That is the clothing that I talked about

that had some disposable BIC razors that were moldy. The handle is broken on the BIC razor. When I examined them before, it had these guards on them. (BETR 2287) Doctor Peretti had testified about a blue fiber in Moore's hands. I compared it to the fibers that I collected from the mortuary from a blanket. I did the same test that I didon the other items. The nylon fiber from the hand was microscopically similar to the fibers from the blanket that came from the funeral home. (BETR 2288)

STATEMENT OF THE CASE

Jessie Misskelley, Damien Echols and Charles Jason Baldwin were charged in Crittenden Circuit Court with Capital Murder, Ark. Code Ann. § 5-10-101, in the deaths of three young boys in West Memphis in 1993. They became known quickly and indelibly as the "West Memphis 3." Misskelley's trial was severed from those of Echols and Baldwin. Misskelley was tried in Clay County. The other two were tried in Craighead County. Circuit Judge David Burnett— now state Senator— was the presiding judge.

Misskelley was convicted of one count of Murder in the First Degree, Ark. Code Ann. § 5-10-102, and two counts of Murder in the Second Degree, Ark. Code Ann. § 5-10-103. He was sentenced to life and two 20-year terms. Echols was convicted of three counts of Capital Murder and sentenced to death. Baldwin was convicted of three counts of Capital Murder and sentenced to life without parole.

The convictions and sentences of all three were affirmed. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996) [*Misskelley I*]; *Echols and Baldwin v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996). All three filed Rule 37 petitions. Misskelley's original petition is at Habeas T 33-36 but is not reproduced in this

Addendum. The petition on which the circuit court decided is at Habeas T 194-486, Add 79-352.

[It is appropriate to discuss the way the record is presented here. *Drymon v. State*, 327 Ark. 375 938 S.W.2d 825 (1997), provides that the prior records in a case are deemed part of the Rule 37 record. The Rule 37 pleadings were in the habeas record adjudicated by this Court in 2010. Furthermore, although the crime occurred in Crittenden County, Misskelley's venue was changed to Clay County and the other two to Craighead. Misskelley and Baldwin had a joint Rule 37 hearing because of the commonality of many witnesses. The circuit court agreed that only one Rule 37 record be compiled—that by Craighead—and that Clay County only need compile what further pleadings specific to Misskelley had been filed after lodging of the habeas record.]

Echols's Rule 37 was litigated and the denial of relief eventually affirmed. *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003). Misskelley's and Baldwin's petitions were held in abeyance while evidence was retested by agreement. (No agreement was reached with regard to some of the evidence.) After passage of Act 1780 of 2001, Ark. Code Ann. § 16-112-201 et seq, the so-called "DNA habeas" law, all three defendants had filed petitions under that law.

STATEMENT OF THE CASE 2

The pending matters----all three's DNA habeas petitions and the Misskelley and Baldwin's Rule 37 petitions— were scheduled for a massive hearing to begin in 2008. However, before the hearing started, Judge Burnett then denied the DNA habeas petitions without a hearing. This Court eventually reversed all three. *Misskelley v. State*, 2010 Ark. 415, Not Reported in S.W.3d, 2010 WL 4366985 [*Misskelley II*] ; *Echols v. State*, 2010 Ark. 417, ___ S.W.3d ___, 2010 WL 4353535; *Baldwin v. State*, 2010 Ark. 412, Not Reported in S.W.3d, 2010 WL 4354242. In the interim, Misskelley and Baldwin had a joint Rule 37 hearing occurring several days at a time through the remainder of 2008 and much of 2009.

In this appeal, the threshold issue is whether Judge Burnett should have recused from the case because during the time in which he heard and decided the case, he was a declared candidate for a partisan political office, the state Senate— as well as because he had filed a judicial misconduct complaint against Misskelley's trial counsel Daniel Stidham, who later became a district judge. The motion was originally filed at Hab T 2326-2342, Add. 33-49. It was denied at R37T 1313, Abs. 7. It was renewed after newspaper reports of his candidacy, previously dismissed by him as speculative, were confirmed by him. R 37T 1709-1715, Abs. 147-153. After Judge Burnett gave a series of interviews discussing

both the case and the impact on his candidacy *before he decided the case*, the motion was renewed again in writing. R37T 1528-1538, Add. 65-78. No hearing was granted. In denying relief, Judge Burnett also denied the recusal request (R37T 1801-1820, Add. 1-19) and denied the motion for reconsideration (R37T 1824-1827, Add. 23-26) seeking a ruling *inter alia* on the constitutional issue in refusing to recuse. (R37T 1833, Add. 29). A not-as-ripe iteration of the claim was made but avoided by this Court in *Misskelley II.* On two occasions in *Misskelley II*—both involving the newspaper reports of his candidacy Misskelley sought remand of the habeas petitionfor additional factfindings as to Judge Burnett's political involvement. These were both denied without comment by this Court.

Should this Court get beyond Judge Burnett's refusal to recuse despite his concurrent Senate candidacy, the Court will then consider the Rule 37 issues. The Court has granted Misskelley only 50 pages, despite the fact that his proposed findings and conclusions were some 260 pages in 12 point type. (R37T 1539-1801) The argument section thus has been reduced by some 85 percent, at significant cost to the development of his claims. Indeed, Misskelley has had to excise some issues completely.

The abstract has the Rule 37 hearing (R37T 1307-2912, Abs. 1-284),

Misskelley's trial (Misk. Tr. 511 to end, Abs. 285-715) and some relevant sections of the Echols-Baldwin trial (Abs. 716-805). Misskelley and Baldwin had designated each other's records in the hearing. The specific issues presented in this appeal are:

- ❑ Judge Burnett's refusal to recuse;
- ❑ Ineffectiveness of counsel in failure to make a Rule 2.3 objection;
- ❑ Ineffectiveness in failing to properly handle the false confession issue;
- ❑ Ineffectiveness in failing to utilize a forensic pathologist;
- ❑ Ineffectiveness in failing to challenge fiber evidence;
- ❑ Ineffectiveness in failing to challenge the serology and DNA evidence;
- ❑ Ineffectiveness in failing challenge improper argument;
- ❑ Ineffectiveness in other failures to investigate;
- ❑ Ineffectiveness in failure to impeach witness Victoria Hutcheson.

ARGUMENT

I.

REVERSAL AND REMAND FOR A NEW HEARING IS REQUIRED BECAUSE THE CIRCUIT JUDGE REFUSED TO RECUSE EVEN THOUGH AT THE TIME THIS CASE WAS *SUB JUDICE* HE WAS A DECLARED CANDIDATE FOR A PARTISAN POLITICAL OFFICE. HE ALSO SHOULD HAVE RECUSED BECAUSE HE HAD FILED A JUDICIAL MISCONDUCT COMPLAINT AGAINST MISSKELLEY'S TRIAL LAWYER.

Standard of review: The general standard on recusal is abuse of discretion.. *Perroni v. State*, 358 Ark. 17, 186 S.W.3d 206 (2004). However, if there is constitutional error in refusal to recuse, reversal is automatic. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081 (1993).

The denial of Rule 37 relief must be reversed because then-Judge David Burnett refused to recuse even though he had announced his candidacy for a partisan political office, a seat in the state Senate— a position he eventually won. Judge Burnett's repeated refusal to recuse although simultaneously— and overtly— running for a partisan political office is contrary to due process guarantees of the United States (Fourteenth Amendment) and Arkansas (Art. 2 § 8) Constitutions. It also violates the spirit, if not the letter, of Amendment 80 to

the Arkansas Constitution, the Arkansas Code of Judicial Conduct and the applicable case law of this Court.

