

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Do you have any complaint or criticism  
3 that you want to tell me now about their services, their  
4 advice or their treatment of you in this case?

5 THE DEFENDANT: No, sir.

6 THE COURT: Are you completely satisfied?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Have they discussed with you your right  
9 to testify?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Have they discussed with you all the  
12 facts and circumstances of the case?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Have you been truthful with them?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Is it your desire not to testify?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: All right. Anything else?

19 MR. STIDHAM: Would you like us to make our motion  
20 for a directed verdict back here or in open court or---

21 THE COURT: Do you have anything to add to your  
22 original motion for a directed verdict at this point?

23 MR. STIDHAM: Not really, your Honor. I just want  
24 to be real careful---

25 MR. CROW: --There was a case recently where a guy

1           said, "I renew my motions," and the Court said that  
2           wasn't enough, and that scared us to death.

3           THE COURT: I'm familiar with that case and that's  
4           what I'm getting ready to say. Do you have any new  
5           matter that you want to add to your original motion for a  
6           directed verdict?

7           MR. STIDHAM: Just the same arguments that we made  
8           previously.

9           THE COURT: Let the record reflect that defense  
10          counsel has reannounced and reaffirmed all of their  
11          motions, all of their reasons and justifications for a  
12          directed verdict, and the Court has considered those  
13          motions again at the close of the defendant's case and  
14          the motion is denied.

15          MR. STIDHAM: I hope that's sufficient, your Honor.

16          THE COURT: I don't know why it wouldn't be. There  
17          isn't any point in your rehashing them. What I've done  
18          is give you an opportunity to state any matter---

19          MR. STIDHAM: --We would like to very briefly say  
20          that we don't feel the State has met its burden of proof  
21          on capital murder because of the intent required of Mr.  
22          Misskelley. We don't think that has been established.

23          We would also state that we don't feel the State has  
24          met its burden with regard to accomplice liability.

25          We'd also submit the State hasn't met its burden

1 with regard to first degree murder.

2 And again, we'd like you to consider all those  
3 arguments that we made at the close of the State's  
4 case---

5 THE COURT: --I think you made those at the close of  
6 the State's case as well. I will reconsider them now,  
7 and it will be the Court's finding that the State has  
8 made a prima facie case as to Jessie Misskelley, Junior's  
9 liability as an accomplice clearly.

10 There is testimony in the record from Mr. Misskelley  
11 to the officers that he knew what they were going to do,  
12 that they had talked about beating some boys up before  
13 they ever went out there the day before. He went out  
14 there and met with them, if his story is to be believed,  
15 and during the course of the attack on the first two boys,  
16 one of them -- Moore, I believe -- ran. He ran him down,  
17 retrieved him and brought him back and that to me is more  
18 than enough conduct to implicate him in both capital  
19 murder, first degree murder or any lesser degree in that  
20 there is a transferred intent that he knew at the time he  
21 retrieved the one boy that the other two were being  
22 beaten, and that he aided and agreed to aid and assist in  
23 that criminal enterprise that turned out to result in the  
24 death of the three youngsters. And I think a jury could  
25 easily conclude from that that he was guilty of capital,

1 first degree, second degree. I don't know about  
2 manslaughter. I hadn't thought about that yet, but we  
3 will talk about that later.

4 MR. DAVIS: Do you anticipate if we get through with  
5 our rebuttal evidence by around noon or so that we will  
6 go ahead and instruct, argue and do everything this  
7 afternoon?

8 THE COURT: Yes.

9 MR. STIDHAM: Your Honor, are you satisfied with --  
10 I don't want to waive any motion for a directed verdict.  
11 If the Court feels I need to go out and---

12 THE COURT: No. I think you've made your motion,  
13 and I also would point out you made a long offer of proof  
14 yesterday with regard to Doctor Ofshe, and I had made a  
15 ruling that basically limited and restricted his  
16 testimony to some degree and as it ended up he was able  
17 to voice and view and articulate all of his opinions and  
18 beliefs that I had originally instructed him not to, not  
19 as a result of anything you did but it turned out that  
20 way, so the record should reflect that those opinions  
21 were given to the jury.

22 MR. STIDHAM: Not all of his opinions.

23 THE COURT: All except the business about cult  
24 activity, and you didn't attempt to ask him that. I  
25 think I made a statement that some of the cult stuff was

1 probably admissible.

2 MR. STIDHAM: Doctor Ofshe was never allowed to tell  
3 the jury of his opinion in regard to the involuntary  
4 nature of the statement.

5 THE COURT: The main reason for that is he indicated  
6 to the Court he had taken a seventy-five page statement  
7 from Jessie Misskelley and that he was basing a great  
8 deal of his opinion on that statement.

9 And the Court felt to allow him to do that would be  
10 having him testify for Mr. Misskelley and that while he  
11 can rely upon hearsay data and information, it is not  
12 normally reliable. It does have to be evidence that is  
13 adduced during the trial.

14 It might have been a different ruling had Misskelley  
15 elected to testify and testified to the effect that --  
16 "The officers tricked me. They did this, they did that"  
17 -- and then Ofshe testified, it might have been a totally  
18 different picture.

19 But to do what you wanted to do was going to allow  
20 an expert to testify for the defendant, and I didn't  
21 think that was appropriate.

22 I think in a narrow case where the real issue is the  
23 truthfulness of a confession, that to allow experts to go  
24 in and give their opinion that, "I don't believe it is  
25 true," invades the province of the jury.

1 MR. STIDHAM: I respectfully disagree, your Honor.  
2 I understand your ruling. Thank you.

3 (RETURN TO OPEN COURT.)

4 MR. STIDHAM: Your Honor, may I approach the bench?

5 THE COURT: Yes.

6 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT  
7 OF THE HEARING OF THE JURY.)

8 MR. STIDHAM: Your Honor, I think it kind of  
9 confuses the jury when we rested back there and they  
10 don't know what happened.

11 THE COURT: I'll tell them.

12 MR. STIDHAM: Okay.

13 (RETURN TO OPEN COURT.)

14 THE COURT: Are we ready?

15 Alright, ladies and gentlemen, good morning, and  
16 Court will be in session and for your information and  
17 everyone else's information the defense has rested their  
18 case. The Court's heard a motion and we're now ready to  
19 proceed with rebuttal.

20 MR. DAVIS: Your Honor, the State would call Gary  
21 Gitchell.

22 MR. STIDHAM: Your Honor, may counsel approach the  
23 bench again?

24 THE COURT: Yes.

25 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT

1 OF THE HEARING OF THE JURY.)

2 MR. STIDHAM: Your Honor, I want to point out to the  
3 Court that Officer Gitchell was in the courtroom  
4 yesterday during the testimony and I understand that he  
5 watched some of the testimony and---

6 THE COURT: --I observed him in the courtroom during  
7 some of Doctor Ofshe's testimony. I don't know about him  
8 being here prior to that.

9 MR. STIDHAM: We would submit that's a violation of  
10 the Rule.

11 THE COURT: He is a -- he is a rebuttal witness. He  
12 had been released from the Rule by the Court and by  
13 agreement with both parties and, therefore, I'm going to  
14 allow him to testify.

15 (RETURN TO OPEN COURT.)

16 GARY GITCHELL

17 having been previously sworn to tell the truth, the whole  
18 truth, and nothing but the truth, then testified further as  
19 follows:

20 REDIRECT EXAMINATION

21 BY MR. FOGLEMAN:

22 Q. For the record you are Inspector Gitchell who previously  
23 testified in this case?

24 A. Yes, sir, I am.

25 Q. Inspector Gitchell, I believe that you were in the

1 courtroom yesterday during some of Mr. Ofshe's testimony. Is  
2 that correct?

3 A. Yes, sir.

4 Q. Mr. Ofshe testified that the fact that this incident  
5 happened at night was not mentioned until page eighteen when  
6 Detective Ridge said, "The night you were in these woods."  
7 Was the fact that this happened at night mentioned prior to  
8 page eighteen of the transcript?

9 A. Yes, sir. Mr. Ofshe's remark was incorrect inasmuch as  
10 on page twelve of the transcript Jessie states, "Well, after  
11 all this stuff happened that night." That's the first time  
12 that night is mentioned by Jessie himself.

13 Q. Alright. Had you -- had you or Detective Ridge mentioned  
14 night prior to that?

15 A. No, sir.

16 Q. Mr. Ofshe also testified in regards to the follow-up date  
17 that nowhere in the record did Jessie say seven or eight until  
18 you mention seven or eight. Where did you get seven or eight?

19 A. I -- I derived that from -- there again, back on page  
20 twelve of the transcript, Jessie states, "Then they called me  
21 at nine o'clock that night."

22 Q. Um-hum.

23 A. And then you refer to page twenty-four of that same  
24 transcript and then there's a mention of, "How long after you  
25 got home you received the phone call?"



1 And Jessie responds, "An hour."

2 So that's where I deducted the -- the time frame.

3 Q. Okay. Now, would you refer to page three of the  
4 transcript?

5 A. (COMPLIES.)

6 Q. Where the transcript shows that Detective Ridge said,  
7 "Nine o'clock in the morning." Mr. Ofshe testified that  
8 Jessie said -- that Jessie said that, not Detective Ridge and  
9 that the transcript is wrong. Who said that?

10 A. Detective Ridge is the person that said, "Nine o'clock in  
11 the morning." And I even have a -- the tape which shows that  
12 Detective Ridge said that.

13 Q. Would you play that portion of the tape?

14 A. (COMPLIES.)

15 (TAPE BEING PLAYED FOR JURY AT THIS TIME.)

16 BY MR. DAVIS:

17 Q. And who just said, "Nine o'clock in the morning."?

18 A. That's Detective Ridge that said that.

19 Q. Alright. If you would, Inspector Gitchell, describe for  
20 the jury the room that this interview took place in.

21 A. The room which we used to interview Jessie in was  
22 Detective Lieutenant Hester's -- she's a female police officer  
23 at the police department. Her room is probably the nicest  
24 room that we have in the detective division. She has pictures  
25 of her children, colorings that they've done in school saying,

1 "Mother, I love you." -- things of that nature. So it's  
2 probably the most relaxed atmosphere that we have in the  
3 police department.

4 Q. Alright, and describe for the jury the -- the atmosphere  
5 during the interviews themselves, both on tape and off tape.

6 A. Well, during that time, we were probably nervous, but the  
7 atmosphere itself was a very laid back and subdued nature.

8 Q. During either interview on tape -- off -- first  
9 interview, follow-up interview, was any pressure or  
10 intimidation used by either yourself or Detective Ridge?

11 A. No, sir, none whatsoever. We knew this case due to the  
12 type of coverage it had received that whomever would be picked  
13 up, we would have to use -- we would have to talk with this  
14 person and use the utmost care and treat them truly with kid  
15 gloves as if we were talking with one of our own children.

16 Q. And was there anything in -- in either of the tape  
17 recorded portions that indicate anything on the defendant's  
18 part that you observed or heard that would indicate a lack of  
19 pressure or intimidation?

20 A. Yes, sir. On the second tape that I did with Jessie  
21 Misskelley there are three places in there which he's yawning,  
22 and---

23 Q. He's yawning?

24 A. Yes, sir. He's -- you can hear him going (DEMONSTRATING)  
25 -- just yawning. So there's not any pressure there.

1 Q. Alright, and you can hear this on the tape?

2 A. Yes, sir, you can.

3 Q. Did you or Detective Ridge ever feed any information to  
4 this defendant?

5 A. No, sir.

6 Q. Did you or Detective Ridge---

7 MR. CROW: I'll object to leading, your Honor.

8 THE COURT: Avoid leading.

9 MR. CROW: Thank you.

10 BY MR. FOGLEMAN:

11 Q. What if any manipulations did you or Detective Ridge do  
12 to the defendant?

13 A. None whatsoever.

14 Q. Would you ever try to get a person to confess to a crime  
15 that they did not commit?

16 A. Absolutely not.

17 MR. FOGLEMAN: I don't have any further questions.

18 MR. STIDHAM: Your Honor, could we have a moment,  
19 please?

20 THE COURT: Yes.

21 MR. STIDHAM: I need to review the transcript right  
22 quick.

23 MR. FOGLEMAN: Your Honor, I do have one more  
24 question.

25 BY MR. FOGLEMAN:

1 Q. In regard to State's Exhibit One Oh Five, that's --  
2 excuse me -- I think that's the photograph -- or the series of  
3 photographs that were shown to the defendant?

4 A. Yes, sir.

5 Q. When the defendant identified which boy had been sexually  
6 mutilated, did you or Detective Ridge use any suggestion to  
7 suggest who he should pick?

8 A. No, sir, not whatsoever. He picked out this young man  
9 right here -- the Byers boy. (INDICATING.) He mentions  
10 Michael Moore simply because in the caption, Michael Moore  
11 comes underneath this picture and that's why Detective Ridge  
12 read the caption underneath to straighten that out. He did  
13 pick the right boy who was castrated.

14 Q. Alright. When this -- when he identified -- as far as  
15 when the -- when he identified who was castrated, where was  
16 the picture?

17 A. The picture was sitting on the desk.

18 Q. Alright, it was laying on a desk?

19 A. Yes, sir.

20 Q. Alright, and was anybody pointing to any of the pictures?

21 A. No, sir, not at all.

22 MR. FOGLEMAN: I don't have any further questions.

23 RECROSS EXAMINATION

24 BY MR. STIDHAM:

25 Q. Inspector Sitchell, this statement wasn't videotaped, was

1 it?

2 A. No, sir, it wasn't.

3 Q. And you didn't take notes during the first statement, did  
4 you?

5 A. No, sir.

6 Q. And -- but you didn't take notes prior to the tape  
7 recorder coming on so you really don't know exactly what  
8 questions were asked and what questions were answered, do you?

9 A. Just from recollection.

10 Q. So if we had a videotape we'd know for sure, wouldn't we?

11 A. Yes, sir.

12 Q. At an earlier hearing on January thirteenth in Marion I  
13 asked you about -- going on to the second tape -- and  
14 immediately you're telling Jessie, "You told me earlier it was  
15 seven or eight."

16 A. Yes, sir, I recall.

17 Q. And I asked you, "When did you talk to him about that?"  
18 and your response was, you didn't remember.

19 A. My first response, if you'll look in the transcript, was,  
20 "I believe it was during the very first taping." Is that not  
21 correct, counsel?

22 Q. Detective Gitchell, what page is that on?

23 A. Uh -- one forty-six is what page was shown.

24 Q. I believe your response, Detective Gitchell, was that you  
25 weren't sure.

1 A. Uh -- I did make that response later, but my first  
2 response was, "I believe it was during the first tape," and  
3 then subsequently after several more questions from you, I  
4 told you, "I really wasn't sure." But I first do -- do recall  
5 making the statement, "I believe it was during the first  
6 tape."

7 Was that not correct?

8 Q. I believe that's correct and then you said you weren't  
9 sure. You thought it was the first tape.

10 A. I thought it was the first tape.

11 Q. Now you're more certain of that?

12 A. It was during the first tape, yes, sir.

13 MR. STIDHAM: Pass the witness.

14 REDIRECT EXAMINATION

15 BY MR. FOGLEMAN:

16 Q. How did that come up in that other hearing about -- what  
17 was the whole---

18 A. It was in the same gist as now about the mentioning of  
19 the time. Mr. Stidham asked me if -- what -- at what time did  
20 we -- did that statement come up. I stated at first, "I  
21 thought it was during the taped interview," which this is what  
22 the transcript is of that I just testified to.