A brief synopsis of the relevant facts: Misskelley and Baldwin had both habeas corpus and Rule 37 petitions pending. Misskelley filed a motion seeking Judge Burnett's recusal on grounds involving him having filed a judicial misconduct complaint against Judge Dan Stidham, who was Misskelley's trial counsel and obviously a witness in the upcoming Rule 37, and because Judge Burnett had told counsel that he would not seek re-election in 2008 but would instead run in 2010 for the state Senate. (Hab. T 2326-2342. Add 33-49)

In the hearing on August 20, 2008, Judge Burnett summarily denied the request and said his political plans were indefinite. (R37T 1313, Abs. 7) Judge Burnett then denied the habeas corpus petition without a hearing. Among the grounds for appeal was his refusal to recuse, but this Court reversed on the circuit court's erroneous application of the habeas statute and mooted the recusal issue. *Misskelley II.*

The Rule 37 proceedings were not completed before Judge Burnett's term expired at the end of 2008, but he was designated to continue to preside over this case. (R 37T 1503, Add. 54) As a result of a June, 2009 newspaper article

ARGUMENT 2

mentioning Judge Burnett's political plans, when the hearing next resumed Misskelley renewed the motion for recusal. (R37T 1509-1518, Abs. 147-153. Add. 59-64) A colloquy occurred, in which defense counsel renewed his motion for recusal on federal and state constitutional grounds as well as the Code of Judicial Conduct, and which were rejected by Judge Burnett:

> MR. ROSENZWEIG: .... 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 conscience 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,[1] 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?

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[1] The court reporter incorrectly spelled the names of the cases. Misskelley has corrected the spellings.

ARGUMENT 5

MR. ROSENZWEIG: Because, because, 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, 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 strictures.

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.

This colloquy was brought to the attention of this Court in a motion of June 15, 2009 entitled MOTION FOR REMAND FOR FURTHER FACTFINDINGS ON ISSUE OF JUDGE BURNETT'S POLITICAL PLANS AND FOR DESIGNATION OF SPECIAL JUDGE TO MAKE FACTFINDINGS. It was denied by this Court on September 10, 2010

While the appeal of the denial of habeas corpus was still pending in this Court the publication of a series of interviews that Judge Burnett gave—including remarks about this case—caused Misskelley to renew the motion for factfindings in this Court on December 31, 2009 and in the circuit court (R37 T 1525-1538.

ARGUMENT 7

Add 65-78) The motion was denied in this Court on January 21, 2010. Misskelley had attached to both motions—the ones in this Court and in the circuit court—three articles: an interview in the *Arkansas Democrat-Gazette*, an interview in the *Jonesboro Sun*, and a column by John Brummett. In all of these, Judge Burnett discussed the West Memphis 3 case, criticized the media's coverage of the case and conceded again that he was definitely running for the Senate.

Misskelley pointed out that comments by Judge Burnett evinced a bias and/or the appearance of bias, as well as unseemliness when defense counsel were under Judge Burnett's gag order, there were the structural constitutional problems of Judge Burnett's concurrent judicial and political functions.

In his order denying relief, Judge Burnett did rule on the recusal issue, but in such a sketchy way, ignoring the constitutional issues completely, that Misskelley filed a motion for reconsideration (R37T 1824-1827, Add. 23-26), which was summarily denied by Judge Burnett. (R37T 1833, Add. 29). Only a few weeks later, Judge Burnett filed for the Senate on the first day of the filing period, March 1, 2010 and was eventually elected.

There are various bases for a finding by this Court that Judge Burnett should have recused: The requirements of Amendment 80, federal and state constitutional

ARGUMENT 8

rights of due process, and the Code of Judicial Conduct and this Court's case law on impropriety and the appearance of impropriety.

Amendment 80. In 2000, the voters of this state approved Amendment 80. The amendment explicitly abolished partisan judicial elections. Section 15 of Amendment 80 provides:

> SECTION 15. PROHIBITION OF CANDIDACY FOR NON-JUDICIAL OFFICE. If a Judge or Justice files as a candidate for non-judicial governmental office, that candidate's judicial office shall immediately become vacant.

The purpose of Section 15 obviously was to take the judiciary out of partisan politics. Indeed, the scope of Section 15 even includes nonpartisan executive and legislative offices, such as some mayoralties and school boards. Although technically Judge Burnett was not encompassed by the literal words of Section 15 because by the time he grudgingly conceded that he was a declared candidate he was serving as a special judge and the Senate filing period had not opened, clearly his involvement in this case while an announced candidate violates the spirit animating the amendment.

Due process. It is a violation of due process of law under the Fourteenth Amendment and Art. 2 § 8 of the state Constitution for a biased judge to sit on a

case. No matter how much Judge Burnett might believe himself to be fair, if indeed he was running for partisan office at the time he made the factfindings against Misskelley on appeal here, the law concludes that he was not fair and the decision made under such a circumstance simply cannot stand. A decision by a factfinder who should not have sat on the case is structural error not subject to a prejudice or harmless error analysis. *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623 (1955); *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80 (1972); *Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477 (1968)*; Allen v. Rutledge*, 355 Ark. 392, 139 S.W.3d 491 (2003).

Moreover, Arkansas has an appearance of impropriety standard for recusal. *Huffman v. Arkansas Judicial Discipline and Disability Comm*., 344 Ark.274, 42 S.W.3d 386 (2001); *City of Jacksonville v. Venhaus*, 302 Ark. 204, 788 S.W.2d 478 (1990); *Bolden v. State*, 262 Ark. 718, 561 S.W.2d 281 (1978). Moreover, the Supreme Court appears to have accepted the appearance standard as a matter of federal constitutional law in judicial bias cases. *Caperton v. A.T. Massey Coal Co., Inc*., ___ U.S. ___, 129 S.Ct. 2252 (2009).

Code of Judicial Conduct. It is also a violation of numerous provisions of the Arkansas Code of Judicial Conduct to express bias or the appearance of bias.

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Although the existence of legal error does not inexorably mean that there is ethical error, the Code is nonetheless relevant to this analysis. In a cognate situation, this Court has held that the Arkansas Rules of Professional Conduct are material in attorney disqualification cases. *Berry v. Saline Memorial Hosp.*, 322 Ark. 182, 907 S.W.2d 736 (1995); *Sturdivant v. Sturdivant*, 367 Ark. 514, 241 S.W.3d 740 (2006). There is no reason to think that the Code of Judicial Conduct is immaterial to judicial recusal. The relevant provisions include, but are not necessarily limited to, Rule 1.2, Promoting Confidence in the Judiciary; Rule 2.2, Impartiality and Fairness; Rule 2.4, External Influences on Judicial Conduct; Rule 2.10, Judicial Statements on Pending and Impending Cases; Rule 2.11, Disqualification; and Rule 3.1. Extrajudicial Activities in General.

The Code thinly slices the vocation of part-time judiciary into three categories: "continuing part-time judge," "periodic part-time judge, " and "pro tempore part-time judge." The Code was amended by this Court effective July 1, 2009. If Judge Burnett was and is a "continuing part-time judge, " he was and is required under both the old Code Canon V and the new Code Canon 4 to have resigned his judicial post upon "becoming a candidate." The Terminology section of the old Code, which would have applied to Judge Burnett's decision in the case

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now on appeal, defines the phenomenon of "becomes a candidate" as when any of the following things occur: (i) a public announcement of candidacy: (ii) he or she "declares or files" as a candidate with the election or appointment authority; or (iii) he or she "authorizes solicitation or acceptance of contributions or support." Of the three, the second is a calendary impossibility under the law but both the first and third occurred while the habeas petition was *pendente lite* before Judge Burnett. Additionally, both the old Code and the new Code prohibit impropriety and the appearance of impropriety and mandate the avoidance of conflict of interest and inappropriate political activity although part-time judges are excused from certain portions of the Code. But even if there is no violation of the ethical strictures, that does not mean that there has been no legal error.