23 Q. Were you given an opportunity -- did you go through and  
24 look through every page of the transcript during that hearing  
25 to see if you could find where it was?

1 A. No, sir, I had not had an opportunity to do that.

2 Q. Alright. Is that until after the hearing?

3 A. Right, on this that I've looked through, yes, sir.

4 Q. Alright. In fact referring to page one thirty-six of  
5 that hearing, Mr. Stidham asked you, "Why does the tape we  
6 just heard -- the second tape say -- you told me earlier this  
7 happened about seven." And what was your answer?

8 A. My answer to him was, "You didn't hear all of the first  
9 tape. You've got transcripts of it and if you had played the  
10 whole tape you would have heard what I was referring to."

11 Q. Okay.

12 MR. FOGLEMAN: I don't have any further questions.

13 RE-CROSS EXAMINATION

14 BY MR. STIDHAM:

15 Q. The second taped statement you don't even know what time  
16 that was, do you?

17 A. It was approximately five o'clock.

18 Q. Why didn't you announce what time it was on the tape?

19 A. I didn't think to do that.

20 Q. And there are several gaps in the tape, is there not?

21 A. Yes, sir, that's accounted for from me leaving the room  
22 and going back and talking with Mr. Fogleman because he had  
23 some questions for me to ask Jessie.

24 Q. The prosecutor was sending you back in the room to ask  
25 Jessie more questions?

1 A. That's correct.

2 Q. Isn't it customary, Inspector Gitchell, to when you get  
3 on a tape to announce what date it is, what time it is, the  
4 tape was turned off---

5 A. That would be customary---

6 Q. Let me finish my question, please.

7 A. Well, I was going to answer the first part.

8 Q. Isn't it customary that when you stop the tape, you  
9 announce what time it is and when you go back on tape, you  
10 announce what time you begin again?

11 A. That's customary in this type of statement which we did  
12 do that. However, this -- the only reason I did this tape was  
13 to verify because I be -- I was sure nobody would believe what  
14 I would be saying, so that's why I carried the tape in with  
15 me.

16 MR. STIDHAM: Nothing further.

17 MR. FOGLEMAN: I don't have any further questions.

18 (WITNESS EXCUSED.)

19 THE COURT: Call your next witness.

20 MR. DAVIS: Your Honor, the State would call Doctor  
21 Vaughn Rickert.

22 THE COURT: Doctor, you were previously sworn.

23 THE WITNESS: Yes, sir.

24 DOCTOR VAUGHN RICKERT

25 having been previously sworn to speak the truth, the whole

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1 truth, and nothing but the truth, then further testified as  
2 follows:

3 DIRECT EXAMINATION

4 BY MR. DAVIS:

5 Q. Would you state your name, please, sir?

6 A. Vaughn I. Rickert.

7 Q. And, Mr. Rickert, where are you employed?

8 A. I'm employed by the Department of Pediatrics at the  
9 University of Arkansas for Medical Sciences and also  
10 affiliated staff with Arkansas Children's Hospital.

11 Q. And in what capacity are you employed there?

12 A. I'm employed as a clinical psychologist more known as the  
13 pediatric and adolescent psychologist and an associate  
14 professor of pediatrics.

15 Q. And could you explain to us briefly what you do in that  
16 job as a pediatric and adolescent psychologist with the  
17 Arkansas Children's Hospital?

18 A. My role is threefold. My first role is providing  
19 clinical service where I diagnose and treat children and  
20 adolescents who may have diagnosable disorders of substantial  
21 psychological difficulties in terms of both evaluations and  
22 treatment.

23 My second role is to do and conduct research and my  
24 research interests are in adolescent medicine issues  
25 particularly revolving around adolescent substance use and

1 various health related behaviors that adolescents might engage  
2 in which could compromise their health in the future.

3 My third role is to do teaching to provide education to  
4 pediatric residents and medical students surrounding child and  
5 adolescent development and treatment and diagnosis issues that  
6 may help them in their practice of pediatrics.

7 Q. Now, when you refer to adolescents -- just so we  
8 understand -- what age group are we talking about?

9 A. Adolescents generally refer to individuals between the  
10 ages of twelve to twenty-one.

11 Q. Okay. Now, could you briefly tell us about your  
12 background, education, training, and experience in this  
13 particular field?

14 A. Yes. I received my Bachelor's Degree in psychology from  
15 Michigan State University in nineteen seventy-seven. I went  
16 to graduate school to get a Masters and Specialist Degree in  
17 school psychology. School psychology is the sub-speciality of  
18 psychology looking at psychological processes and difficulties  
19 that children experience within a school setting.

20 After working professionally for three years in that  
21 field, I went back to get my Doctoral Degree in professional  
22 psychology in -- and specializing in clinical type psychology.  
23 As a part of the degree requirements, you were required to do  
24 a full time internship which I did at Johns Hopkins University  
25 School of Medicine in Baltimore. After completing that

1 internship, I graduated and was awarded a degree and was  
2 employed at the University of Arkansas for Medical Sciences in  
3 nineteen eighty-six.

4 Most recently I have been awarded fellow status in the  
5 Society of Adolescent Medicine which is a elected title to  
6 indicate substantial contributions in the area of adolescent  
7 health and medicine.

8 Q. And is that an award that you received or an honor that  
9 you received that's based on your scientific achievements?

10 A. Yes. Yes. It's directly related to my scientific  
11 contributions to the field as well as my educational effort  
12 within the society.

13 Q. Now, could you tell us kind of what -- what a general  
14 difference between psychology and sociology is?

15 A. Generally, the field while related focus on differences.  
16 In psychology you are typically taught and evaluate children  
17 -- particularly in a clinical area -- looking at mind-body  
18 relationship and more particularly psychological processes  
19 like processes and things of that nature, but it's definitely  
20 looking at the individual person, child, or adult.

21 Sociology, while they may be concerned with individual  
22 behaviors, it's more recognized looking at groups of people.  
23 So within both fields there are some overlaps but within the  
24 areas of clinical psychology particularly, you are trained to  
25 treat and diagnose individuals which is not something that

1 sociologists would be trained to do.

2 Q. Now, as part of your job with the Children's Hospital, do  
3 you review evaluations performed by other doctors to determine  
4 the significance of those evaluations and also what further  
5 things might be done in regard to a particular patient?

6 A. Yes, that's part of my standard procedure.

7 Q. Okay. And in doing those evaluations are you familiar  
8 with some of the tests that were referred to by Doctor Wilkins  
9 during his testimony?

10 A. Yes, I am.

11 MR. DAVIS: Your Honor, at this time we would submit  
12 Doctor Rickert as an expert in the field of adolescent  
13 psychology.

14 THE COURT: Do you want to take him further?

15 MR. CROW: No, your Honor.

16 THE COURT: Alright, you may proceed.

17 BY MR. DAVIS:

18 Q. Now, Doctor Rickert, what have you examined or looked at  
19 prior to coming here to testify today?

20 A. I have reviewed Doctor Wilkins' psychological report and  
21 also I have reviewed an attached transcript that he was  
22 testifying to in November and December, I believe.

23 Q. And those were hearings in this matter -- previous  
24 hearings in this matter?

25 A. Yes, they were.

1 Q. Okay. And were you also present for the majority of  
2 Doctor Wilkins' testimony yesterday?

3 A. Yes, I was.

4 MR. STIDHAM: Your Honor, may counsel approach the  
5 bench?

6 THE COURT: Yes.

7 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT  
8 OF THE HEARING OF THE JURY.)

9 MR. STIDHAM: Judge, he's not going to be allowed to  
10 testify about Doctor Wilkins' evaluations, is he? Doctor  
11 Wilkins' own evaluation, not the evaluation of the  
12 defendant.

13 MR. DAVIS: No. No. No. No.

14 THE COURT: No. No. You're talking about -- no.

15 MR. DAVIS: I didn't even -- I'm not going into  
16 that.

17 MR. STIDHAM: I just wanted to make sure. I just  
18 wanted to make sure. Thank you, your Honor.

19 (RETURN TO OPEN COURT.)

20 BY MR. DAVIS:

21 Q. Just to clarify something, Doctor Rickert. When you said  
22 that you had reviewed an evaluation, it's Doctor Wilkins'  
23 evaluation of this defendant, correct?

24 A. Yes, that is correct.

25 Q. Okay. Now, let me ask you: Have you ever done any work

1 as a professional witness before?

2 A. No, I have not.

3 Q. How much income did you receive last year as a  
4 professional witness?

5 A. I received zero dollars.

6 Q. Okay. And have you received or have you been promised  
7 anything to come testify here today?

8 A. I have not been promised anything.

9 Q. Now, first off, let me ask you: Are the tests -- the  
10 standardized tests that Doctor Wilkins referred to in his  
11 report, are they based on scientific methods?

12 A. Some of them are.

13 Q. Okay. Can you explain for us what scientific methods  
14 means and why it's important?

15 A. When looking at a way a person responds or the score that  
16 one gets on a particular instrument, we want to make sure that  
17 that score would happen again and again and again or that the  
18 test is reliable. What you get the first time is likely what  
19 you would get the second or third time.

20 In addition you always -- you also want to make sure that  
21 the test is valid. That is what it says it's supposed to  
22 measure is in fact what it measures. Obviously in the field  
23 of psychology and in mental health some of the things that we  
24 discuss and try to make attributions to are very complicated  
25 and are not very simple.

1           As a result, tests which are standardized and normed  
2 provide very useful information because as a part of the  
3 scientific method these tests have been given to a large  
4 number of individuals from various different parts of the  
5 country at various ages. So that a -- so that a person who is  
6 thirteen you are comparing to other people within that sample  
7 who are also thirteen to look at the way in which they  
8 responded to get some index of the difference from normal  
9 versus abnormal -- high or versus low.

10           In contrast there are some instruments which don't have  
11 this amount of information and so you're generally limited to  
12 the kinds of inferences that you can draw because we are  
13 unsure or it has yet to be demonstrated that the results you  
14 got today is the same results you would get next week or next  
15 year.

16 Q.   Is that -- is that why it's important in all fields of  
17 science or studies that tests be based on proper scientific  
18 methods?

19 A.   In order to draw accurate conclusions, that is definitely  
20 important.

21 Q.   Okay. And you listened to the testimony of Doctor  
22 Ofshe---

23 A.   Yes.

24 Q.   ---or Mr. Ofshe yesterday. Was there any -- did you hear  
25 anything that he testified to that related to or indicated

1 there was any scientific methods from which he drew his  
2 opinion?

3 A. No, I did not hear any such---

4 MR. STIDHAM: Your Honor, I would object to that. I  
5 don't of any -- this witness is not an expert in the same  
6 field as Doctor Ofshe is and now he's going to get up  
7 there and say things about Doctor Ofshe -- not scientific  
8 methods not being there. He doesn't know anything about  
9 that.

10 MR. DAVIS: Your Honor, I think he -- I can clarify  
11 this.

12 THE COURT: Alright.

13 BY MR. DAVIS:

14 Q. Does the science -- no matter what field you're working  
15 in -- scientific methods in order to determine the accuracy of  
16 your results is the same whether it's in biological science or  
17 whether it's in psychology, correct?

18 A. That's correct.

19 MR. STIDHAM: Your Honor, again, my objection is  
20 this witness is not qualified to challenge something  
21 outside his field. He shouldn't be allowed to testify  
22 about things he has no knowledge of. This is the same  
23 witness who was on the stand yesterday saying he'd never  
24 heard of the---

25 MR. DAVIS: Your Honor---



1 MR. STIDHAM: ---Gudjonsson Scale of Suggestibility.  
2 And again I would submit---

3 MR. DAVIS: Your Honor---

4 MR. STIDHAM: ---that he knows nothing about that  
5 area.

6 MR. DAVIS: Excuse me. But if he's going -- if he's  
7 going to give a dissertation to the jury, then we're  
8 going to need to go back in chambers. If he's going to  
9 make objection, then I can respond.

10 MR. STIDHAM: I just made my objection, your Honor.

11 THE COURT: Alright, respond.

12 MR. DAVIS: Your Honor, my response is that he has  
13 testified that the scientific methods upon which any  
14 theory -- the reliability of any theory is based is the  
15 same no matter what field it's in.

16 THE COURT: Alright, ask him to describe what we  
17 mean when we say "scientific methods". Alright, and then  
18 -- I'm going to overrule your objection temporarily.

19 BY MR. DAVIS:

20 Q. Doctor, what is scientific method or can you describe  
21 that for us as simple as possible?

22 A. Basically what you're looking at is the reliability and  
23 the validity or the accuracy of getting the same results time  
24 over time and being recorded the validity, that is the  
25 truthfulness of a response or a particular result. In the

1 case of biology making sure that when you treat someone with  
2 an antibiotic that in fact that they get better. If you would  
3 do that over and over again, you would get the same results.  
4 Generally that's accepted scientific methods.

5 MR. STIDHAM: Your Honor, again my objection is this  
6 witness doesn't know anything about what Doctor Ofshe was  
7 testifying about yesterday. He stated on the -- this is  
8 the same guy who was on the stand yesterday I do believe  
9 and said he had never heard of the suggestibility scale  
10 by Doctor Gudjonsson. That's---

11 MR. FOGLEMAN: That's because it's not  
12 scientifically recognized.

13 MR. STIDHAM: No.

14 THE COURT: Okay. You all have editorialized enough  
15 now. I think I've got the picture.

16 Alright, Doctor, based upon your education,  
17 training, and experience, do you have an opinion as to  
18 the scientific reliability of -- what did we call that?

19 MR. STIDHAM: Gudjonsson Suggestibility Scale.

20 THE COURT: Yes.

21 MR. FOGLEMAN: Your Honor, that wasn't the question  
22 that was asked. The question that was asked is whether  
23 during the -- Mr. Ofshe's testimony what was---

24 MR. STIDHAM: Doctor Ofshe.

25 MR. FOGLEMAN: Can you treat a broken arm with your

1 mind?

2 MR. STIDHAM: Is this gentleman---

3 MR. CROW: Is this gentleman---

4 THE COURT: --Alright, I'm not going to put up with  
5 that. We've been here too long for that kind of stuff  
6 now. State your objection.

7 MR. STIDHAM: Your Honor, may I voir dire the  
8 witness about his knowledge---

9 MR. FOGLEMAN: Your Honor, I'm---

10 THE COURT: In just a minute maybe. Go ahead.

11 MR. FOGLEMAN: Your Honor, the question was: Is  
12 whether or not during the testimony of Mr. Ofshe that  
13 there was any scientific basis given for the conclusions  
14 that he drew.

15 MR. STIDHAM: He don't know that, Judge.

16 MR. FOGLEMAN: Well, he heard the testimony.

17 THE COURT: I'm going to allow him to give his  
18 opinion in that regard.

19 BY THE WITNESS:

20 A. I did not hear any report as to if the same procedure was  
21 applied by himself or someone else that he may have trained,  
22 that he would arrived at the same conclusions.

23 Q. And in the scientific community if you want to have your  
24 theory accepted as valid, what do you do?

25 A. Typically what is done and it's the customary procedure

1 that you write up the results of your study. You describe  
2 what you did, what results you're having, what you believe are  
3 the implications, and you submit that paper to a scientific  
4 journal in your field or in a related field where it is  
5 reviewed by other peers, that is, other colleagues with  
6 similar training -- not necessarily similar views -- and based  
7 upon that review your paper and your results are either  
8 accepted or rejected.

9 In addition what one typically does as well is send in a  
10 very short description of your paper and your findings to  
11 professional societies who have people who review to determine  
12 whether or not the scientific method is worth reporting and  
13 the results worth reporting and they might invite you or may  
14 choose not to invite you to present your findings at a  
15 scientific meeting.

16 Q. Was there anything in Doctor Ofshe's testimony yesterday  
17 that indicated that his theories had been published in any  
18 accepted peer review articles?

19 A. I did not hear any evidence of that.

20 Q. Now, is a Pulitzer Prize, does that have any -- is that  
21 an award given for scientific achievements?

22 A. No, it is not.

23 Q. And would that have any more to do with the  
24 qualifications of a sociologist than the Heisman Trophy?

25 A. It would not.

1 Q. Now, you have reviewed the tests and the report of Doctor  
2 Wilkins and I would first like to bring your attention to the  
3 I. Q. test that he's used. Which one was that?

4 A. That was the Wechsler Adult Intelligence---

5 MR. STIDHAM: Your Honor, may counsel approach the  
6 bench?

7 THE COURT: Yes.

8 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT  
9 OF THE HEARING OF THE JURY.)

10 MR. STIDHAM: Has this doctor examined my client,  
11 your Honor?

12 THE COURT: I don't know that he -- that he needs  
13 to. He can refer to the report and give his opinion  
14 based upon a report and data. You made that same  
15 objection the other day. I'm going to allow him to do  
16 that and that's what he can do.

17 MR. STIDHAM: Your Honor, we would ask that the jury  
18 be instructed to disregard his testimony regarding Doctor  
19 Ofshe. He's not an expert in the same field as Doctor  
20 Ofshe and his stuff about scientific methods in biology  
21 have nothing to do with the testimony.

22 THE COURT: A scientific method is a concept and  
23 it's used in mathematics. It's used in engineering.  
24 It's used in -- it's used in every field. A scientific  
25 method is something that any educated person that employs

1 the scientific method can give an opinion and in my  
2 opinion this conforms to the norm of the scientific  
3 method and that's really all that he's done.

4 MR. STIDHAM: Thank you, your Honor.

5 (RETURN TO OPEN COURT.)

6 BY MR. DAVIS:

7 Q. Doctor, which one was the I. Q. test that was performed?

8 A. The Wechsler Adult Intelligence Scale Revised.

9 Q. Okay, and do you recall what the results of those tests  
10 were -- the ones that Wilkins performed?

11 A. I recall that Mr. Misskelley's score was in the  
12 borderline range and that with the exception of two of the ten  
13 sub-tests, his scores were in the lower range of -- in the  
14 borderline range essentially.

15 Q. And did you also review where it indicated that he had  
16 performed and scored eighty-eight and eighty-four on previous  
17 I. Q. tests?

18 A. Yes, I did.

19 Q. And that would have been in performance?

20 A. Right. In terms of the background information that was  
21 provided in this report it was evident that Mr. Misskelley had  
22 -- the intelligence scale is comprised of two portions -- a  
23 verbal portion where you're asked questions and expected to  
24 answer, and a performance portion where you're expected to  
25 listen to the instruction at the same time you're being shown,

1 but to solve problems using your eyes and hands.

2 The performance pattern that was reported in Doctor  
3 Wilkins' report indicated that Mr. Misskelley's ability to  
4 solve problems using his eyes and hands was in the average  
5 range whereas when he was asked questions or -- of a verbal  
6 nature such as defining words or telling how two words or  
7 concepts are similar, was markedly below that and in the  
8 borderline range.

9 Q. Now, what -- what does your success in school or book  
10 learning have to do with how you score on an I. Q. test?

11 A. Well, certainly they're related and, in fact,  
12 historically the I. Q. test was developed in order to separate  
13 out children who may profit from education versus children  
14 that they thought would not profit from education -- although  
15 we know that that's not true today.

16 So there is a very high relationship between individual  
17 children and adults who did very well in school and their  
18 overall intelligence because they are very related things --  
19 particularly on the verbal portions of the instrument. As you  
20 age you get more and more of those concepts or you have more  
21 and more opportunity to hear information that may be related  
22 to particular questions or similar questions that you would  
23 experience on an I. Q. test.

24 Q. And if somebody has an average performance level and  
25 ranks in the average range on performance, yet ranked markedly

1 lower in verbal I. Q., could that be a result of---

2 MR. CROW: Object to leading, your Honor.

3 BY MR. DAVIS:

4 Q. ---what would that have to do with academic---

5 THE COURT: Overruled.

6 BY MR. DAVIS:

7 Q. ---training?

8 A. I would expect, as I think many of my colleagues would,  
9 that a lower score on the verbal portion could indicate a  
10 number of things. It could indicate someone who had  
11 difficulties in recalling information that was presented in  
12 school, that if they probably didn't -- may not be doing well  
13 in school. It could also be due to emotional difficulties.  
14 We sometimes find that scores are suppressed in the verbal  
15 because of emotional difficulties as well as language  
16 difficulties. And in -- also in conclusion that the test  
17 while it tries to be fair to all children and adults in this  
18 particular case, people who have been deprived of similar  
19 opportunities do as a result score lower than their estimated  
20 abilities might be if we could get an unbiased estimate.

21 Q. So is there much correlation between that verbal I. Q.  
22 and how you're able actually to function or street smarts?

23 A. There may be some relationship as well as there may be  
24 very little relationship. For example, one of the things that  
25 you want to discern -- particularly in the case where you're



1 looking at an individual being considered for special  
2 education purposes as a handicapped individual is to make sure  
3 that they're functioning on a day-to-day level is commensurate  
4 with their overall intelligence. In some cases it is and in  
5 other cases it is not and so you want to see how well they  
6 communicate their needs and wants on a daily basis to people  
7 around them, what their ability to relate to other people is,  
8 get some estimate of their ability to take care of themselves  
9 -- fix themselves dinner for example for older individuals.  
10 For younger individuals and children it might be how well they  
11 are to take a bath, to dry themselves, to wipe themselves and  
12 the like.

13 So you want to get some frame of reference to talk about  
14 an individual's ability in daily life situations by measuring  
15 their adaptive behavior.

16 Q. And in your practice have you dealt with numerous people  
17 in the adolescent age group that had I. Q. scores similar to  
18 what you see in this particular case?

19 A. I have.

20 Q. Okay, and are those people as a general rule able to  
21 function and -- and interact in society?

22 A. They certainly are, but the quality of those interactions  
23 may be different among different individuals, but generally  
24 they can be expected to function.

25 Q. Now, there was -- Doctor Wilkins had some Play Doh out

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1 and did what he called Piaget's Conservation of Matter Test.  
2 What -- what did that indicate if somebody looked at two balls  
3 of clay and one is rolled out long wise and one is left in a  
4 ball -- what is that test designed to show us?

5 A. The test is an effort to demonstrate Piaget's concepts.  
6 Not to belabor the Court and certainly your Honor, but Piaget  
7 was a developmental psychologist who was looking at the  
8 development of thinking skills from very young and as children  
9 age.

10 Then he proposed that individuals went through certain  
11 stages of thinking ability. That particular instrument is a  
12 test that is designed to determine whether or not an  
13 individual knows that just because two things don't look  
14 exactly the same they may be in fact the same thing.

15 It was widely thought and held years ago that as  
16 individuals age that they went through these stages and  
17 everybody went through them from being very -- very, very  
18 concrete or what we call preoperational, really not  
19 understanding cause and effect, to being fairly concrete to  
20 the last stage which was formal -- ah -- formal abstraction.  
21 That is the ability to make plans and deal with future things  
22 much like people do in calculus and engineering dealing with  
23 concepts that they can't see or put their hands to.

24 However, we have found through the course of science --  
25 and particularly with this particular theory -- that only

1 about fifteen percent of the population achieves this notion  
2 of formal abstract thinking. And in fact many people are  
3 concrete thinkers.

4 Q. Was that fifteen percent?

5 A. Fifteen percent of the population is estimated to thought  
6 -- to be believed to have developed this notion of formal  
7 abstract thinking that Piaget proposed.

8 Q. Okay, so basically what Wilkins was saying was that this  
9 defendant is a concrete thinker?

10 A. Yes.

11 Q. Okay, and eighty-five percent of the population are  
12 concrete thinkers?

13 A. Of one sort or another, yes.

14 Q. Now, you deal -- when you deal in therapy with  
15 adolescents are you -- is your job in therapy to try to  
16 persuade them or even suggest to them changes in their conduct  
17 and changes in their behavior?

18 A. It certainly is a part of the therapeutic interlude to  
19 offer suggestions and to provide comment to what they seem to  
20 be doing. The purpose of therapy or coming into therapy  
21 whether the adolescent him or herself comes to you and says, I  
22 have a particular problem, or the parent suggests that there  
23 is a particular problem, the point of therapy is to try to  
24 improve the situation both to the adolescent as well as his  
25 immediate family.

1 Q. And it is -- is the real goal of therapy to persuade them  
2 or convince them in a clinical setting that they should modify  
3 their conduct?

4 A. Yes, it is.

5 Q. And modify their behavior?

6 A. Right. If they want to experience those kinds of---

7 MR. STIDHAM: Your Honor, may we approach the bench?

8 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT  
9 OF THE HEARING OF THE JURY.)

10 MR. STIDHAM: Judge, this has been a long trial and  
11 it's going to be longer. What does that have to do with  
12 anything?

13 MR. CROW: Doctor Wilkins was not his therapist.

14 MR. DAVIS: Do what?

15 MR. STIDHAM: What -- what does that have to do --  
16 any relevance to this case?

17 THE COURT: Are you making an objection to  
18 relevancy?

19 MR. CROW: Yes, sir, I'm making an objection to  
20 relevancy.

21 THE COURT: I don't know. What is the relevancy of  
22 that line of questioning?

23 MR. DAVIS: Your Honor, I think he's experienced  
24 with people in a therapeutic setting where his very goal  
25 was to modify and change and suggest changes in their

1 attitude and I think he can describe what the reaction of  
2 even low functioning people are. That they can react  
3 belligerently, they can deny any effort at changing their  
4 mind or their thought processes or actions. We've been  
5 given the impression that just because you have a low I.  
6 Q. that if somebody suggests something to you, you dive  
7 out the window to try to do it.

8 THE COURT: Alright, I'm going to allow it.

9 MR. CROW: Your Honor, our objection would be that  
10 all the testimony hasn't been that everybody with a low  
11 I. Q. is that way, it's just what possibly these people  
12 are more---

13 THE COURT: --He's -- well, I know it, but I think  
14 he can give the different possibilities and that's what  
15 he's trying to do.

16 (RETURN TO OPEN COURT.)

17 THE COURT: Go ahead.

18 BY MR. DAVIS:

19 Q. Doctor, these -- these people that you deal with in  
20 therapy frequently have I. Q. levels about the same as this  
21 defendant?

22 A. Um-hum. Yes.

23 Q. And in therapy your goal is to suggest to them a change  
24 in behavior many times.

25 A. Right, and hopefully have them come to believe when they

1 try out the behavior that it produces positive results or in  
2 some cases they don't receive the kind of comments or  
3 unpleasant consequences that they have been experiencing  
4 before.

5 Q. And -- and really the design of the therapy is to kind of  
6 manipulate them into doing what's beneficial to them, correct?

7 A. Yes, that is -- that is -- that could be considered one  
8 of the goals.

9 Q. Do people with low I. Q.'s similar to this defendant ~~\*~~  
10 is it -- or do they manipulate just like that? I mean, are  
11 they easily suggested or is their behavior and attitude  
12 changed?

13 A. Yes. That's -- people can respond very easily and you  
14 make the therapeutic process almost seem very easy, but on the  
15 other hand they can be belligerent, they can be manipulative,  
16 they can be sullen, they can say, I don't want to do this.  
17 There are a whole range of responses. Just because someone  
18 has an I. Q. of such and such number, such and such score, or  
19 does not necessarily correspond to how they will react in  
20 terms of being persuaded to change a particular behavior that  
21 they might be engaged in.

22 Q. In other words the person with a low I. Q. may be just as  
23 belligerent and stubborn as the person that's a genius?

24 A. That's true.

25 Q. Now, you heard testimony yesterday about how you

1 determine if someone is being persuaded or is being subjected  
2 to suggestibility?

3 A. Yes, I did.

4 Q. Okay. What would you have to have in order to -- what  
5 would you want to have in order to determine if a person at a  
6 particular period of time was being influenced or manipulated  
7 or subjected to suggestibility?

8 A. There would be two things that I think would be important  
9 -- actually three -- but two very important. One, I would  
10 want to have some evidence that the person's ability to  
11 remember, to recall information that he may have or she may  
12 have experienced and/or heard was in the normal range of kind  
13 of what we would expect for someone of that age.

14 The second thing that I think would be important the  
15 latitude suggesting something or influencing something is to  
16 have some kind of permanent product or documentation of that  
17 interaction. That is a videotape. Certainly at least an  
18 audiotape because influencing and persuasion -- much like in  
19 therapy -- is not only verbal information that's being given  
20 and received, but it's also non-verbal cues as well that need  
21 to be examined and the value of it.

22 Q. And so you would need to know not only what was said but  
23 how it was said and that sort of thing before you could even  
24 begin to speculate as to whether someone was suggested or  
25 influenced to act---

1 MR. CROW: Again, your Honor, there's an awful lot  
2 of leading going on.

3 THE COURT: Avoid leading.

4 BY THE WITNESS:

5 A. As part of the training to become a clinical psychologist  
6 as well as in allied fields such as social work and other  
7 mental health fields such as psychiatry. For example, it is  
8 customary, for example, for therapy sessions for trainees to  
9 be videotaped and for you to be monitored because of that and  
10 those influences. That is a typical part of training and so  
11 to make judgments about that I would think that that would be  
12 equally important.

13 Q. Now, Doctor, there were indications in this test that the  
14 defendant -- I believe it was on the Wechsler Memory Scale --  
15 showed some marked deficits in visual and verbal recall?

16 A. Yes.

17 Q. Okay. Now, if you are presented with a hypothetical  
18 where a person had viewed, participated, witnessed an event  
19 that occurred approximately thirty-five days earlier and he  
20 had these deficits in memory that are indicated in Doctor  
21 Wilkins' report, would it be surprising for that individual to  
22 state facts in a less than chronological order?

23 A. It would not be surprising. In fact that's what I would  
24 expect.

25 Q. Okay. Would you expect that person to have difficulty in



1 remembering specific details?

2 A. Yes, I would.

3 Q. Would you expect that the most graphic occurrences during  
4 that time period would be the things that would be most vivid  
5 in the memory?

6 A. That would seem very likely.

7 Q. Now, you indicated that you worked with adolescents that  
8 are involved with drug abuse and that sort of thing?

9 A. That's one of my research areas of interest, yes.

10 Q. Okay, and would huffing gasoline -- does that have an  
11 effect on the memory?

12 A. Unfortunately there is some evidence that suggests that  
13 it certainly has some effect on the brain. Specific  
14 impairment we are unclear about, but it is generally  
15 recognized that individuals who huff or inhale solvents of one  
16 sort or another can do tremendous damage to the brain. Now  
17 whether or not these damages are reversible is unclear at this  
18 point.

19 Q. And it would cause -- that would cause -- affect memory  
20 not only during the time you're under the influence of the  
21 gasoline, but also possible down the road?