A second ground for recusal was that Judge Burnett had filed a judicial discipline complaint against Misskelley's trial attorney, Dan Stidham, which was found to have been without merit. Stidham later was elected district judge in Greene County. [The text of the complaint was not a matter of public record.. Because the merits of this motion depended on the content of Judge Burnett's complaint, Misskelley moved to obtain a copy of that complaint, but Judge Burnett denied the entire motion.]

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The Judicial Discipline Commission's dismissal indicates that the thrust of Judge Burnett's complaint focused on Stidham's July, 2003 comments to the press regarding the 1993-94 Misskelley trial. The subject of Judge Burnett's complaint apparently was an article that appeared in the *Paragould Daily Press* on July 26, 2003, which he submitted to the Commission on August 18, 2003. In the article, Stidham maintained his client's innocence, and reiterated a number of facts from the trial that were a matter of public record. In fact, such details received extensive coverage in two Home Box Office (HBO) documentaries, the filming of which Judge Burnett himself permitted during trial. The Commission found that no misconduct or wrongdoing occurred. The letter from the Commission was attached as Exhibit 1 to the motion. The article was Exhibit 2.

Judge Burnett's complaint suggests a bias against Stidham. Stidham was to be a witness in the ongoing Rule 37 proceeding. Accordingly, Judge Burnett should have recused himself in order to avoid any impropriety, appearance of impropriety or situation where his impartiality might reasonably be questioned. "The appearance of impartiality is as important, if not more so, than actual impartiality." *Patterson v. R.T.*, 301 Ark. 400, 402, 784 S.W.2d 777 (1990).

Judge Burnett's unsubstantiated complaint against Stidham creates the

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appearance of bias such that a reasonable person might question his ability to impartially hear and weigh Stidham's testimony. See, e.g. *Allen*, supra (recusal appropriate in contempt action where judge became embroiled in personal dispute with attorney); *Rollins v. Reed*, 495 So. 2d 636 (Ala. 1986) (recusal required where judge filed complaint with bar association against attorney and two years later still harbored negative feelings about him); *Patterson*, supra (recusal warranted where judge was on board of advocacy group related to subject matter of trial and her in-court comments created the appearance of prejudgment). The judicial proceedings in this case are particularly susceptible to creating an appearance of impropriety given the public's intense exposure to the case. When the motion was brought, while Judge Burnett was still serving his term, he was also Stidham's immediate supervisor. Greene District Court is part of the Pilot District Court program established under Ark. Code Ann. § 16-17-1101 et seq., in which Stidham serves as a full time District Judge handling matters for the circuit court under Administrative Order 18 of the Arkansas Supreme Court. Under the case assignment and allocation plan, Judge Burnett was one of three circuit judges assigned to the criminal docket of Greene County, and Stidham, as judge, hears those matters referred to him by Judge Burnett. Therefore, because of the

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supervisory relationship between Judges Burnett and Stidham, Judge Burnett should have recused or disqualified himself for that reason as well.

In fact, Judge Burnett's opinion rejected Stidham's confessions of error essentially *in toto* and accused him of dissembling.

For this Court to hold that a judge has no requirement to recuse when he or she has declared himself (or herself) to be a candidate for a partisan office would be an awful precedent. This would repoliticize the judicial system in a way that the Code of Judicial Conduct and Amendment 80 have striven to avoid. Because of the structural error inherent in a judge who should not have been sitting on the case. Judge Burnett had the right to politick and run for partisan legislative office; what he did not have was the right to sit on this case, over the objections of a party, while politicking and running. This Court must reverse and remand.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

This Court does not reverse the denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004).

Assuming that this Court does not reverse the Rule 37 judgment *in toto*

because of the recusal issue, Misskelley now discusses the various claims of ineffective assistance of counsel. The Court has allocated 50 pages for argument, which means that, for example, about 15 percent of the length of the proposed findings and conclusions. It is impossible to discuss the issues with the factual and legal specificity necessary to develop the claims properly in this brief.

A defendant is guaranteed effective assistance of counsel by the Sixth and Fourteenth Amendments and Art. 2 § 10 of the Arkansas Constitution. The cause and prejudice test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), is the test for ineffectiveness and adopted as the state test under Rule 37. *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988). *Strickland* is not a preponderance test. 466 U.S. at 694, 104 S.Ct. at 206. The following statement should be deemed applicable to each and every claim discussed in this brief: *On each claim, counsel's conduct fell below the standard of competence necessary for a lawyer in a case such as this (the cause prong) and there is a reasonable probability that the result would have been different had counsel acted appropriately (the prejudice prong).* The circuit court rejected all of Misskelley's contentions. In its resolution of the case, the court was clearly erroneous.

Although Misskelley did not receive the death penalty, the death penalty was

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sought at trial and trial counsel's preparation and performance must be assessed in light of that fact. The American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (A.B.A. 1989 Ed.) delineate what needs to be done in preparing for, and defending, a capital case. These standards have long been considered "guides to determining what is reasonable". *Wiggins v. Smith*, 539 U.S. 510, 522, 123 S.Ct. 2527 (2003). The performance here fell below every norm of the Guidelines and *Strickland* case law.

Trial counsel Dan Stidham and Gregory Crow had essentially no relevant criminal defense or trial experience. (R37T 514-639, 674-685. Abs. 94-100, 104-109) Act 1341 of 1997, partly codified at Ark. Code Ann. § 16-87-203 et seq. , established that the State is responsible for payment of defense expenses. In late 1993 the question was unsettled. At that time, the question of whether the county or the state was responsible for paying the appointed attorneys in this case was unsettled. *State v. Crittenden County*, 320 Ark. 356, 896 S.W.2d 881 (1995). Because of their inexperience and the unsettled nature of the law, counsel did not seek access all the expert assistance to which they were entitled under *Ake v. Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087 (1985), the ABA Guidelines and emerging Arkansas case law—with disastrous consequences.

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II. COUNSEL FAILED TO PROPERLY RAISE AND PRESERVE A RULE 2.3 CLAIM.

In 1993, Rule 2.3, A.R. Crim.P was a bright line rule requiring that "when a law enforcement officer requests someone to accompany him to the police station, he shall make it clear that there is no legal obligation to comply with such a request." (*Hart v. State*, 312 Ark. 600, 605, 852 S.W.2d 312 (1993)(*overruled by State v. Bell*, 329 Ark. 422, 430, 948 S.W.2d 557 (1997)).

Counsel failed to properly raise Rule 2.3, which, according to the testimony of the police at the suppression hearing, would have resulted in automatic suppression of Misskelley's statements to police. Without this evidence, would have been acquitted. *See. e.g.*, *Misskelley I* at 459.

III. COUNSEL FAILED TO PROPERLY HANDLE THE FALSE CONFESSION ISSUE.

Counsel was ineffective for failing to present sufficient and available evidence of Misskelley's mental deficiencies at the motion to suppress his confession. Counsel did not present any evidence of Misskelley's mental deficits on the issues of whether Misskelley knowingly and intelligently waived his *Miranda v. Arizona*, 396 U.S. 868, 90 S.Ct. 140 (1969), rights or whether he

voluntarily confessed.[2] Instead, counsel asked the court to consider the testimony Dr. William Wilkins given two months earlier at Misskelley's hearing on motion to transfer, and 23 days earlier at Misskelley's motion to prohibit imposition of the death penalty due to mental retardation. (Trial 835-898. Abs. 289-298) In particular, counsel wanted the court to take judicial notice of Misskelley's IQ and mental capabilities to which he had previously testified. (Trial 1126. Abs. 356).