22 A. Yes, that is certainly a consideration.

23 Q. Okay. And marijuana and alcohol use, do they impair the  
24 ability to recall events?

25 A. Yes. Alcohol as many people know is a depressant and

1 when we drink a lot of it we may not remember exactly what we  
2 did.

3 Q. Now, if you would in referring to the diagnoses that  
4 Doctor Wilkins made, did those diagnoses fit -- or -- or --  
5 you -- how significant are those diagnoses? Is this -- does  
6 this indicate somebody that is a sick individual?

7 A. If the word sick is referring to someone who is in  
8 psychiatric -- significant psychiatric distress, no, they do  
9 not. His axis one diagnosis which is typically used to  
10 indicate mental health or a mental disorder -- it's adjustment  
11 reaction. Many individuals during the course of their  
12 lifetime experience what we call an adjustment reaction which  
13 is just some impairment in your ability to function day-to-day  
14 because of some particular event or some situation.

15 I believe that was his axis one diagnosis and I think  
16 that is not a significant psychiatric disorder.

17 Q. Anything in the diagnosis that indicates to you that this  
18 defendant had any significant psychiatric difficulty at the  
19 time of this examination?

20 A. No, it does not. In fact it stated in the report that --  
21 in two or three places that there was no marked  
22 psychopathology.

23 Q. Did that necessarily jive with the very detailed  
24 description you heard Doctor Wilkins give as to this  
25 defendant's emotional insecurity, his lack of -- intense

1 feelings of inferiority, insecurity, lack of self-confidence,  
2 self-esteem, did all of that fit with what you see as a pretty  
3 insignificant diagnosis?

4 A. No, there was not a great correspondence between some of  
5 his descriptions and the diagnoses and also the test results.  
6 When I was evaluating or looking at his report, he would  
7 report findings and then on some occasions he would make  
8 elaborate details of what appeared to be a relatively benign  
9 result.

10 MR. DAVIS: One second, your Honor.

11 Pass the witness.

12 CROSS EXAMINATION

13 BY MR. STIDHAM:

14 Q. What are you again?

15 A. I'm a licensed psychologist.

16 Q. You're not a social psychologist, are you?

17 A. No, I am not.

18 Q. Do you know anything about false confessions and police  
19 interrogation techniques and influence?

20 A. No, I do not.

21 Q. Do you have any opinion as to whether a police station is  
22 a coercive setting or a tranquil setting?

23 A. I don't have any such opinion.

24 Q. Okay. And you mentioned earlier that -- if I heard you  
25 correctly and if I didn't, please tell me -- that you thought

1 it was important to videotape.

2 A. Yes, it would seem to me that would be an important---

3 Q. If it's not videotaped, it's sort of kind of hard to  
4 figure out what happened, isn't it?

5 A. It would seem to me that would be my opinion, it would be  
6 difficult to accurately come to a conclusion.

7 Q. Doctor, is there a difference between not remembering  
8 something or just getting it wrong?

9 A. Well, if you get it wrong, you didn't remember it.

10 Q. When did you get retained to -- to work on this case by  
11 the State?

12 A. I -- could you define what retained means?

13 Q. When did you know you were going to be working and  
14 testifying in this case?

15 A. I knew about the possibility that that might occur a  
16 month ago perhaps, maybe, but it -- nothing was definite. I  
17 was simply asked to look at the materials.

18 Q. And your name didn't appear on any witness list, did it?

19 MR. DAVIS: Your Honor, I object to that question.

20 It's improper. Mr. Stidham knows---

21 MR. STIDHAM: I'll withdraw it, Judge.

22 THE COURT: Alright.

23 BY MR. STIDHAM:

24 Q. You don't know whether you're going to get paid for this  
25 or not?

1 A. No, I do not. I would assume that I'm not because it  
2 hasn't been mentioned on the front-end.

3 Q. Okay. How much time has you spent talking and visiting  
4 with and evaluating Mr. Misskelley yourself?

5 A. I have not spent any time.

6 MR. STIDHAM: Pass the witness.

7 REDIRECT EXAMINATION

8 BY MR. DAVIS:

9 Q. Just one thing Doctor, you know yesterday Doctor Wilkins  
10 was talking about how certain tests showed that this defendant  
11 was at the third grade -- performing certain skills at the  
12 third grade level or second grade level?

13 A. Yes.

14 Q. Okay. Does that mean from a professional standpoint,  
15 does that mean that he is like a third grader?

16 A. No, and that's one of the difficult things at least in my  
17 field is that we tend to use results in order to give people  
18 frames of reference, and so when we say that a person who is  
19 -- in this particular case, he's seventeen or eighteen -- is  
20 like a third grader, the reality is they are not like a third  
21 grader. Their responses were similar to the way other third  
22 grade children responded.

23 Now, particularly what Doctor Wilkins was reporting was  
24 how well the defendant could spell words, how well could he  
25 calculate math problems on paper and pencil, and how well he

1 could read words that increased in difficulty. Those are  
2 academic tests. It's an academic measure and so the responses  
3 he gave grossly were very much like a normal or average  
4 second, third or fourth grader. Obviously someone who is  
5 older than nine, ten, or eleven, obviously has many more  
6 experiences and so it would be inappropriate to say they are  
7 like a -- someone under their stated age.

8 Q. In other words, that's basically -- they're like a third  
9 grader in terms of academic achievements?

10 A. They are responding similar to a child in third grade, an  
11 average child, yes.

12 Q. And Mr. Stidham asked you if you were a social  
13 psychologist. If you wanted to be licensed -- to be a  
14 licensed social psychologist, you couldn't get such a license  
15 in the State of Arkansas, could you?

16 A. No, you could not.

17 MR. DAVIS: No further questions.

18 BY MR. DAVIS:

19 Q. Could anybody?

20 A. No, no one. There is no board for that particular  
21 discipline.

22 MR. DAVIS: Nothing further, your Honor.

23 (WITNESS EXCUSED.)

24 THE COURT: Alright, ladies and gentlemen, it's  
25 about time for a recess. With the usual admonition you

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1 may be in recess for ten minutes.

2 (RECESS.)

3 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT  
4 OF THE HEARING OF THE JURY.)

5 THE COURT: The jury sent a message to the Court  
6 that they wanted to know if telephone records could have  
7 been secured. I told her I couldn't answer that question  
8 that I'll tell the lawyers. So I've told both of you --  
9 all of you. I think what they were talking about was  
10 this call from West Memphis to Memphis or West Memphis to  
11 Marion and they're not long distance. They're not toll  
12 calls so you can't---

13 MR. STIDHAM: Thank you, your Honor.

14 (RETURN TO OPEN COURT.)

15 THE COURT: Alright, Court will be in session.

16 PETE MERCIER

17 having been first duly sworn to speak the truth, the whole  
18 truth, and nothing but the truth, then testified as follows:

19 DIRECT EXAMINATION

20 BY MR. FOGLEMAN:

21 Q. State your name and where you live for the jury.

22 A. My name is Pete Douglas Mercier. I live -- used to  
23 reside in Highland Trailer Park.

24 Q. And have you ever been to Dyess wrestling?

25 A. I went down one time with some friends not to wrestle.

1 Q. Okay, but you went down -- were -- were they wrestling?

2 A. Yeah, they were, right.

3 Q. And do you recall whether or not that was before or after  
4 the murder of these three children?

5 A. That was before.

6 Q. I want to show you what's introduced as State's Exhibit  
7 One Oh Three and ask if you recognize the signature on the  
8 very bottom? (HANDING TO WITNESS.)

9 A. (EXAMINING.) Yes.

10 Q. Alright, whose signature is that?

11 A. That's mine.

12 Q. Okay, would you mind taking this yellow highlighter and  
13 highlighting that for us for the jury? (HANDING TO WITNESS.)

14 A. (COMPLIES.) Alright.

15 Q. Do you recall signing that?

16 A. Yes.

17 Q. And how many times did you go?

18 A. One time.

19 Q. One time?

20 A. To the best of my knowledge.

21 MR. DAVIS: I don't have any further questions.

22 CROSS EXAMINATION

23 BY MR. STIDHAM:

24 Q. Mercier, is that---

25 A. Yes, sir, that's correct.



1 Q. With a name like Stidham you've got to be real careful  
2 not to butcher people's last names. Are you on the search and  
3 rescue team?

4 A. Yes, sir, I am.

5 Q. Do you remember May the fifth?

6 A. Yes, sir.

7 Q. Do you remember going to the search and rescue meeting  
8 with Kevin Johnson?

9 A. Yes, sir, I recall.

10 Q. And at the meeting some of the guys had scanners?

11 A. Radios in their trucks, yes.

12 Q. And you told me out in the hall that that night at the  
13 meeting it came over the scanners that the boys were missing?

14 A. I didn't hear it. Someone else said something about it,  
15 but I didn't hear it personally.

16 MR. STIDHAM: Pass the witness.

17 (WITNESS EXCUSED.)

18 JAMES DOLLAHITE

19 having been previously duly sworn to speak the truth, the  
20 whole truth, and nothing but the truth, then testified further  
21 as follows:

22 REDIRECT EXAMINATION

23 BY MR. FOGLEMAN:

24 Q. Are you the same Deputy Dollahite that testified  
25 previously?

1 A. That's correct.

2 Q. Officer, I want to show you what I've marked in this case  
3 first as State's Exhibit Two A and ask if you can identify  
4 that? (HANDING TO WITNESS.)

5 A. (EXAMINING.) Yes, sir, I can.

6 Q. And what is that?

7 A. That's a lay-out diagram of lots for Highland Trailer  
8 Park.

9 Q. Alright. First of all if you would on this---

10 MR. FOGLEMAN: Well, your Honor, I would offer  
11 State's Exhibit Two A.

12 MR. STIDHAM: No objection, your Honor.

13 THE COURT: Alright, it may be received without  
14 objection.

15 (STATE'S EXHIBIT TWO A IS RECEIVED IN EVIDENCE.)

16 BY MR. FOGLEMAN:

17 Q. If you would take my pen and label where the service road  
18 is. (HANDING TO WITNESS.)

19 A. (COMPLIES.)

20 Q. Just write "S. R." or -- yes, just write "S. R." That  
21 will be easy.

22 A. (COMPLIES.)

23 Q. Okay. Now, when you entered Highland Park, if you could  
24 take this pink -- I think that's pink -- marker and mark the  
25 entrance that you entered in Highland Park. (HANDING TO

1 WITNESS.)

2 A. (COMPLIES.)

3 Q. And where you went in Highland Park. Is that where you  
4 stopped?

5 A. That's where I stopped on the first complaint -- I mean  
6 the initial complaint call.

7 Q. Okay. Alright, did you ever go anywhere else on any of  
8 the other ones?

9 A. Yes, sir.

10 Q. Alright. Where did you go then?

11 A. (INDICATING.)

12 Q. Okay. The jury, of course, couldn't see that, but you  
13 turned the corner. The first complaint you stopped there at  
14 the corner?

15 A. Yes, sir, at the stop sign.

16 Q. Alright, and then the second or third---

17 A. Second and third complaints.

18 Q. You turned---

19 A. I turned right at the stop sign and---

20 Q. Alright, and went another maybe fifty feet or so?

21 A. That's correct.

22 Q. Okay. Now, if you would, would you take this blue marker  
23 and mark the -- where Stephanie Dollar's residence is.

24 (HANDING TO WITNESS.)

25 A. (COMPLIES.)

1 Q. Okay. And if you could again take my pen and if you  
2 could just write across the top here "S. Dollar." (HANDING TO  
3 WITNESS.)

4 A. (COMPLIES.)

5 Q. Are you aware of where the defendant lived?

6 A. Yes, sir.

7 Q. Alright, and if you could show the general area of where  
8 the defendant lives.

9 A. (COMPLIES.)

10 Q. Okay. And if you could -- okay. Alright. Now, when you  
11 went the first time, were you with other officers or alone?

12 A. I was alone.

13 Q. Alright. Did other officers later come?

14 A. On the third call.

15 Q. On the third call? And who were those officers?

16 A. Officer McAfferty and Officer Jason Oliver.

17 Q. Alright, and on any of these trips did you ever see the  
18 defendant?

19 A. No, sir.

20 Q. Okay.

21 MR. FOGLEMAN: I don't have any further questions,  
22 your Honor.

23 MR. STIDHAM: No questions, Judge.

24 (WITNESS EXCUSED.)

25 JOE McAFFERTY

1 having been first duly sworn to speak the truth, the whole  
2 truth, and nothing but the truth, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. FOGLEMAN

5 Q. Would you state your name and occupation for the jury?

6 A. My name is Joe McAfferty. I'm a Corporal of Marion  
7 Police Department.

8 Q. How long have you been in law enforcement?

9 A. Twenty-one years.

10 Q. Officer McAfferty, I want to direct your attention to May  
11 the fifth of nineteen ninety-three. Have you been shown a  
12 report of that?

13 A. Yes.

14 Q. And do you recall going in response to a dispatch to that  
15 area?

16 A. Yes.

17 Q. Alright. Did looking at that report help refresh your  
18 memory?

19 A. Yes.

20 Q. Alright. And where did you go and who else went when you  
21 responded to Highland Park?

22 A. I went to Highland Trailer Park along with Officer Oliver  
23 of the Marion Police Department and Deputy Dollahite of  
24 Crittenden County.

25 Q. And let me show you what's been introduced as State's

1 Exhibit Two A and if you could indicate on that map what  
2 entrance that you entered the park and if you would use this  
3 red marker. (HANDING TO WITNESS.)

4 A. (COMPLIES.) And this is Highway Seventy-seven here?  
5 (INDICATING.)

6 Q. (EXAMINING.) No, that's the service road.

7 A. Oh, the service road. Okay.

8 Q. North would be up this way. (INDICATING.)

9 A. Okay. This is the service road coming along side  
10 Highland?

11 Q. Um-hum.

12 A. Okay. I came in the very first entrance which would be  
13 right along here. (INDICATING.) This would be the same way.

14 Q. Alright. Same way as this one?

15 A. Right.

16 Q. Okay.

17 A. Exactly the same way here. This is the first entrance  
18 here---

19 Q. When you say "exactly the same way", the jury---

20 A. ---into Highland.

21 Q. ---can't see what you're referring to. Are you referring  
22 to the same way as the pink marks?

23 A. Yes, sir. This is the very first entrance coming into --  
24 into the park. This is the last entrance which is by Heck's  
25 Wrecker Service.

1 Q. Okay. And if you could take the red marker and mark the  
2 route you followed.

3 A. (COMPLIES.) That's about where I stopped right there.  
4 (INDICATING.)

5 Q. Where you stopped the darker marker?

6 A. Yes, sir, right there.

7 Q. Okay. Now -- now, when you arrived there approximately  
8 how many people were there?

9 A. Not counting the officers?

10 Q. Not counting the officers.

11 A. There would be around six, I think.

12 Q. Alright. And do you remember any of the people that were  
13 there?

14 A. I recognized one of them, Mr. Dedman, I believe was one  
15 of them that was there. There were some young children and a  
16 young lady standing there.

17 Q. Now, when you say "young children", what age are you  
18 talking about?

19 A. Oh, I don't know, maybe around thirteen, some younger  
20 than that -- some little kids. There might have been some  
21 young lady there in her early teens.