Thus, Wilkins's previous testimony was the only evidence before the court of Misskelley's ability to knowingly, intelligently and voluntarily waive his rights and render a voluntary confession. This is despite the fact that at the previous hearing, Wilkins did not testify about Misskelley's mental deficits as they related to these issues. Wilkins never testified that he conducted an examination of Misskelley designed to assess him in these areas, and in fact, he did not conduct such testing. (See Forensic Evaluation dated November 8, 1993, (R37T 3657-3666. Add.II 2110-2119) At the earlier hearing on the motion to transfer, Wilkins did testify to findings that nonetheless were relevant to the suppression hearing, but

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[2] The statements appear in several places in the record. They are reproduced here as exhibits to the Amended and Supplemental Rule 37 petition. (Habeas T. 194-530. Add. 79-532)

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counsel failed to discuss those findings at the suppression hearing. Particularly important, Misskelley had a full-scale IQ of 72, a *verbal* IQ of 70, and a performance IQ of 75. Earlier tests showed results at 67, 70, 73, respectively. (Tr. 838-842. Abs. 290-292). Misskelley's reading skills were at the third grade level, while his writing ability fell below the first grade level. Misskelley tended to think in childlike ways about the same way... that a six or seven year old would do." Under significant stress, Misskelley would rapidly revert to fantasy and daydreaming. *Id.*

Counsel failed to bring these details to the court's attention and all but conceded the issues at the hearing by proceeding solely on Wilkins' earlier testimony despite the fact that the issues at the suppression hearing were distinctly different from those on which the court ruled at the earlier hearings.

In 2004, Dr. Timothy Derning evaluated Misskelley to determine whether in 1993 and 1994, Misskelley was competent to stand trial and whether he could knowingly, intelligently, and voluntarily waive his *Miranda* rights and render a voluntary confession.

Dr. Derning testified that Misskelley was mentally retarded and that as a result Misskelley was not able to make a knowing and voluntary waiver of his

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Miranda rights. (Rule 37T 1264-1394. Abs. 124-130). Space limitations prevent a larger discussion of this issue.

Counsel failed to investigate or conduct discovery aimed at uncovering tactics used by the West Memphis Police Department in its interrogations. Counsel did not investigate the extent to which the officers, including Ridge and Gitchell, were trained in the "Reid Method" discussed in Inbau and Reid, *Criminal Interrogation and Confessions* (1962) - the contents of which spurred the prophylactic rule announced in *Miranda.* Nor did counsel consider questioning the officers about such tactics at the suppression hearing or at trial, despite the abundance of literature available.

A Reid interrogation is not to investigate whether the suspect is guilty but, rather, to get from the suspect an admission and/or a confession that will assist the prosecution in convicting him. The primary goal of interrogation is to get incriminating statements that confirm the detective's pre-existing theory of the suspect's guilt with regard to the underlying criminal act. As a result, interrogation (unlike interviewing) is confrontational (even if this occurs in a friendly or professional manner). The detective is supposed to do most of the talking, and the detective uses accusatorial, manipulative and deceptive interrogation techniques to

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overcome the suspect's anticipated resistance and move him from denial (what the interrogator expects) to admission (the objective of interrogation).

At trial, defense counsel focused primarily on its attempts to prove that Misskelley made a false confession to the police. However, counsel conducted inadequate investigation, preparation and litigation of this defense. To prove the false confession, counsel called three experts: Warren B. Holmes (Trial 1840-1877 Abs. 561-571), Wilkins (Trial 1885-2005 Abs. 571-602), and Richard Ofshe (Trial 2026-2138. Abs. 604-659) Holmes and Oshe testified to the factors that are often present in a false confession and likewise testified that Misskelley's confession evidenced several of these factors.) Ofshe also testified that by using particular techniques, police can elicit a false confession in a person who is highly suggestible, has low self esteem, and/or has mental deficiencies. He explained that Misskelley's statements were shaped by the police tactics employed during his twelve hours at the police station. Counsel called Wilkins to establish the critical link in Misskelley's false confession defense: that he was indeed highly suggestible and had mental deficiencies that made him vulnerable to coercive or suggestive police interrogation. As discussed *infra*, Wilkins was not only ineffective witness on the crucial issue, but he actually *damaged* Misskelley's case

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considerably.

The defense did not elicit from any of its false confession experts a discussion of the Reid coercive police tactics. Counsel never adduced any literature on such tactics at trial or at the suppression motion. In addition, counsel did not take the steps necessary to demonstrate Ofshe's reliability to the jury.

This Court credited Misskelley's confessions with being the most powerful, indeed the only, evidence against Misskelley. "The statements were the strongest evidence offered against the appellant at trial. In fact, they were virtually the only evidence, all other testimony and exhibits serving primarily as corroboration." *Misskelley I, id* As discussed infra, the other testimony was unreliable also.

Counsel's hiring of Wilkins as the only psychological expert to evaluate Misskelley did more harm than good to Misskelley's case. It turned out that at the time of his testimony Wilkins was under investigation for various ethical violations. By the time of his testimony before the jury he had agreed to certain restrictions on his practice, and agreed to undergo his own psychological evaluation. The restrictions included a ban on practicing neuropsychology and from handling sex abuse cases, and required that he be supervised in his practice. The court ruled he could be impeached with this information. (R37T 779-780.

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Abs. 112 referring to Tr 1794-1790) When Wilkins testified, he was impeached with his professional failings and restrictions. (Trial 1390-1405. Abs. 572) He also admitted that he had told *his own examiner* that he had a lack of knowledge of the widely used psychological test known as the Minnesota Multiphasic Personality Inventory (MMPI.) (Tr 1402, Abs. 574. His examiner also found some 'fundamental deficits in [Wilkins'] knowledge in certain areas" and a "failure to appreciate the limitations of [his] professional competence." This was devastating, since many of his tests contained a subjective component.

Perhaps the most damaging testimony the jury heard in this regard was the fact that, as a result of disciplinary proceedings against him, Wilkins could no longer "deal at all with child sexual abuse cases," and that he required supervision while treating any patients. (RT 1390, Abs. 572) Thus, while the jury did not hear directly about the conduct underlying the disciplinary action against Wilkins, it essentially heard that he had done something bad enough that he could no longer be trusted alone with children who had been victims of sexual abuse.

Another disaster was Wilkins's inability to articulate a proper reliance on the Gudjonsson Suggestibility Scale. He admitted that he had *never used* the scale before (Tr 1936, Abs. 578), had no training in giving the test, and had no training

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in how to interpret the results. Under these circumstances, the court was practically obligated to sustain the prosecution's objection. In fact, in 1994 at the time of trial, Gudjonnson's book, *The Psychology of Interrogations, Confessions and Testimony* (1992), was the leading authority on false confessions. Ofshe, who took the stand after Wilkins, described Gudjonsson's book as the "authoritative work" on interrogations and confessions and opined that the content reported therein was universally accepted by professionals in the field. As a result, Wilkins looked like a rogue scientist with unsubstantiated methods and opinions. Furthermore, appellate counsel was also ineffective for failing to challenge the court ruling denying Misskelley's motion for continuance to find and prepare another mental health expert. Though this court agreed to give counsel "a day or two" to find a new expert after the extent of Wilkins disciplinary problems fully surfaced, that time period was wholly insufficient.