22 Q. Okay, and are you acquainted with the defendant?

23 A. Yes, sir.

24 Q. Alright. Were you acquainted with the defendant prior to  
25 May the fifth?

1 A. Yes.

2 Q. Did you ever see the defendant on that day?

3 A. No, sir, I don't recall seeing him there when I was  
4 there.

5 MR. FOGLEMAN: I don't have any further questions,  
6 your Honor.

7 CROSS EXAMINATION

8 BY MR. STIDHAM:

9 Q. Officer, you don't recall?

10 A. No, sir.

11 Q. That means you're not real certain then, right?

12 A. I just don't recall seeing him where I was at.

13 MR. STIDHAM: Nothing further.

14 REDIRECT EXAMINATION

15 BY MR. FOGLEMAN:

16 Q. I want to show you this radio log that's been introduced  
17 as Defendant's Exhibit Four. (INDICATING.) What time does it  
18 show that you all checked off the scene or left that area?

19 A. (EXAMINING.) It would be right here. (INDICATING.)

20 Q. And what time is that?

21 A. Eighteen fifty-nine.

22 Q. What does that mean?

23 A. It would be around six forty-three -- or six fifty-nine.

24 Q. Six fifty-nine?

25 A. Yes, sir.



1 Q. Okay. Did you all ever go back after that?

2 A. No, sir, that was the only time I went there.

3 Q. Okay.

4 MR. FOGLEMAN: I don't have any further questions.

5 MR. STIDHAM: Nothing further, your Honor.

6 (WITNESS EXCUSED.)

7 JASON OLIVER

8 having been first duly sworn to speak the truth, the whole  
9 truth, and nothing but the truth, then testified as follows:

10 DIRECT EXAMINATION

11 BY MR. FOGLEMAN:

12 Q. Would you state your name and occupation for the jury?

13 A. Jason Oliver. I'm a patrolman with the Marion Police  
14 Department.

15 Q. And, Patrolman Oliver, I want to direct your attention to  
16 May the fifth of nineteen ninety-three. Have you been shown a  
17 report in regard to that day and in regard to the incident at  
18 Highland Park?

19 A. I was shown a report and I was -- I was the officer there  
20 at the time.

21 Q. Okay. Well, I was getting to that. Alright, and you  
22 were there?

23 A. Right.

24 Q. Who else went to that scene when you were there?

25 A. Corporal Joe McAfferty with the Marion Police Department

1 and Deputy James Dollahite of Crittenden County.

2 Q. And if you would, take this blue marker and mark the  
3 route that you followed going into Highland Park. (HANDING TO  
4 WITNESS.) This is North toward Marion. (INDICATING.) This  
5 is the service road. (INDICATING.)

6 A. (COMPLIES.) Okay.

7 Q. Alright, and you've marked on the Exhibit Two A that you  
8 came in a different entrance than the other officers?

9 A. That's right.

10 Q. Alright. Is that further to the south?

11 A. Yes, it is.

12 Q. And when you got there, about how many people were there  
13 on the scene -- not counting the officers?

14 A. I'd say seven or eight.

15 Q. Okay, and are you -- were you acquainted with the  
16 defendant on May the fifth and know who he was?

17 A. Yes, sir.

18 Q. Okay, and did you see him there?

19 A. No, sir, I did not.

20 MR. FOGLEMAN: I don't have any further questions.

21 CROSS EXAMINATION

22 BY MR. STIDHAM:

23 Q. Do you remember who was there -- the other people? Did  
24 you know them?

25 A. I remember faces. I could tell you probably maybe one

1 name and that's it.

2 MR. STIDHAM: Nothing further, your Honor.

3 (WITNESS EXCUSED.)

4 GLORIA WILSON

5 having been first duly sworn to speak the truth, the whole  
6 truth, and nothing but the truth, then testified as follows:

7 DIRECT EXAMINATION

8 BY MR. DAVIS:

9 Q. Would you state your name, please, ma'am?

10 A. Gloria Wilson.

11 Q. And, Ms. Wilson, where do you live?

12 A. West Memphis.

13 Q. Okay, and back in -- on May fifth of nineteen ninety-  
14 three, were you conducting an alcohol safety program for  
15 people who had received D. W. I.'s and were required to go to  
16 alcohol safety school?

17 A. Yes, I was.

18 Q. Okay. And any -- when did you start -- when was the  
19 first time you started doing that class?

20 A. May fifth of ninety-three.

21 Q. So that -- so that was the first night you'd ever done  
22 that?

23 A. Yes.

24 Q. And when did those classes start?

25 A. The time?

1 Q. Yes, ma'am.

2 A. Six o'clock in the evening.

3 Q. Okay. And when would those classes end?

4 A. Well, anywhere from seven-thirty to eight o'clock, but on  
5 this particular one they ran closer to eight o'clock because  
6 that was my first day and I was being evaluated.

7 Q. And when you say "evaluated", was there somebody there  
8 observing what you were doing?

9 A. That's right.

10 Q. Okay, and so how late did this class that you conducted  
11 on May the fifth -- how late would it have gone to?

12 A. At least fifteen to eight.

13 Q. Okay. Now, I would like to show you what's marked as  
14 State's Exhibit Two B which is kind of a sign-in sheet. Is  
15 that a sign-in sheet you use -- or a copy of one that you  
16 would use to -- for people to sign in on a particular -- at  
17 the meeting? (HANDING TO WITNESS.)

18 A. (EXAMINING.) No, this is a list that I made and when  
19 they come to class I just call them by name and check that  
20 they was in class. But I do have a list that they do sign  
21 because they sign in.

22 Q. Okay. Have you got that with you?

23 A. No. Maybe at this first particular session he might not  
24 have signed in.

25 Q. Okay. Well, this indicates this---

1 A. This indicated that I did call -- call them out by name  
2 and checked. The check indicates that they were in class.

3 Q. Okay, and who is the last one on this roster?

4 A. Jessie Misskelley.

5 Q. And that's Jessie Misskelley, Senior?

6 A. Yes, it is.

7 Q. And does it show that he was checked as being present on  
8 that first class?

9 A. Yes.

10 Q. And that would have been on May fifth. Is that correct?

11 A. Yes.

12 MR. DAVIS: Your Honor, at this time we would ~~move~~  
13 for the introduction of State's Exhibit Two B.

14 MR. STIDHAM: No objection.

15 THE COURT: Alright, it may be received without  
16 objection.

17 (STATE'S EXHIBIT TWO B IS RECEIVED IN EVIDENCE.)

18 MR. DAVIS: May we exhibit to the jury, your Honor?

19 THE COURT: Yes, you may.

20 (STATE'S EXHIBIT TWO B EXHIBITED TO THE JURY.)

21 MR. DAVIS: Mr. Stidham, did you all ever introduce  
22 that receipt -- the blow-up of the receipt showing he was  
23 there on the fifth?

24 MR. CROW: I think we---

25 MR. STIDHAM: I think we just introduced the

1 original receipt.

2 BY MR. DAVIS:

3 Q. I'd like to refer you to exhibit -- Defendant's Exhibit  
4 Number Five. Is that a receipt that Jessie Misskelley, Senior  
5 -- reflecting that he paid Fifty Dollars to that class on May  
6 fifth? (HANDING TO WITNESS.)

7 A. (EXAMINING.) Yes, it is.

8 Q. And from -- so based on your testimony the persons  
9 attending that class would not have left until a quarter til  
10 eight, at least, on that day?

11 A. Yes.

12 MR. STIDHAM: No questions, your Honor.

13 (WITNESS EXCUSED.)

14 BRYN RIDGE

15 having been previously duly sworn to speak the truth, the  
16 whole truth, and nothing but the truth then testified further  
17 as follows:

18 REDIRECT EXAMINATION

19 BY MR. FOGLEMAN:

20 Q. You're the same Detective Ridge that previously  
21 testified?

22 A. Yes, sir.

23 Q. Detective Ridge, in your experience as an investigator,  
24 in the past have you attempted to obtain phone calls that --  
25 records of phone calls that were not long distance -- local

1 calls?

2 A. Yes, sir, I have.

3 Q. Alright, and are you able to get that type of record?

4 A. No, sir.

5 MR. FOGLEMAN: I don't have any further questions.

6 MR. STIDHAM: No questions, Judge.

7 (WITNESS EXCUSED.)

8 MR. DAVIS: Your Honor, at this time the State would  
9 rest.

10 THE COURT: Have you got anything additional?

11 MR. STIDHAM: May we approach the bench?

12 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT  
13 OF THE HEARING OF THE JURY.)

14 MR. STIDHAM: I would prefer we renew our directed  
15 verdict motion in chambers right before we do jury  
16 instructions.

17 THE COURT: No, you can do it right here. Do you  
18 want to add any additional matter not previously covered?

19 MR. STIDHAM: Oh, your Honor, I would like to  
20 briefly go through it while -- if we can do that in  
21 chambers while we're doing the jury instructions.

22 THE COURT: Well, just a minute. I'll just let the  
23 jury go because we're going to have to go over the jury  
24 instructions anyway.

25 (RETURN TO OPEN COURT.)

1 THE COURT: Alright, ladies and gentlemen, both  
2 sides have rested their case and the testimony is  
3 concluded. It's -- I'm getting ready to give you a  
4 recess. It's still important that even though both sides  
5 have rested their case that you not attempt to discuss  
6 the case among yourselves or with anyone until it's  
7 finally submitted to you. I'm going to give you a long  
8 lunch break -- until one-thirty. And the reason for that  
9 is is the Court will have to hear and rule on some  
10 motions. I'll have to go over and discuss the jury  
11 instructions with the lawyers. I don't anticipate that  
12 to take too long, but I want to give them a little bit of  
13 time to collect their thoughts because as soon as I read  
14 the jury instructions then they'll argue their case. So  
15 that's the reason for the two hour lunch break.

16 So, again, you're reminded of the admonition not to  
17 discuss the case or allow anyone to attempt to discuss it  
18 with you or in your presence. And you may stand in  
19 recess until one-thirty.

20 (RECESS.)

21 (THE FOLLOWING HEARING WAS HELD OUT OF THE PRESENCE  
22 OF THE JURY.)

23 THE COURT: Let the record reflect that this is a  
24 hearing out of the presence of the jury.

25 MR. STIDHAM: Your Honor, may I have just a moment,



1 please?

2 THE COURT: Yes.

3 MR. STIDHAM: Your Honor, we would like to -- to  
4 renew our Motion for Directed Verdict.

5 THE COURT: Alright, let me make the announcement.  
6 I need the door closed out there, please.

7 Let the record reflect that this is a hearing out of  
8 the presence of the jury at the close of the case, both  
9 the State, and the defendant, and rebuttal.

10 Alright, you may proceed.

11 MR. STIDHAM: Your Honor, again, we would renew our  
12 Motion for a Directed Verdict and we would submit that  
13 the State has not met its burden of proof with regard to  
14 the defendant having committed the offense of capital  
15 murder, three counts of capital murder. More  
16 specifically, we would submit that there is no evidence  
17 that Mr. Misskelley with the premeditated and deliberated  
18 purpose of caused the death of another person, caused the  
19 death of any of the three victims.

20 Secondly, your Honor, we would submit that the only  
21 evidence the State has offered is the defendant -- is the  
22 defendant's statements to the police in which if you  
23 assume that they are true -- and we say that they're not  
24 -- he said that he was only present and that he did not  
25 hurt or kill anyone. The Supreme Court has ruled that

1 mere presence at the crime was not sufficient to attach  
2 accomplice liability.

3 Your Honor, there's no proof that Mr. Misskelley  
4 acted as an accomplice to the capital murders or any  
5 homicide or any level of homicide. In order for the  
6 State to prove Mr. Misskelley was an accomplice they must  
7 show that he aided, assisted, or abetted in committing  
8 the offense. Secondly, that Mr. Misskelley himself had  
9 the required intent to commit the charge of capital  
10 murder.

11 We would respectfully direct the Court to the  
12 nineteen ninety-three decision of the Arkansas Supreme  
13 Court in Fight versus State. It's cited at 314 Ark. 438,  
14 and which provides "Our interpretation of the accomplice  
15 liability statute, Five dash, Two dash, Four Oh Three  
16 effectuates the policy that an accomplice's liability  
17 ought not to extend beyond the criminal purpose that he  
18 or she shares. Because accomplice liability holding an  
19 individual criminally liable for actions done by another  
20 it is important that the prosecution fall squarely within  
21 the statute."

22 Your Honor, we would submit that there is nothing  
23 that has been introduced by the State against the  
24 defendant to suggest that he had the intent to commit any  
25 homicidal act or aid or assisted in any homicidal act.

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1           Again, your Honor, we would submit that there's  
2 nothing without adding conjecture and speculation that  
3 would make Mr. Misskelley an accomplice to this homicide.

4           THE COURT: Is the Fight case the one that involved  
5 the loaning of an automobile to a person that---

6           MR. CROW: Yes, your Honor.

7           THE COURT: ---killed a person while -- while  
8 intoxicated?

9           MR. CROW: Yes, your Honor, that's the case.

10          THE COURT: Well, I think that---

11          MR. STIDHAM: Your Honor, we would also---

12          THE COURT: ---considerably distinguished from the  
13 present facts.

14          MR. STIDHAM: Your Honor, I think there is also some  
15 logic that we could direct this way in regard to the  
16 Fairchild decision in talking about the intent of an  
17 accomplice, and we'd like to bring that to the Court's  
18 attention as well, and when we submit our arguments for  
19 each level of homicide that we anticipate the Court will  
20 instruct the jury on.

21          THE COURT: Well, I think you've pretty well  
22 enunciated the same objections at the proper stages  
23 previously.

24          Does the State want to make a -- a response for the  
25 record?

1 MR. DAVIS: Your Honor, for the record, the mental  
2 intent required -- as the Court's well aware that mental  
3 intent is something that can only be proved by  
4 circumstantial evidence, and in this case basically what  
5 the defense is arguing is that there -- the defendant is  
6 not a credible individual in that what he said to the  
7 police was a lie.

8 But basically what he said to the police that was  
9 introduced is that he knew they were going out there to  
10 hurt someone the night before, that he went out there,  
11 that is clear from the record that at a very minimum --  
12 even looking at the evidence in a light most favorable to  
13 the defendant -- which is not what the measure is -- that  
14 -- that Steven Moore -- or Michael Moore, excuse me --  
15 would not be dead but for the defendant's actions in  
16 aiding and assisting in bringing him back.

17 In addition to that, there's evidence that there  
18 were three weapons used. There was evidence that there  
19 was different type injuries caused. There's evidence  
20 that a different type of knots on the ligatures which  
21 would be consistent with more than one individual, and I  
22 certainly think the jury can infer just from the very  
23 nature of three eight-year-olds being killed that there  
24 was more than one person actively involved in that, and I  
25 think all of those things together -- primarily what the

1 defendant has said himself to police officers indicates  
2 that he had that mental state necessary to amount to  
3 capital murder.

4 THE COURT: Motion for Directed Verdict will be  
5 denied. The Court's of the opinion that a jury question  
6 has been established.

7 MR. STIDHAM: Thank you, your Honor.

8 THE COURT: Alright, gentlemen, I don't anticipate  
9 us having a whole lot of problem on these instructions.  
10 Do you want to tackle them now in the back?

11 MR. STIDHAM: I prefer that, your Honor.

12 THE COURT: Well, you know, there was one thing.  
13 You and Mr. Crow offered an instruction on the diminished  
14 capacity of -- what do we call it -- in capital murder.  
15 There's a new statute -- a ninety-three statute -- that  
16 where it's an allegation that a person is mentally  
17 retarded that that -- that goes -- that goes on the death  
18 penalty and only in the punishment phase, but I'm -- I'm  
19 raising this now because as I recall, Doctor Wilkins'  
20 testimony and the last psychologist that testified each  
21 of them testified affirmatively that he was not mentally  
22 retarded.