Moreover, a problem with using the MMPI for Misskelley is that it is not normed for people with IQ below 80. People who know what they're doing also know that people with low IQ do not perform well on personality tests. (R37T 1204. Abs. 128)

Counsel also was ineffective for failing to challenge the scientific basis for

statements made by rebuttal witness Dr. Vaughn Rickert. (Trial 2151-2179. Abs. 661- 675) He was qualified as an expert in the field of adolescent psychology after brief questioning by the prosecution and no voir dire from the defense. Among other things, he testified that a person who had witnessed a shocking event 35 days prior to relating its details, would not recite the details in chronological order. He also said that the graphic details of the event would remain the most vivid in the person's memory. Counsel did not challenge this testimony, despite the fact that it was not within the realm of Rickert's expertise; Rickert was not qualified as an expert in memory and he cited no scientific basis for reaching this conclusion. He cited neither published studies nor his own empirical research. The statements were bare conclusions with no scientific support. Counsel also failed to cross-examine him on his conclusions.

Counsel's unfamiliarity with use of scientific trial experts resulted in ineffective presentation of evidence from confessions expert Richard Ofshe. (Trial 2026-2138. Abs. 604-659) At trial, Ofshe testified that all of his work for the last 30 years had focused on the subject of influence, including ten or twelve years studying the influence of violent cult groups on the individual. Since the late 1980's he had focused on police interrogations and how in certain circumstances,

they can lead to coerced confessions. He explained that he has published works on all of the aforementioned topics, including four or five books, thirty or more articles in scientific journals, and numerous papers.

Defense counsel did not, however, ask Ofshe to discuss any of the specific works he has published on police interrogation and/or coerced confessions. The curriculum vitae that Ofshe furnished to the defense contained numerous examples of literature on confessions, coercion and related materials that he had published or delivered orally and thus submitted for peer review. See curriculum vitae of Dr. Ofshe, Ex. D-3. (Add 812-820):

> "Coerced Confession: The Logic of Seemingly Irrational Action," Cultic Studies Journal, Vol 6, No. 1, pp. 1-15, 1989.
>
> "Coerced Persuasion and Attitude Change," The Encyclopedia of Sociology, edited by Edgar Borgatta and Marie Borgatta. Macmillan, New York, 1982.
>
> "Coerced Confessions: Case Studies in the Tactics of Persuasion," America Sociological Association meeting, Atlanta, August 1988.
>
> "Coercive Persuasion of the Mind in Police Obtained Confessions," Second Annual Conference – Criminal Defense Litigation Along the Rim and the River. Flagstaff, Arizona, June 1991.
>
> "Coerced False Confessions: The Social

> Psychology of Extreme Influence," Alameda County Criminal Defense Bar, Oakland, California, October 4, 1993.
>
> "Police Interrogations and the Coercion of False Confessions" Top Gun II, Criminal Defense Seminar, St. Petersburg, Florida, October 22, 1993.

(See curriculum vitae of Dr. Ofshe, Ex. D-3 of petition, Add. 812-820)

In addition to these examples, several other publications and academic lectures were listed on Ofshe's CV that explored general concepts of coercion, influence, and decision-making. Counsel failed to explore with Ofshe these works that directly bore on his expertise to evaluate Misskelley's confession for evidence of coercion. Nor did counsel ask Ofshe about other literature on which Ofshe would have based his opinions, such as Inbau and Reid's treatise. Despite the widespread availability of materials on the Reid and other well-known interrogation tactics, counsel discussed none of these important works with Ofshe while he was on the stand.

Moreover, counsel's ineffectiveness prejudiced Misskelley substantially. *First*, the prosecution called Dr. Rickert as a rebuttal witness who testified that nothing in Ofshe's testimony showed that his theories were accepted in the scientific community. (Trial 2151-2179. Abs. 661- 675) Specifically, Rickert

cited the fact that Ofshe did not testify that his theories had been published in any peer-review article. As noted above, this was far from true, yet was not challenged by defense counsel. *Second*, the prosecution capitalized on counsel's failures by deriding the testimony in closing argument. Counsel did nothing to address the lengthy and devastating arguments raised by the prosecution as to Ofshe's credibility.

Dr. Warren Holmes was called and qualified as "an expert in the field of police interrogation." (Trial 1840-1877 Abs. 561-571) His testimony was critical to the overarching defense theme that Misskelley's confession was false and was coerced. Counsel had various failures with regard to Holmes. They included: That Holmes had no objection to most of the police tactics; counsel never gave Holmes the information to which he could tie to Misskelley the personality traits likely to make someone falsely confess to in the interrogation; counsel did not elicit from Holmes various facts that Misskelley had gotten wrong, he never tied those traits to Misskelley, nor did he provide Holmes with materials that would allow Holmes to tie them to Misskelley. Counsel focused Dr. Holmes on only two facts that were inconsistent with the crime scene: the general time frame and the type of ligature. He did not elicit other critical facts that Misskelley had gotten wrong such as how

they were tied and whether Byers was choked (he was not); that there was anal rape (there was not); that the boys were beaten and their clothes ripped off (they weren't); that he could not have seen this from the service road; that Misskelley had named persons he had attended cult meetings with (none was confirmed.); he did not elicit from Holmes that coercion of a psychological impaired person could cause false confession; he did not elicit that the entire interview process should have been taped and did not rehabilitate the witness when he appeared to concede that an interrogation of four hours was acceptable; he called Holmes in the suppression hearing without having him listen to the tape of the confession, despite the fact that tone was important and did not provide him with background facts of the case and he did not properly object when on cross the prosecutor got Holmes to say that 99 percent of recanted confessions the confessor was guilty.

IV. COUNSEL WAS INEFFECTIVE IN FAILING TO CONSULT WITH AND UTILIZE A FORENSIC PATHOLOGIST

At Misskelley Echols's Rule 37 hearing, Stidham admitted that despite the trial court's ruling that he would consider requests for the funding of defense experts on a case by case basis, he "didn't make a specific request in advance for the payment of experts." (R37T 725. Abs. 109). He also admitted that "[t]he only pathologist that I spoke with before the trial was Dr. Peretti at the State Medical

Examiner's Office." (R37T 735. Abs. 110)

Counsel's failure to consult with any forensic pathologist before, during, or after trial (within the time for filing a motion for new trial), fell below an objective standard of reasonableness because the state relied primarily on its own pathologist's controversial theories to corroborate Misskelley's statements to police. Misskelley presented the testimony of numerous experts contradicting the trial (and Rule 37 hearing) testimony of Drs. Peretti and Sturner. These establish that the injuries supposedly caused by a person wielding a knife were instead created by postmortem animal predation. The circuit court's conclusion otherwise was clearly erroneous.

A number of forensic scientists testified in the Rule 37 proceeding. They were Patricia Zajac (R37T 470-505. Abs. 89-93), Dr. Werner Spitz (R37T 1425-1870. Abs. 131-137, 154-168), Dr. Michael Baden (R37T 1880-1996. Abs. 170-187), Dr. Richard Souviron (R37T 2001-2109. Abs. 187-197) and Dr. Janice Ophoven (R37T 2125-2222, Abs. 197-212) Despite trial testimony to the contrary, new analysis of the scientific evidence and those witnesses's reviews of the then existing evidence demonstrates the following, contrary to the trial testimony: (a) None of the boys was cut on his penis, and the one boy whose

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genital area was described as "mutilated" actually suffered a 'degloving' injury inconsistent with the use of a knife, and consistent with the kind of degloving injury caused by animal predation; (b) There are no knife wounds to Steven Branch's face; (c) A number of the observed injuries are postmortem injuries; (d) There is no evidence on any of the three boys of anal or oral sex; (e) the mechanism for the blunt force injuries cannot be determined; (f) the evidence regarding causes of death is not definitive; (g) the fiber evidence is completely unreliable; and (h) the victims were tied in a manner wholly inconsistent with Misskelley's description.

Emasculation of Christopher Byers: Dr. Peretti testified at trial that the penis had been attacked by a serrated blade. His opinion about how these injuries occurred was wrong. Drs. Ophoven, Spitz, Baden and Souviron testified in the Rule 37 hearing that this injury was caused by postmortem animal predation.

Knife wound to Steven Branch. There was testimony at trial that there was a knife wound to Steven Branch's face. However, the testimony of Drs. Ophoven, Spitz , Baden, and Souviron is that this is animal predation as well.

Anal or oral sex. Despite the somewhat speculative trial testimony that the injuries could be the result of anal or oral sex, there was no anal trauma to any of

the boys because there was no rape and the bruising to the ears and mouths was caused by animal predation and perhaps blunt force but not by forced oral sex.

Blunt force injury. At trial, the Medical Examiner testified that the head injuries to Michael Moore were caused by two different types of weapons: a broad surface, for example a log 2-4 inches in diameter, and a two by four or smaller stick or broom handle. Dr. Spitz found that the location of skull fractures at the base of the skulls of Christopher Byers and Steven Branch is inconsistent with blows. Thus, as with the other injuries, the corroboration does not exist. For most of the blunt force injuries, the mechanism could not be determined.

Cause of death. This Court found very persuasive the fact that Misskelley reported he had seen Christopher Byers apparently die but not the two other boys and the Medical Examiner testified that Byers did not drown but the other two did. By contrast, Dr. Spitz found that all three boys "died of drowning while bound at the ankles and wrists.

Fiber Evidence. At trial, the State called Lisa Sakevicius (now deceased), a criminalist with the Arkansas State Crime Lab. (Trial 1507-1523. Abs. 487-493) The defense allowed her to be qualified as an expert without objection. She testified without objection that a fiber found on a victim's Cub Scout cap was

"similar to" fibers from a shirt from Damien Echols' residence; that a second fiber found on a victim's pants was "microscopically similar" to the same shirt; and that a third fiber found on a victim's shirt was "consistent with" a fiber from a red housecoat found at Jason Baldwin's residence.

Misskelley presented testimony at the Rule 37 hearing that the testimony was unreliable. Furthermore, the National Research Council has published entitled *Strengthening Forensic Science in the United States: A Path Forward* (Feb. 2009). See, *Melendez-Diaz v. Massachusetts*, __ U.S. __, 129 S.Ct. 2527 (2009)(relying extensively on the study), in which fiber evidence is addressed thus:

> A group of experienced paint examiners, the Fiber Subgroup of the Scientific Working Group on Materials Analysis (SWGMAT), has produced guidelines, but no set standards, for the number and quality of characteristics that must correspond in order to conclude that two fibers came fromthe same manufacturing batch. There have been no studies of fibers (e.g.,the variability of their characteristics during and after manufacturing) on which to base such a threshold. Similarly, there have been no studies to inform judgments about whether environmentally related changes discerned in particular fibers are distinctive enough to reliably individualize their source, and there have been no studies that characterize either reliability or error rates in the procedures. Thus, a "match" means only that the fibers could have come from the same type of garment, carpet, or furniture; it can provide only class evidence.
>
> Because the analysis of fibers is made largely

> through well-characterized methods of chemistry, it would be possible in principle to develop an understanding of the uncertainties associated with those analyses. However, to date, that has not been done.

(Strengthening Forensic Science, p. 162-163)

Evidence of tying. In his confession, Misskelley said that the boys were tied with brown rope to each other but that they could move. That was not so. However, the boys hands were not tied to each other. Each one was hog-tied, *i.e.*, left hand to left foot, right hand to right foot. Moreover, they were tied with their own shoelaces, some were black and some were white.

Dr. Frank Peretti was the prosecution's main trial and Rule 37 witness on the physical evidence and the manner in which it corroborated Misskelley's confession as to how the murders supposedly took place. (Trial 1313-1357. Abs. 400-407. R37T 2583-2854. Abs. 259-276) Peretti's testimony corroborated Misskelley's eventual statement to police that the boys had been repeatedly raped, had been held by their ears during forced oral sex, and that Byers had been the victim of a deliberate castration with a knife. These were the main details on which the prosecution relied to demonstrate that Misskelley did not falsely confess under police pressure. Peretti's testimony made Misskelley's bizarre statement believable because Peretti's opinion tracked the details of the statement. Among

other things, Perretti corroborated that the boys had been held by their ears during forced oral sex; that the Byers boy was castrated with a knife; that the victims had anal dilation that could have resulted from insertion of an object; that Steve Branch's face had multiple "cutting wounds."

Trial counsel neither challenged Dr. Peretti's qualifications, although he was not board-certified nor did he challenge his testimony under *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991), or *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S.Ct. 2786 (1993), regarding the methodologies by which he arrived at his conclusions regarding cause of death, mechanism of injury, and evidence of sexual assault.

In denying relief on Misskelley's motion for new trial, this Court found that counsel failed to conduct effective cross examination on two points that would have demonstrated the falsity of Misskelley's confession. Specifically, counsel failed to elicit from Peretti the facts that (1) the lack of blood at scene meant that the victims may have been murdered in a different location than Robin Hood Hills, and (2) the castration of Byers would have required skill and precision. *See Misskelley,* 323 Ark. at 478. The Supreme Court denied Misskelley a new trial because trial counsel failed to elicit this testimony.

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V. COUNSEL FAILED TO PROPERLY CHALLENGE, CROSS EXAMINE, AND REBUT THE STATE'S FIBER EVIDENCE.

Counsel for Misskelley was ineffective for failing to adequately challenge and rebut the state's fiber evidence. At trial, the state had no physical evidence connecting Misskelley to the scene. The best it could do was attempt to connect Baldwin and Echols to the scene and did so with the flimsy "scientific" evidence presented by criminalist Lisa Sakevicius. (Trial 1507-1523. Abs. 487-493) According to Sakevicius, she found fibers on the crime scene evidence that were "microscopically similar" to fibers found in the homes of Echols and Baldwin. Specifically, she testified that she found (1) a single red rayon fiber on a polka dot shirt belonging to one of the victims, that was "microscopically similar" to a red housecoat found in Baldwin's home; (2) a green polyester fiber from a cub scout cap that was microscopically similar to a shirt in Echols' house; and (3) a green polycotton fiber on one of the victim's blue pants that was microscopically similar to the shirt in Echols' house. Counsel for Misskelley committed a four-tiered error that prejudiced Misskelley with regard to Sacevicius' testimony.

First, counsel failed to challenge Sacevicius' testimony under *Prater* or *Daubert*. Had counsel adequately prepared for this testimony and objected to it, the fiber evidence would likely have been excluded. First, Sakevicius did not

adequately document her work. Further, the record shows that counsel had information necessary to conduct a challenge to the actual testing and methodology employed by Sakevicius in this case. *Second*, counsel failed to conduct voir dire of Sacevicius before her direct examination. *Third*, counsel failed to effectively cross examine Sacevicius on her findings. Importantly, counsel did not elicit from Sacevicius that the fibers she compared were very common and could be found in the majority of households: In the Echols/Baldwin trial, Sacevicius agreed that there were insufficient unique individual microscopic characteristics to identify the green fiber as coming from the shirt, which in fact was blue in color. (EBRT 2257-2260, Abs. 781-800). *Fourth*, defense counsel failed to call an expert to rebut Sacevicius' testimony.