23 MR. STIDHAM: Your Honor---

24 THE COURT: So there is no evidence to the Court  
25 that he was mentally retarded.

1 MR. STIDHAM: Your Honor, again, the Arkansas  
2 Legislature has promulgated that definition and it is not  
3 the same definition as used by -- the clinical  
4 definition---

5 THE COURT: Well, we can argue that later, but I'm  
6 just voicing my view of the status of the evidence that  
7 there is no evidence to suggest that he is other than --  
8 at the very worst a borderline functioning individual.

9 MR. CROW: We've used the term -- mostly, mentally  
10 deficient. We've tried to stay away from the term,  
11 mentally retarded.

12 THE COURT: Well, I think the statute uses the  
13 term---

14 MR. CROW: Judge, again, the statute's definition of  
15 mentally deficient or retarded is different.

16 MR. STIDHAM: It refers to sub-average general  
17 intellectual functioning, and that's different than  
18 saying somebody with this particular I. Q. is classified  
19 as---

20 THE COURT: --Well, right now there's no testimony  
21 to that effect at all other than the hearing that was  
22 conducted in Osceola and I recall the testimony from that  
23 hearing, but if it's to be submitted to the jury and it  
24 may be talking about something right now that may never  
25 come up. But if it does come up, I anticipate that

1 you'll have to then redirect that testimony to the jury  
2 in the punishment phase.

3 MR. CROW: We fully anticipate that.

4 THE COURT: These are the ones I'm going to give in  
5 the first batch and then these are the verdict forms that  
6 accompany it. They're exactly like yours with a  
7 exception of that one language and I did add Two Oh Two.  
8 The only reason I'm using that set rather than yours is  
9 because you included manslaughter and I'm not going to  
10 give manslaughter.

11 MR. STIDHAM: You are or you're not?

12 THE COURT: Not. I don't think there's any -- any  
13 factual scenario at all that I've heard that would  
14 justify giving the manslaughter charge as a lesser  
15 included.

16 MR. CROW: Your Honor, I have reviewed the  
17 instructions which the Court will submit. The objection  
18 I have, I have as to the A. M. C. I. Four Oh One,  
19 Accomplice Liability, in and of itself it's appropriate  
20 if accompanied by another instruction which the Court is  
21 refusing, I have no objection.

22 However, without the accompanying instruction I do  
23 object and that I will submit my accompanying  
24 instruction. The accompanying instruction I would  
25 request has been labeled Defense Instruction Number One

1 and proffered as follows: I would also like to proffer  
2 it in the alternative, too, your Honor. First off, the  
3 proffer I have -- I'm submitting now.

4 An accomplice is criminally responsible for the act  
5 of others only to the extent he has a shared criminal  
6 purpose with the others. If you ultimately find that  
7 Jessie Lloyd Misskelley, Junior was an accomplice you may  
8 find him guilty only of a crime you determine that he had  
9 a conscious object to engage in or a conscious object to  
10 cause such a result. And I've cited the case of Fight  
11 versus State. That would be Arkansas cite 314 Ark. 438  
12 -- I do not have the Southwest cite. It wasn't on there.

13 THE COURT: Okay. The Court has considered  
14 defendant's offered instruction number one and refused it  
15 for the following reasons. I believe it's covered by A.  
16 M. C. I. Four Oh One. That this is not an approved  
17 modification and quoting from the Fight case, the Court  
18 there held that if one's purpose was to promote or  
19 facilitate the commission of an offense then they were  
20 accomplices of that criminal offense, and the Court  
21 distinguishes Fight from the present case for the  
22 following reasons.

23 In the Fight case the passenger in the automobile  
24 was merely a bystander. He did nothing in the operation  
25 of the car, did not direct the operation of the car, did



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not in any way -- at least from what the facts report -- influence the operation of the vehicle in any way or any matter, and therefore did nothing whatsoever to aid, assist or promote in the operation of a vehicle that caused the death of an individual. And I would have come to the same conclusion. Had that been the facts in this case there would have been a directed verdict.

MR. CROW: Yes, your Honor.

THE COURT: And so to me that the facts before the Court are entirely different and distinguishable from Fight. In the present case there is testimony -- if it's believed -- from the defendant himself indicating that he knew and had knowledge of and was aware of his accomplices' intent to do harm to some boys -- hurt some boys I believe was the quote -- on the day before. That he then accompanied them -- or went to the location where they were and met with them and at and during the course of the conduct that we're here for, he assisted in holding, retaining, and retrieving one of the young victims -- specifically Moore -- and brought him back after having observed violence being done to the others and those -- those are indications clearly that a jury could find and conclude that the defendant, Jessie Misskelley, was an accomplice and that he did not only agree to aid, but that he had prior knowledge of the

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1 possibility of a person being hurt and, secondly, that he  
2 participated in the actual retention of one of the  
3 persons who ultimately died. And but for that act that  
4 young man may very well have been alive. For that  
5 matter, all three of them could have if he escaped to a  
6 safe refuge.

7 MR. CROW: Your Honor, if I may respond---

8 THE COURT: For those reasons I'm denying the  
9 submission.

10 MR. CROW: If I may respond briefly to that, your  
11 Honor?

12 THE COURT: Sure.

13 MR. CROW: Of course, in our directed verdict motion  
14 we discussed that. I don't intend to change anything  
15 about my directed verdict motion.

16 My contention is this: At this point after the  
17 Court's ruling of directed verdict for the sake of  
18 argument I will acknowledge what you just stated.

19 However, it is not the -- the jury is not required  
20 to find that he had -- those intentions. I think the  
21 jury could by -- by his -- by the statements that have  
22 been given in testimony earlier could find less. I think  
23 the jury is -- it's critical that the jury finds --  
24 understands that if they don't find that he had that  
25 intention, that he personally had an intention, I don't

1 want the jury confused that the intention of Damien or  
2 the intention of Jason was Jessie's intention. Arguably  
3 they could find that was -- that he had this intention at  
4 all -- up to this point. But I think it's critical that  
5 if the jury believes that he -- you know -- if the jury  
6 believes the story to some extent but takes the lesser  
7 case scenario -- that's what they decide -- they're back  
8 in the jury room, your Honor, and they decide, I think  
9 the story is somewhat credible. I think he was there. I  
10 don't think he intended to do any of this. I don't think  
11 he did anything that happened to these boys, but I know  
12 Jason and Damien intended, therefore, we are going to  
13 find him guilty of capital murder.

14 If that's their thought process, your Honor, I think  
15 that's an incorrect statement of what the thought process  
16 should be.

17 THE COURT: I think everything you're saying are  
18 reasonable inferences that can be argued from the facts  
19 and argued to the jury. However, the law on accomplice  
20 liability states simply and simply put. We've done away  
21 with---

22 MR. CROW: Yes, your Honor.

23 THE COURT: ---accessories before and accessories  
24 after the fact and we have one broad statute on  
25 accomplice liability and what a jury must find in order

1 to find that one was an accomplice of another in any  
2 criminal event is that it was their purpose of promoting  
3 or facilitating the commission of any offense. And that  
4 they aided, agreed to aid, or attempts to aid the other  
5 person in the planning or committing of the offense.

6 So the gravestone of the offense of accomplice  
7 liability is the purpose to aid and facilitate---

8 MR. STIDHAM: The offense, your Honor.

9 THE COURT: ---the offense. That's exactly right.

10 MR. CROW: So if the offense is capital murder he  
11 has -- he has to have the purpose and aid -- to  
12 facilitate capital murder.

13 THE COURT: Well---

14 MR. CROW: If the offense is first degree murder he  
15 has to have a purpose to aid or facilitate---

16 THE COURT: Well, I'm not sure that that's an  
17 accurate statement. I -- I think that if it can be shown  
18 that one's intent -- intends to aid and assist another  
19 person in a criminal endeavor and it results in death,  
20 that the element of transferred intent applies and that's  
21 not something that we normally argue by way of jury  
22 instructions to a jury. I mean it's a concept of law  
23 that you know and I know---

24 MR. CROW: Yes, your Honor.

25 THE COURT: It's also the concept of a felony murder

1 back door -- once I start reading the jury instructions,  
2 I don't want anybody going in and out. I probably ought  
3 to announce out there if anybody wants to come in they'd  
4 better do it now. I didn't think to tell you that.

5 Alright, Court will be in session.

6 Alright, ladies and gentlemen, I'm about to read to  
7 you the instructions of law that you are to apply to the  
8 facts that you've heard in this case. They've been  
9 reduced to written form and you'll be able to take a copy  
10 of the instructions to the jury room with you and they  
11 should answer your questions on point of law. I'll  
12 attempt to read them where you can understand them.  
13 Obviously, I might read them too fast, or stumble over  
14 something. I hope I don't, but if I do, you do have a  
15 copy in the jury room to refer to.

16 Was there anything else you gentlemen need to do  
17 before I proceeded reading the instructions?

18 MR. DAVIS: No, sir.

19 MR. STIDHAM: No, sir.

20 THE COURT: Alright.

21 The faithful performance of your duties as jurors is  
22 essential to the administration of justice. It is my  
23 duty as judge to inform you of the law applicable to this  
24 case by instruction and it is your duty to accept and  
25 follow them as a whole, not singling out one instruction

1 to the exclusion of others. You should not consider any  
2 rule of law with which you may be familiar unless it is  
3 included in my instructions.

4 It is your duty to determine the facts from the  
5 evidence produced in this trial. You are to apply the  
6 law as contained in these instructions to the facts and  
7 render your verdict upon the evidence and law. You  
8 should not permit sympathy, prejudice, or like, or  
9 dislike of any party to this action or of any attorney to  
10 influence your findings in this case.

11 In deciding the issues you should consider the  
12 testimony of the witnesses and the exhibits received in  
13 evidence. The introduction of evidence in Court is  
14 governed by law. You should accept without question my  
15 rulings as to the admissibility or rejection of evidence,  
16 drawing no inferences that by those rulings I have in any  
17 manner indicated my views on the merits of the case.

18 Opening statements, remarks during the trial, and  
19 closing arguments of the attorneys are not evidence, but  
20 are made only to help you in understanding the evidence  
21 and applicable law. Any argument, statements, or remarks  
22 of the attorneys having no basis in the evidence should  
23 be disregarded by you.

24 I have not intended by anything I have said or done  
25 or by any questions that I may have asked to intimate or

1 suggest what you should find to be the facts, or that I  
2 believe or disbelieve any witness who testified. If  
3 anything that I have done or said has seemed to so  
4 indicate you will disregard it.

5 In considering the evidence in this case you are not  
6 required to set aside your common knowledge, but you have  
7 a right to consider all of the evidence in the light of  
8 your own observations and experiences in the affairs of  
9 life.

10 You are the sole judges of the weight of the  
11 evidence and the credibility of the witnesses. In  
12 determining the credibility of any witness and the weight  
13 to be given his testimony, you may take into  
14 consideration his demeanor while on the witness stand,  
15 any prejudice for or against a party, his means of  
16 acquiring knowledge concerning any matter to which he  
17 testified, any interest he may have in the outcome of the  
18 case, the consistency or inconsistency of his testimony,  
19 its reasonableness or unreasonableness, and any other  
20 fact or circumstance tending to shed light upon the truth  
21 or falsity of his testimony.

22 An expert witness is a person who has special  
23 knowledge, skills, experience, training, or education on  
24 the subject to which his testimony relates. An expert  
25 witness may give his opinion on questions and

1 controversies. You may consider his opinion in the light  
2 of his qualifications and credibility, the reasons given  
3 for his opinion, and the facts and other matters upon  
4 which his opinion is based. You are not bound to accept  
5 an expert opinion as conclusive, but you should give it  
6 whatever weight you think it should have. You may  
7 disregard any opinion testimony if you find it to be  
8 unreasonable.

9 The State must prove beyond a reasonable doubt each  
10 element of the offense charged. On the other hand, the  
11 defendant is not required to prove his innocence. There  
12 is a presumption of the defendant's innocence in a  
13 criminal prosecution. In this case Jessie Lloyd  
14 Misskelly, Junior is presumed to be innocent. That  
15 presumption of innocence attends and protects him  
16 throughout the trial and should continue and prevail in  
17 your minds until you are convinced of his guilt beyond a  
18 reasonable doubt.

19 Reasonable doubt is not a mere possible or imaginary  
20 doubt. It is a doubt that arises from your consideration  
21 of the evidence and one that would cause a careful person  
22 to pause and hesitate in the graver transactions of life.

23 A juror is satisfied beyond a reasonable doubt if  
24 after an impartial consideration of all of the evidence  
25 he has an abiding conviction of the truth of the charge.



1 Evidence that a witness previously made a statement  
2 which is inconsistent with his testimony at the trial may  
3 be considered by you for the purpose of judging the  
4 credibility of the witness, but may not be considered by  
5 you as evidence of the truth of the matter set forth in  
6 that statement.

7 In this case the State does not contend that Jessie  
8 Lloyd Misskelly, Junior acted alone in the commission of  
9 the offenses of three counts of capital murder. A person  
10 is criminally responsible for the conduct of another  
11 person when he is an accomplice in the commission of an  
12 offense.

13 An accomplice is one who directly participates in  
14 the commission of an offense or who with the purpose of  
15 promoting or facilitating the commission of an offense  
16 agrees to aid, aids, or attempts to aid the other person  
17 or persons in the planning or committing the offense.

18 Purpose is defined: A person acts with purpose with  
19 respect to his conduct or a result thereof when it is his  
20 conscious object to engage in conduct of that nature or  
21 to cause such a result.

22 Jessie Lloyd Misskelly, Junior is charged with three  
23 counts of capital murder. This charge in each count  
24 includes the lesser offenses of first degree murder and  
25 second degree murder for each count. You may find the

1 defendant guilty of one of these offenses or you may  
2 acquit him outright. If you have a reasonable doubt as  
3 to which offense the defendant may be guilty of on each  
4 count, you may find him guilty only of the lesser  
5 offense. If you have a reasonable doubt as to the  
6 defendant's guilt of all offenses, you must find him not  
7 guilty.

8 Jessie Lloyd Misskelly, Junior is charged with the  
9 offense of capital murder, three counts. To sustain this  
10 charge on each count the State must prove the following  
11 things beyond a reasonable doubt:

12 First, that with the premeditated and deliberated  
13 purpose of causing the death of any person, Jessie Lloyd  
14 Misskelly, Junior or an accomplice caused the death of  
15 Michael Moore in Count One or Stevie Branch, Count Two,  
16 or Chris Byers, Count Three.

17 Purpose is defined again: A person acts with  
18 purpose with respect to his conduct or a result thereof  
19 when it is his conscious object to engage in conduct of  
20 that nature or to cause such a result.

21 If you have a reasonable doubt of the defendant's  
22 guilt on the charge of capital murder, you will then  
23 consider the charge of first degree murder.

24 To sustain the charge of first degree murder the  
25 State must prove beyond a reasonable doubt that Jessie

1 Lloyd Misskelly, Junior with the purpose of causing the  
2 death of another person caused the death of Michael Moore  
3 in Count One, Steven Branch in Count Two, and Christopher  
4 Byers in Count Three.

5 If you have a reasonable doubt of the defendant's  
6 guilt on the charge of first degree murder, you will then  
7 consider the charge of second degree murder.