VI. COUNSEL WAS INEFFECTIVE FOR FAILING TO PREPARE FOR AND CHALLENGE THE SEROLOGY AND DNA EVIDENCE.

At both the Misskelley and Echols/Baldwin trials the state presented the testimony of serologist Kermit Channell (Tr. 1530-1543, Abs. 493-502; EBRT 2104-2165, Abs. 765-771) and DNA analyst Michael DeGuglielmo (Tr. 1543-1550, Abs. 502-505; EBRT 2166-2180, Abs. 771-781) in an attempt to show that there was sperm on Evidence Exhibits 45 (described as blue pants) and Exhibit 48 (described as blue jeans). These pants, wet and muddy, had belonged to two of the

victims and had been retrieved from the drainage ditch when the bodies were discovered. In the Misskelley trial, this testimony became an important part of the state's final argument, with Fogleman arguing that the screening tests were positive for semen and that the DNA was from sperm. (Trial T 2266, Abs. 709-710)

As is demonstrated in the testimony of Patricia Zajac (R37T 470-505, Abs. 89-93), the testimony upon which the state relied to make these arguments was false and misleading, and the arguments themselves misconstrued and distorted the false evidence that had been presented by the serology and DNA experts. As a summary of Channell's testimony 'positive for semen' couldn't be much more misleading. This was at least a serious scientific failure.") At both trials, Channell did in fact testify that he ran two presumptive tests for semen and got positive results. The two tests he identified as positive were the laser "test" and the acid phosphatase test. The fact that no semen was found on any item was not brought to the attention of the jury through cross examination at either trial.

DeGuglielmo falsely testified at an admissibility hearing in the Misskelley case that "[t]he initial information that we were given on this was that they were, what I guess would best be phrased as potential seminal stains." (Trial R 1496-

1506. Abs. 479-487) Channell admitted in the Rule 37 hearing that there was no semen. (R37T 411-15. Abs. 85)

DeGugliemo also misleadingly stated during the admissibility hearing and repeated in both trials that: "In this particular case we detected no DNA in the epithelial or nonsperm portion of those two samples *and a very small amount of DNA in the male or sperm portion of those two samples, the interpretation from that being that there likely was a small amount of sperm present on those garments.*" (Trial T 1500-1503, Abs. 483-484).

What DeGugliemo did not explain is what is common knowledge among all competent forensic DNA analysts. As explained in Rudin and Inman, *An Introduction To Forensic DNA Analysis* (2d. ed. 2002)(Ch 6),

> The result of a differential extraction is two tubes, one containing DNA all or mostly from sperm and the other containing DNA all or mostly from the non-sperm cells. Due to the nature of the sample, seperation of the non-sperm cell DNA from sperm cell DNA may not always be complete. For example, if the sperm is in poor condition, some sperm cells may have already popped open, releasing their DNA prematurely. Because the method of seperation depends upon initially intact sperm cells, some of this free sperm DNA may show up in the final non-sperm cell fraction. *Alternatively, in a mix of many non-sperm cells and just a few sperm, some non-sperm cell DNA may persist among the sperm and may be detected in the final sperm fraction.* (Emphasis added)

Because "some non-sperm DNA may leak into the sperm fraction" it was

misleading in the extreme for DeGuglielmo to testify that because his DNA quantiation test found a "marginal" level of DNA in a "sperm" fraction it must mean that the DNA came from sperm. The testimony was especially misleading since, according to Channell's report, "no sperm."

The foregoing demonstrates that the state's serology and DNA evidence and argument at both trials was false and misleading and that there is no support whatsoever for a central tenet of the state's case, namely, that there was sperm or semen found on the pants of two of the victims. Further, it is clear from Stidham's testimony that he made no effort to discover the laboratory bench notes, or to the challenge the admissibility or weight of this evidence.

Though DeGuglielmo admitted that he could not say for certain that the cuttings from the jeans were "sperm stains" because he did not see any sperm under the microscope, he nonetheless testified that he detected "sperm fractions" through the process of differential extraction. These findings were subject to attack in light of the state of the science at the time of trial.

Further, counsel's failure to prepare and hire a DNA expert rendered him incapable of adequately challenging the testimony of crime lab employee Kermit Channel, who supposedly provided the foundation for DeGuglielmo's testimony.

ARGUMENT 41

While counsel vaguely objected to the scientific basis for Channell's testimony in chambers, (Trial T 1497, Abs. 482), counsel failed to timely renew the objection seek a hearing on the admissibility of the results of Channell's screening tests.

Counsel also failed to challenge the evidence that did come in. Channell testified that the first test he ran on the cuttings from the victims pants was just a basic screening test. Channell testified that he then conducted the second test, the acid phosphatase test. Channell explained that this is "a screening test to see if the item...*possibly* can contain semen," and that this second test came back positive. (Trial T 1533-1534, Abs. 494) On cross, counsel did nothing to underscore the fact that a positive acid phosphatase test means only that the item tested *may* contain semen, not that it is in fact *positive* for semen. Counsel did not elicit that a positive acid phosphatase test could indicate the presence of something other than semen. Counsel conducted completely ineffective cross examination by failing to highlight the inconclusiveness of Channell's' findings

The prosecutor falsely said in closing that there were two positive tests for semen. (Trial T 2266, Abs. 709-710) He grossly misstated the evidence, and defense counsel lacked the knowledge to say so. The prosecutor also focused on the fact that although Deguglielmo saw no sperm under the microscope, he did

ARGUMENT 42

separate out "sperm fractions" containing DNA that indicated the presence of sperm. Later, Davis rebutted the defense argument that no evidence supported Misskelley's statement to police that the victims were sodomized by arguing "the DNA guy said that there was DNA consistent as coming from a source of male sperm on the pants of one of the boys." (Trial 2285, Abs. 711)

VII. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER ARGUMENT AND/OR PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

As discussed below, counsel failed to raise several critical objections during the prosecution's closing argument, thereby waiving those issues on appeal. There is insufficient space to discuss them here. They include personal comments on the evidence and personal disparagement of defense counsel. (Tr 2282, Abs. 711); misstatements about the bloody man at the Bojangles restaurant, (Tr 2237, Abs. 694; Tr. 2293, Abs. 714); false statements about the "[t]he blood was washed off the bank and the scuff marks." (Tr. 2237, Abs. 694) No such fact was in evidence, and the there was *no* evidence that any blood was on the embankment in the first place; failing to object to the prosecution's misrepresentation of the results of Channell's tests for the possible presence of semen, as discussed above; falsely implying that the Bojangles evidence had been tested, when it had been lost by the

police (Tr. 2293, Abs. 714); and improper references to Misskelley's demeanor.

VIII. COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE.

A bloody man was seen at the Bojangles restaurant in West Memphis the night of the murders. Counsel was aware that the police had scraped blood samples off the wall of restroom of the Bojangles restaurant. Despite the fact that counsel presented to the jury that this man was a likely suspect, Counsel made no effort to determine what, if anything, the police did with the samples. Counsel could have obtained this information either through investigation or with a discovery request targeted specifically to the results of the samples. Proper investigation would have revealed that the Detective Ridge never sent the samples to the crime lab, and that he "lost them." (EBRT 1723-1725, Abs. 752)

Counsel was ineffective for failing to interview or attempt to interview Victoria Hutcheson about her statements to police that she went to an esbat with Misskelley and Echols. Had counsel spoken with Hutcheson, she may have mustered the courage then to explain what she subsequently revealed — that she fabricated the entire story about Misskelley attending an esbat. She gave a statement repudiating her claims against Misskelley (Rule 37 Ex. 68. Add. II 2996-3120), but in the Rule 37 hearing asserted her Fifth Amendment rights. (R37 T

2418, Abs. 246).

The defense was not adequately or effectively prepared to chronicle the activities, locations, and alibi evidence pertinent to Misskelley's case on both the day before the killing (May 4, 1993) and throughout the day of the killings (May 5, 1993). Counsel investigated and prepared this defense shortly before trial and did not spend the time necessary to prepare the witnesses and did not prepare for or anticipate the cross examination that completely undermined this defense. The prosecution cross-examined and impeached the defense's alibi witnesses with documents, police incident reports, prior statements, and other matters that the defense was not prepared to adequately address, though the information was available and pertinent.

For example, defense witnesses Stephanie Dollar (Trial T 1625-1637. Abs. 529-531) remembered seeing Misskelley at the Highland Trailer Park in the early evening of May 5, 1993 because that was the same day that her neighbor, Connie Molden, slapped Stephanie's son off of his bicycle. She testified that, when Officer Dollarhite responded to the scene, she and Misskelley were standing no more than five feet away from Dollarhite's car. The next witness that the defense called on this point was Officer James Dollahite (Trial T 1638-1648. Abs. 531-

533), who said that he had indeed responded to the scene, but he did not see Misskelley there. Apparently unprepared for this response, counsel asked, "is it possible that he was there and you just don't remember it?" to which Dollarhite responded, "No Sir." On cross, the prosecution elicited repetitive testimony on the fact that Dollahite did not recognize Misskelley as someone who was with Stephanie Dollar or any of the other bystanders, despite having know Misskelley and his family for 22 or 23 years. Counsel conducted no re-direct examination. Counsel apparently did not anticipate or prepare for the possibility that Dollahite would testify unfavorably.

Counsel also failed to anticipate use of alibi witnesses' prior statements to police. In addition to Dollar, similarly devastating impeachment occurred with the testimony of Christy Moss Jones (Trial T 1663-1674. Abs. 534-537); Jim McNease (Trial T 1690-1694. Abs. 541-543); Fred Revelle (Trial T 1725-1742. Abs. 548-552) and Roger Jones (Trial T 1742-1747, Abs. 552-554). Furthermore several of these witnesses wore yellow ribbons of support for Misskelley, which gave the prosecution ample opportunity to impeach their credibility on cross and in closing arguments. The alibi defense was also extremely disorganized and did not appear to follow any prepared time line or method of presentation. It was a

confusing, often contradictory, presentation of no less than sixteen witnesses. During closing arguments, counsel used no time line–visual or otherwise–to explain to the jury how the testimony of those sixteen witnesses proved Misskelley was in the park and then wrestling on the night of the murders.

Further, the prosecution argued that Misskelley's own alibi put him in two places at once, remarking "he's sitting on the front porch with somebody, and at the same time, he's with his girlfriend, and they're two different people, and then all of a sudden at the time that the Sheriff's Deputy got there, he's with Dennis Carter." The prosecution also reminded the jury that "Dennis Carter got up here and testified when he talked to the police the first time he gave them a statement and said he hadn't seen Jessie all day." (Tr. 2286-2287 Abs. 712)

Not only did counsel conduct late and inadequate investigation and preparation of Misskelley's alibi, but counsel likewise failed to present alibi evidence of his codefendants. Such evidence was highly relevant because a showing that Baldwin could not have been at the scene would have shown that Misskelley's statements about the crimes were false. Space does not permit the discussion here, but Baldwin outlines the evidence in his own brief.

ARGUMENT 47

IX. COUNSEL FAILED TO IMPEACH VICTORIA HUTCHESON.

Counsel was ineffective for failing to impeach witnesses with information available at trial, including but not limited to, Victoria Hutcheson. First, counsel failed to recall Hutcheson's denial of a statement that would have permitted impeachment with testimony by Rhonda Dedman. Second, counsel failed to use information provided by Jennifer Roberts that would have impeached Hutcheson on several matter to which Hutcheson testified.

Counsel intended to call Rhonda Dedman to show that, contrary to Hutcheson's testimony at trial, Hutcheson made statements about her interest in the reward money offered for information in the investigation of this case. When counsel asked Hutcheson, "Did that thirty thousand dollar reward have anything to do with your decision" to "play detective?," she answered, "No. It had nothing to do with it. Counsel then asked, "Did you ever tell anybody that you were going to get that reward?" Hutcheson answered "Not to my knowledge, no." (Trial T 1477. Abs. 466) Thus, Hutcheson denied making a statement about her expectation of a reward.

Yet, when counsel called Rhonda Dedman to say that Hutcheson had plans for how to "split the reward money" with her son and "another little boy," the court

sustained an objection on the grounds that counsel had not confronted Hutcheson with such a statement. (Trial T 1766. Abs. 557) This is because both counsel Stidham and Crow erroneously told the court that Hutcheson said she did not remember telling anyone she would get the reward money. Hutcheson, however, never said that she "did not remember" making such a statement. Rather, she denied making such a statement. Nonetheless, proceeding on their faulty recollection of Hutcheson's testimony, both counsel erroneously argued that a witnesses' failure to remember making a statement was a proper foundation for admitting extrinsic evidence to impeach the forgetful witness. Id. The court held that, because counsel did not offer Hutcheson a chance to explain or deny the statement, Dedman's testimony was inadmissible. Id. Worse still, the court told counsel that they could recall Hutcheson to establish the necessary foundation (which had already been established), but counsel neglected to do so.

Counsel also failed to impeach her with statements made to Jennifer Roberts. (Ex. D-2, Add. 796-811). Impeachment would have included her denials of the police knowing about her playing detective; she knew details that no one else knew; and that the police had installed a surveillance system in her trailer; and her knowledge that Mark Byers was into witchcraft; and whether she was going to

receive reward money.

CONCLUSION

Misskelley prays that this Court reverse the decision of the circuit court and remand the matter for a new Rule 37 proceeding.

JESSIE LLOYD MISSKELLEY JR.

_____
JEFF ROSENZWEIG
Ark. Bar No. 77115
300 Spring St. Suite 310
Little Rock, AR 72201
(501) 372-5247
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have mailed copies of the Abstract, Brief and Addendum to the Hon. David Burnett, c/o Craighead County Courthouse, the Hon. David Laser, Craighead County Courthouse Jonesboro, AR, and Dustin McDaniel, Attorney General, 323 Center St. Little Rock, AR 72201 and counsel of record for Baldwin Blake Hendrix and John Philipsborn this ____ day of February, 2011.

_____
JEFF ROSENZWEIG

ADDENDUM PART 1

This addendum is in two parts. The record is complicated: Under *Drymon v. State*, 327 Ark. 375 938 S.W.2d 825 (1997), the record previously in this Court becomes part of the Rule 37 record. Accordingly, since the habeas corpus record resulting in *Misskelley v. State*, 2010 Ark. 415, already had much of the pleadings in it, it was not necessary to recompile it here. Moreover, since Misskelley and Baldwin had a joint Rule 37 hearing, it was necessary to compile only one appellate record; Judge Burnett ordered that be done by the Craighead Circuit Clerk. The Clay Circuit Clerk provided only those parts subsequent to the circuit court's habeas decision which was specific to Misskelley. The second part of the addendum consists of the hearing exhibits in the Rule 37 hearing. For the convenience of the Court, Misskelley uses Baldwin's pagination of the exhibits.

Moreover, in order to hold the size of the addendum down to manageable levels, Misskelley includes only the final Rule 37 petition----the one actually adjudicated----and does not include exhibits thereto other than absolutely necessary. Most of the exhibits were also introduced either at the trial or in the Rule 37 hearing.

The order has been slightly changed in order to make the arrangement most sensible.

ORDER AND APPELLATE FILINGS

RECUSAL PLEADINGS

Rule 37 documents

ADDENDUM, PART 2

The following are exhibits from the Rule 37 hearing. Misskelley and Baldwin had a joint hearing. Therefore, for the convenience of the Court, Misskelley and Baldwin use the same pagination in the Addendum for these exhibits, using the Baldwin brief's numbering.

INDEX TO ADDENDUM 7

INDEX TO ADDENDUM 8

INDEX TO ADDENDUM 9

INDEX TO ADDENDUM 12