8 To sustain the charge of second degree murder the  
9 State must prove beyond a reasonable doubt that Jessie  
10 Lloyd Misskelly, Junior knowingly caused the death of  
11 Michael Moore in Count One, Steven Branch, Count Two, and  
12 Christopher Byers in Count Three under circumstances  
13 manifesting extreme indifference to the value of human  
14 life or that Jessie Lloyd Misskelly, Junior with the  
15 purpose of causing serious physical injury to Michael  
16 Moore, Count One, Steven Branch, Count Two, and  
17 Christopher Byers, Count Three did cause the death of  
18 Michael Moore, Steven Branch and Christopher Byers.

19 Knowingly is defined: A person acts knowingly or  
20 with knowledge with respect to his conduct or the  
21 circumstances that exist at the time of his act when he  
22 is aware that his conduct is of that nature or that such  
23 circumstances exists. A person acts knowingly with  
24 respect to a result of his conduct when he is aware that  
25 it is practically certain that his conduct will cause

1 such a result.

2 Serious physical injury means physical injury that  
3 creates a substantial risk of death or that causes  
4 protracted disfigurement, protracted impairment of  
5 health, or loss or protracted impairment of a function of  
6 any bodily member or organ.

7 In order to find that Jessie Lloyd Misskelly, Junior  
8 acted with premeditated and deliberated purpose you must  
9 find that he had the conscious object to cause death and  
10 that he formed that intention before acting as a result  
11 of weighing in the mind the consequences of a course of  
12 conduct as distinguished from acting upon sudden impulse  
13 without exercise of reasoning powers.

14 It is not necessary that this state of mind existed  
15 for any particular length of time, but it is necessary  
16 that it was formed before the homicide was committed.

17 If you find Jessie Lloyd Misskelly, Junior guilty of  
18 capital murder, first degree murder, or second degree  
19 murder of one or more counts you will so indicate on a  
20 verdict form to be given to you.

21 If you find Jessie Lloyd Misskelly, Junior not  
22 guilty of one or more counts you will so indicate on the  
23 appropriate forms.

24 In your deliberations the subject of punishment is  
25 not to be discussed or considered by you. If you return

a verdict of guilty on any charge, the matter of  
punishment will be submitted to you separately.

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INSTRUCTION NO. 1

An accomplice is criminally responsible for the acts of others only to the 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 from Fight v. State  
 314 Ark. 438 (1993)

INSTRUCTION NO. 7

## AFFIRMATIVE DEFENSE - CAPITAL MURDER

Jessie Lloyd Misskelley, Jr. asserts an affirmative defense to the charge of capital murder. To establish this affirmative defense, Jessie Lloyd Misskelley, Jr. must prove each of the following things:

- First: That he was not the only party to the offense;
- Second: That he did not commit the homicide act; and
- Third: That he did not in any way solicit, command, induce, produce, counsel, or aid its commission.

Jessie Lloyd Misskelley, Jr., has the burden of proving this defense by a preponderance of the evidence, unless the defense is so proved by other evidence in the case. "Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If the evidence with regard to this defense appears to be equally balanced, or if you cannot say upon which side it weighs heavier, then the defense has not been established. If you find that this defense has been established then you shall find Jessie Lloyd Misskelley, Jr. not guilty of the offense of capital murder. Whatever may be your finding as to this defense, you are reminded that the State still has the burden of establishing the guilt of Jessie Lloyd Misskelley, Jr. upon the whole case beyond a reasonable doubt.

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*Refused*

1 Was there anything else, gentlemen?

2 MR. DAVIS: No, sir.

3 MR. STIDHAM: No, sir.

4 THE COURT: Alright, you may argue your case.

5 MR. FOGLEMAN: Your Honor, could I---

6 THE COURT: Do you want the verdict forms? I've got  
7 them here.

8 MR. FOGLEMAN: Your Honor, if I could have just a  
9 second to get---

10 THE COURT: Yes, try to keep them in the right order  
11 for me.

12 MR. FOGLEMAN: May it please the Court, Mr. Stidham,  
13 Mr. Crow, and ladies and gentlemen of the jury. Before I  
14 actually get into -- we call it argument -- I'm not going  
15 to argue with you. I'm going to try to reason through  
16 the facts and law and talk to you -- but before we get to  
17 that, I want to take this opportunity and I'm sure Mr.  
18 Stidham and Mr. Crow would join me in this -- in  
19 sincerely thanking you for your willingness to serve as  
20 jurors in this case. This isn't your all's case. This  
21 is a Crittenden County case and we appreciate -- we all  
22 appreciate your willingness to serve as jurors in this  
23 case and take time away from your families and your jobs  
24 to be with us and help us to see that justice is  
25 done.



1           In this case when you became a juror you recall  
2 standing at the first and you took an oath. And you took  
3 an oath to base your verdict solely and exclusively on  
4 the law as Judge Burnett has given you and the evidence  
5 as it comes from this witness stand, not speculation and  
6 not conjecture, but on the evidence as it comes from this  
7 witness stand. That's all that anybody can ask you to  
8 do.

9           In the Judge's instructions also he mentioned  
10 sympathy. Ladies and gentlemen, this is not a case about  
11 sympathy for either side and it's natural for you to feel  
12 sympathy, but in this case we don't want you to feel  
13 sympathy for anybody in the case. We don't want you to  
14 allow that to affect your decision in this case. We  
15 submit to you after you look objectively at the evidence  
16 in this case, at the testimony in this case, that you  
17 will return an appropriate verdict of guilty to three  
18 counts of capital murder.

19           Now, in this case, Judge Burnett has instructed you  
20 that in order to sustain a conviction of capital murder,  
21 in order for you to return a verdict of guilty of capital  
22 murder the State has to prove two things beyond a  
23 reasonable doubt on each count. That is that with the  
24 premeditated and deliberated purpose of causing the death  
25 of another person this defendant or an accomplice -- or

1 an accomplice caused the death of Michael Moore on Count  
2 One, Stevie Branch on Count Two, and Chris Byers on Count  
3 Three.

4 Now, in regards to the reference to an accomplice,  
5 the Judge has given you an instruction on accomplice.  
6 And in this instruction he tells you that a person is  
7 criminally responsible for the conduct of another person  
8 when he is an accomplice. He's just as guilty if he's an  
9 accomplice. And an accomplice is one who either directly  
10 participates in the commission of an offense, or who with  
11 the purpose of promoting or facilitating a commission of  
12 the offense, he aids, agrees to aid, or attempts to aid  
13 the other person in planning or committing the offense.

14 Now, the definition of purpose is on here, too. And  
15 these definitions are real important. And if you look at  
16 it you'll see that a person acts with purpose with  
17 respect to his conduct or a result thereof when it is his  
18 conscious object to engage in the conduct of that nature  
19 or to cause such a result.

20 Now, what I would like to do now is take the  
21 **elements** of the offense and go through with you the  
22 **elements** that we have to prove and what the evidence has  
23 been in this case.

24 First, that with the premeditated and deliberated  
25 purpose of causing the death of Michael Moore, Stevie

1 Branch, and Chris Byers, this defendant in his taped --  
2 let me back up. This defendant in the statement before  
3 he admitted being present, he tells Detective Ridge and  
4 Detective Gitchell that he has a phone call the day  
5 before the murders and that he's told that Damien and  
6 Jason are going to West Memphis and they're going to get  
7 these boys and hurt them.

8 He also testifies that at one of these cult meetings  
9 he mentions that a photograph of not just some boys, but  
10 these boys is passed around at this meeting. Now, Mrs.  
11 Byers testified about her son coming in a month or so  
12 before and saying about how some strange man all in black  
13 had taken her picture -- had taken the son's picture --  
14 Chris' picture.

15 He also stated that Damien had been watching these  
16 boys. He had been stalking these boys -- premeditation.  
17 In looking at premeditation the injuries themselves speak  
18 loudest -- multiple skull fractures, Chris Byers bleeds  
19 to death, and Stevie Branch and Michael Moore are  
20 drowned. Was there a conscious object to cause death?  
21 Unquestionably. I don't believe anybody could dispute  
22 that.

23 The second element is that the defendant or an  
24 accomplice caused the death of Michael Moore, Stevie  
25 Branch, and Chris Byers. The defendant himself in this

1 taped interview describes this event. He describes his  
2 participation -- or what he said -- is his participation  
3 in this event. The defendant's own expert says that the  
4 natural inclination of a defendant is to lessen his  
5 involvement in the offense, and I'll come back to that a  
6 little bit later. So he describes it for you himself.  
7 In the way he describes it it reveals a premeditated and  
8 deliberate murder although he tries to lessen his own  
9 involvement.

10 Now, these alibis -- being in Highland Park and  
11 wrestling. This was a parade of defendant's friends.  
12 You saw the yellow ribbons. It's a -- the Judge tells  
13 you in judging credibility you judge demeanor, the way  
14 the witness testified, whether -- and I'm not getting  
15 this word-for-word, so rely on what the instruction tells  
16 you, not what I tell you it is -- whether there is any  
17 reason him not to be telling the truth, any bias,  
18 anything to be gained from the outcome of the case. And  
19 when you look at the people with the yellow ribbons the  
20 bias is obvious. They're here to try to help the  
21 defendant.

22 Now, when you analyze their testimony -- and this  
23 isn't a real impressive professional diagram I've got  
24 here -- but, when you analyze their testimony in regard  
25 to Highland Park -- and, of course, you can't see this,

1 but I'm just going to refer to it because it helps my  
2 memory -- the testimony about where the defendant was up  
3 until about five-thirty is really pretty consistent.  
4 It's pretty consistent among the witness. But when you  
5 get to the crucial time around five-thirty or six  
6 o'clock, these witnesses have this defendant in three or  
7 four different places at the same time. You look at it  
8 at about -- see, Susie Brewer, she's got at six -- around  
9 six o'clock -- between five-thirty and about seven, she's  
10 got her and the defendant on the street together and at  
11 Stephanie Dollar's house.

12 You move down to Jennifer Roberts. She's got at six  
13 o'clock the defendant and Christy Jones on the  
14 defendant's porch. Christy Jones says that from  
15 beginning about five-thirty or six she and the defendant  
16 are on her porch by themselves un -- for about an hour or  
17 an hour and a half. So anywhere from five-thirty to  
18 seven or six to seven-thirty she's saying that they're  
19 sitting on the porch all by themselves.

20 You go down to Mr. Hoggard, he puts at six-thirty  
21 ~~Jessie~~ by himself out in front of Stephanie Dollar's  
22 house, not on the porch at the defendant's and not with  
23 Susie Brewer down the street.

24 Mr. McNease says that about that time that he sees  
25 the defendant at this police car which is down the street

1 from the defendant's house and finally, Jessie, Senior  
2 says that he sees the police there when he gets home from  
3 D. W. I. School -- well, D. W. I. School doesn't leave --  
4 doesn't begin until almost eight o'clock and if you'll  
5 look at this radio log you'll see that the officers  
6 checked off the scene there right before seven o'clock --  
7 or eight o'clock. Anyway, it was at a time when -- they  
8 had already left by the time Mr. Misskelly, Senior got  
9 home -- or even left where he was. So this is all  
10 totally inconsistent.

11 And then when you go to the wrestling alibi, that  
12 was a total total mess. You have Fred Revelle, the only  
13 one -- the only person who comes to the police and says,  
14 "Look, I think I may have made a mistake. He was with me  
15 and here's why he was with me. We had gone wrestling.  
16 It was me and Jessie and" -- one other person, I believe  
17 he said and -- in his first statement to the police --  
18 "and I know it was that day because that's the day we  
19 paid the money." So the police naturally doing their  
20 job, they go out and investigate to see if he's right.

21 Was -- you know -- was the defendant somewhere else?

22 And lo and behold, what do they find out? The money was  
23 paid a week before that, and they get a receipt to prove  
24 that.

25 Well, then when Mr. Revelle comes into court and

1       testifies, this story is completely different. He hadn't  
2       told anybody about it with law enforcement.

3               Then you have Dennis Carter come in here and say,  
4       "Yeah, I went with him May the fifth. I know it was May  
5       the fifth as sure as I'm sitting here." But that's the  
6       gist of his words. And then what did he tell the police?  
7       Shortly after -- keep in mind, this is when it was still  
8       fresh in memory -- shortly after the arrest of the  
9       defendant what did he tell them? He said, "I didn't go  
10      wrestling then. I didn't go wrestling until after the  
11      murders that happened -- days after" -- just a mess.

12              And then finally after witness after witness gives  
13      these confusing and conflicting stories about being  
14      wrestling or not wrestling, you have this Johnny Hamilton  
15      come in. And he testifies that, "Well, I'm sure it was  
16      that day. Kevin Johnson was at search and rescue. Keith  
17      Johnson went. That was the only time he went."

18              Keith Johnson says, "Yeah, I went wrestling one time  
19      and some specific events happened, but I don't know when  
20      it was." Keith Johnson, I think, told the truth. He  
21      didn't have any idea when it was, but, yeah, he had been  
22      wrestling with them one time. How do we know that's not  
23      true? Not about Keith Johnson but about that it was May  
24      the fifth.

25              When they went wrestling they signed this document.

1 Keith Mercier -- I hope I say that right -- he came in  
2 today and testified, "I only went one time. I went one  
3 time, signed the form, and it was before the murders."  
4 He was the last person that signed. He had to have  
5 signed after Keith Johnson, after Johnny Hamilton. Keith  
6 Johnson only went one time. So Keith Johnson had to have  
7 gone before the murders because Keith Mercier signed  
8 after him.

9 Also, on Mr. Hamilton Keith said, "Well, I'm not  
10 going to drive six hundred miles for nothing." He would  
11 drive six hundred miles to testify but he won't go three  
12 or four miles from Highland Park to the police department  
13 to tell them, "Hey, I think you made a mistake." He  
14 didn't tell anybody. He didn't even tell the defense.  
15 He didn't tell anybody. Somebody goes and talks to him  
16 last Sunday and he says, "Oh, yeah, I remember vividly --  
17 May the fifth." Where were we May the fifth? I even got  
18 this flu.

19 The defense then moved from alibi to Mr. Bojangles.  
20 Remember Mr. Bojangles? Remember that? Is there any  
21 evidence that suggests that Mr. Bojangles had anything to  
22 do with this? You have a sheet with a single Negroid  
23 hair fragment. A single one. So they pick out Mr.  
24 Bojangles to present up here as this must be the person  
25 who did it. Well, let's think about that a moment.



1 Well, there's blood and he came in and kind of  
2 uncoherent. Is there something to that? Could it have  
3 been Mr. Bojangles? Well, let's think about it. What  
4 about the crime scene? Picture in your mind the crime  
5 scene and then picture in your mind Bojangles. The crime  
6 scene -- not a drop of blood. Not one -- couldn't find  
7 one. The bodies were hidden. The kids' clothes were  
8 hidden. They were crammed down in the mud. The blood  
9 was washed off the bank and the scuff marks. Contrast  
10 that with Bojangles. He goes in there and he leaves  
11 blood all over the place -- down the hall, on the wall,  
12 on the floor, on the commode -- all over the place. Do  
13 you really believe that a guy is going to go to the  
14 trouble of cleaning up the crime scene, hiding the kids'  
15 bodies, hiding their clothes, hiding any evidence of this  
16 crime that's taken place there, and then he's going to  
17 walk down through a field to Bojangles Restaurant, a  
18 public place, and leave blood all over the place. Give  
19 me a break.

20 The defense in their opening claimed that there was  
21 going to be proof that this is Damien tunnel vision. No  
22 evidence to that. None. The testimony was that yes,  
23 Damien was a suspect, but he was one of a number of  
24 suspects. Just one of a number.

25 Let's talk about these experts that were called by

1 the defense. As the Judge has instructed you because  
2 somebody is labeled an expert -- and that applies both to  
3 the experts that testified on behalf of the State and  
4 experts that testified on behalf of the defendant --  
5 you're entitled to weigh their credibility and to judge  
6 what you hear from them, decide whether you think it's of  
7 any value or not.

8 Let's start with Mr. Holmes. What makes Mr. Holmes  
9 an expert? He said why he had thirteen years of law  
10 enforcement experience. He worked for the Miami Police  
11 Department for thirteen years and since that time he's  
12 been a lecturer and a witness. Detective Gitchell's had  
13 nineteen years of experience.

14 Now, let's talk about it. Actually -- you think  
15 about it -- now, Mr. Holmes is a good witness as far as  
16 presentation. But when you sit back and really think  
17 about it and analyze what he said. He said the police  
18 didn't do anything wrong. He had some problems with the  
19 content of some of the questions and some of the  
20 responses. But as far as the police being coercive, he  
21 said the police didn't do anything wrong. In fact if  
22 you'll think back and use your own memory -- do you  
23 remember Mr. Holmes saying, "I would have done the same  
24 things myself." Do you remember that?

25 Mr. Holmes' complaint is time and ligature -- the

2026

1 knots -- and in his -- but in his testimony he says he  
2 complains because they didn't clear these things up.  
3 Well, as the testimony has been and Mr. Holmes himself  
4 admitted, when you're interviewing somebody you don't  
5 stop all of a sudden and start cross examining them about  
6 something they said that may be wrong. The goal is to  
7 keep the person talking. And then he says in his  
8 testimony, "Well, they did go back later and clear up the  
9 time, but not the ligature." And actually when he says  
10 that, if you will look and listen to these tapes, there's  
11 nothing said about how -- or what they're tied with until  
12 the second statement anyway. They didn't clear it up  
13 after the first one because it wasn't in there. It was  
14 in the second one and that was not cleared up.

15 Now, I want to go through some of the things that  
16 Mr. Holmes said that you looked at in determining whether  
17 you've got a -- a coerced confession or true confession  
18 -- I think that's the way he put it. He says on the  
19 problems of time and the ligature, he gave a few possible  
20 explanations. You know, he had to have been doped up or  
21 he had to have been -- have a faulty memory, or maybe  
22 just wasn't -- that he wasn't telling the truth.

23 Now, what we have in this case -- you know -- the  
24 evidence doesn't show whether Mr. Holmes is familiar with  
25 Doctor Wilkins' examination or not. So what do we have?

1 We've got a defendant who huffed gas, smoked pot, abused  
2 alcohol, and he found significant memory gaps. The very  
3 thing that the defense's own expert said could account  
4 for these problems.

5 He also said the most important thing -- I wrote  
6 this down -- that the person sounds and looks like  
7 they're telling the truth. Yet Mr. Holmes admitted that  
8 he had formulated his opinion before he even heard the  
9 tape of the defendant. He had had a transcript, but how  
10 do you judge how they sound if you don't hear the tape?  
11 And he had already formulated his opinion.

12 He gave a number of factors. The indication of  
13 relief was finally out. The -- some indication of  
14 relief. Well, what was the testimony? The testimony was  
15 that after the defendant -- or about the time the  
16 defendant finally admitted that he was there when these  
17 crimes occurred, that he cried. Is that not an  
18 indication of relief? It's over.

19 He also says that one of the factors if you are  
20 wrong in a supposition in questioning the person he will  
21 correct you. Well, let's see if you find any of that.  
22 The factors the defense's own expert says to look for.  
23 If you're wrong in a supposition he will correct you. On  
24 page three of the transcript Inspector Gitchell asked,  
25 "Whose car were you all in?" Suggestful question, isn't

1 it? Leading question, isn't it? Well, does he buy into  
2 the -- does the defendant buy into the suggestion? Does  
3 he go along with these suppositions? No. He says, "We  
4 walked." He corrects him, "No, we didn't go in a car.  
5 We walked."

6 Then on page ten of the transcript. If you're wrong  
7 in a supposition he will correct you. Detective Ridge  
8 says, "Did they take like one picture of one boy?" The  
9 supposition is there's one picture of one boy. Did he go  
10 along and agree with this supposition -- this suggestful  
11 leading question? Right? No, he says, "They were in a  
12 group." He corrects him. "No, it was not one boy in one  
13 picture. The boys were in a group."

14 Then on page eighteen. Detective Ridge, "Besides  
15 just playing, the little boys, had they been in the  
16 water? Did they get into the water with you all?" The  
17 supposition was that the little boys had got into the  
18 water. Is that an incorrect supposition and did he  
19 correct him? He says, "No, they did not get into the  
20 water with us." He corrects him. Just the very thing  
21 that the defense's own expert says that you would do when  
22 you're confessing and not a coerced confession.

23 He then says that in a confession uncoerced that you  
24 have -- why in there they relate conversation with co-  
25 defendants. Do you have that in this case? Well, the

1 proof was that before the tape -- before he admitted that  
2 he was present and the tape was started -- that there was  
3 a telephone call from Jason Baldwin to this defendant.  
4 And in this phone call Damien is in the background saying  
5 something to the effect of, "Tell him we're gonna get  
6 some girls." And he says, "Hey, I know what I'm going --  
7 what's going on." Do you think that the guy is going to  
8 make up something? He's going to make up dialogue of  
9 something like that, or would Mr. Ofshe stated they  
10 manipulated him into saying that.

11 On page three -- again, remember one of the things  
12 the defense's own expert says is, "You'll have  
13 conversations between the co-defendants." The defendant  
14 on page three says, "He called me, asked me could I go to  
15 West Memphis with him and I told him no, I had to work  
16 and stuff. And then he told me he had to go to West  
17 Memphis. So him and Damien went." Conversations between  
18 the co-defendants.

19 On page six -- conversations. He said, "They took  
20 off running, went home, then they called me. They asked  
21 me how come I didn't stay. I told them I just couldn't."  
22 Again, the very thing that the defense's expert says that  
23 you find in a uncoerced confession.

24 And then page twelve. You've got the telephone call  
25 where he says, "We done it. We done it. What are we

1 going to do if somebody saw us?" All conversations with  
2 co-defendants.

3 He then says another factor is that there's  
4 something that corroborates the confession. Now, is  
5 there anything in this tape that corroborates the  
6 confession? Anything at all? Think about it. Number  
7 one, Tabitha Hollingsworth. She testifies and her  
8 testimony was not challenged one iota. She testifies  
9 that her mother and the rest of her family are going to  
10 pick up her grandmother, aunt -- whatever -- some  
11 relation -- and on the way there between -- or about Blue  
12 Beacon Truck Wash -- you know, the woods are just to the  
13 side -- you all know all about the crime scene -- that  
14 they see walking along the service road Damien and his  
15 girlfriend, Domini. And do you remember how she  
16 described the clothing? She said they were muddy. She  
17 also said that they were wearing black and that Domini  
18 had holes in her knees. Do you remember that? If you've  
19 got any notes, refer back. Think back about that --  
20 holes in the knees.

21 Now, what did the defendant say about what Jason was  
22 wearing? All black. One of these shirts with the skull  
23 on it. And it's in the tape about what he's wearing.  
24 And how did he describe the pants that he's wearing? He  
25 said he had holes in the knees.

1           At night along the service road Domini's got red  
2 hair. Jason Baldwin -- slight -- slightly built, long  
3 hair, and pants with holes in the knees. That's one  
4 thing that corroborates the confession.

5           You've got Damien. You've got him at the scene by  
6 Tabitha's testimony and you also have the testimony of  
7 Lisa Sakevicius -- if that's the right pronunciation --  
8 about the fiber. The fibers that were taken from one of  
9 the victim's clothing that were consistent with having  
10 come from this one shirt -- this one shirt out of  
11 Damien's house. The testimony was that she checked  
12 fibers from the victims' houses, checked fibers at  
13 Jason's, Damien's -- the defendants. And out of all of  
14 that one article of clothing that fibers matched. Sure  
15 they can say, "Well, those fibers" -- as the witness  
16 said, "Well, it could have come from a similar type  
17 garment from the same batch of dye", but out of all of  
18 those houses you get one garment that matches.

19           Then from Jason, again, you have a fiber. A fiber  
20 that matches. The only match -- only match out of all of  
21 the clothing in all of those houses -- the only match.

22           Is that a coincidence? Is it a coincidence that the  
23 defendant described Jason as having pants with holes in  
24 his knees and wearing all black and then Tabitha saying,  
25 "Well, I seen Damien and Domini, his girlfriend, and it



1 just so happens she's got holes in her knees." Is that a  
2 coincidence?

3 Then we get something that corroborates it which is  
4 another thing Mr. Holmes says about some inconsequential  
5 matter. I think the way he described it, somebody  
6 walking by or some conversation or something. You  
7 remember what the defendant said in his statement about  
8 what he did with his tennis shoes and what kind of tennis  
9 shoes they were? He said that he gave them to a guy  
10 named Buddy Lucas, and he describes in his statement that  
11 they were white and blue Adidas. Detective Ridge  
12 testified that he went to Buddy Lucas' and lo and behold  
13 what did he get from Buddy Lucas? The white and blue  
14 Adidas'. Is that a coincidence? I think not.

15 Then you get to further corroboration -- the  
16 injuries. When in discussing -- and listen -- you have a  
17 right to listen to those tapes as many times as you all  
18 want you. Listen to those tapes. Don't rely on what I  
19 say they say or what Mr. Stidham or Mr. Crow says or what  
20 Mr. Davis says, you go back there and listen to those  
21 tapes. Listen for the inflection in the voice. Listen  
22 for the yawns that shows the tremendous pressure he was  
23 under in this interview. But when you listen to it, what  
24 you're going to find is they ask him -- it said something  
25 about a boy and where was the person cut? He said, "In

1 the face."

2 Now, in all of this stuff that Mr. Stidham put on  
3 about this knowledge -- the stuff in the paper about they  
4 were all sexually mutilated and that kind of thing,  
5 nothing in there about a boy being cut in the face. They  
6 were beat up real bad, but nothing -- nothing in there  
7 about somebody being cut in the face. He says, "Yes, one  
8 of them was cut in the face." And then they say, "Well,  
9 was -- where was another boy cut?" "At the bottom." It  
10 ends up he says, "In the area of the groin area."

11 Now, is all of that just coincidence that he says  
12 that or is it as Mr. Ofshe said that somehow these  
13 devious officers manipulated this defendant into saying  
14 things that weren't true?

15 You've also got some other factors that they used.  
16 The defendant tells about the kids being grabbed by their  
17 ears. And you heard the medical examiner's testimony  
18 whatever the purpose for grabbing the ears this defendant  
19 in his statement says they were grabbed by their ears.  
20 And if you'll look at that you'll see that's exactly what  
21 he said. And Inspector Gitchell testified but before he  
22 actually said it he was even demonstrating it. And what  
23 do we have from the medical examiner? He's got damage to  
24 his ears. Bruised ears. Consistent with being -- having  
25 been grabbed.

1           You've got three guys supposed to be involved in  
2 this -- the defendant, Damien and Jason. How many  
3 weapons did the medical examiner say that he could put a  
4 minimum number on? Three. At least two club type  
5 weapons. And you don't have to be an expert to look at  
6 these photographs and know that those injuries were not  
7 caused by similar type things. It's obvious that these  
8 were caused by a smaller object. (INDICATING.) These  
9 by a larger object. (INDICATING.) And you have the  
10 knives. Is it a coincidence again that we've got three  
11 weapons?

12           He also said that -- and this is in a sense  
13 corroboration of what he says in his statement -- Mr.  
14 Holmes says it's natural for a person to try to lessen  
15 their involvement. Out of all three of these kids for  
16 the defendant to associate himself with as far as the one  
17 that he dealt with, which one did he pick? He picked  
18 Michael Moore, right? Which of the three boys didn't  
19 have any torture type of mutilation to him? Michael  
20 Moore. Is that a coincidence? Or did the police somehow  
21 say, "Well, this would be a good scenario here. We'll  
22 get him to admit to it but we'll only have him involved  
23 with the one that wasn't hurt too bad." It's not  
24 coincidence. It's not an accident. It's not a guess.  
25 He's telling what he knew despite his faulty memory and

1 his gas -- gas huffing and alcohol abuse.

2 And while we're talking about that, do you recall  
3 Doctor Rickert testifying about the effects of the faulty  
4 memory and the things you'll remember and won't remember?  
5 The things that you remember are the significant things.  
6 This was over a month later or, excuse me, it wasn't over  
7 -- it was about a month later. Which details is he right  
8 on? The most traumatic and terrible event. Which one is  
9 he wrong on? Two things -- time and rope. Are those the  
10 significant things that a person with memory deficits are  
11 going to remember and have branded in their mind? I  
12 think not.

13 In regard to time and it was somewhat pointed out  
14 this morning in Inspector Gitchell's testimony, there's  
15 an interesting statement in here by the defendant. He's  
16 saying this noon stuff and nine o'clock in the morning,  
17 and all of that. On page twelve and listen to this --  
18 when you get -- get back there -- again, make sure that  
19 you ask to listen to the tape and get it to this spot and  
20 you'll look and you'll see that nobody has said anything  
21 about "Hey, it happened at night" or anything like that,  
22 and you're going to hear Jessie say, "Well, after all of  
23 this stuff happened that night that they done it, I went  
24 home about noon." Absolutely makes no sense at all, but  
25 you'll hear those words come out of his mouth. Is it

1 because you've got somebody that doesn't have any concept  
2 of noon? It's not words put in his mouth. That's not  
3 anything from a question that was asked to him. Those  
4 are his words -- "Well, after all of this stuff happened  
5 that night." Was that some kind of a slip? Why did he  
6 say that? He's the one who first says about it happening  
7 that night.

8 Then we get to Doctor Wilkins. He described the  
9 defendant as a gas huffer, heavy alcohol user, pot smoker  
10 and then you see the defendant throughout this trial and  
11 you ask yourself and you listen to these experts and you  
12 say, "Who's being objective?" Is it Inspector Gitchell  
13 and Detective Ridge when they say, "Look, we just talked  
14 to the guy. We let him talk. We took his information,  
15 and when we found out and when we realized that he was  
16 identifying injuries to particular people that only a  
17 person that was there involved knew, we knew we had our  
18 man."

19 Now, are they the ones being deceptive? Who's being  
20 deceptive? This is the person that was there on May the  
21 fifth. The bright eyes. The clear eyes. That is a  
22 person that was there on May the fifth, not the person  
23 that you've been observing -- allowed to observe  
24 throughout this trial. Who's being deceptive in this  
25 case?

1           Doctor Wilkins claims that this defendant is  
2 suggestible. Do you remember when he was asked, "Well,  
3 did you do some kind of test?" or "Was there any tests  
4 that showed that?" There is no basis for his opinion  
5 other than his general conclusion that he's suggestible.

6           And remember what Doctor Rickert said -- about being  
7 suggestible? And how you would need to know whether the  
8 person had a memory problem because that could affect  
9 whether they're being suggested to or they just don't  
10 remember. Do you remember that? Doctor Wilkins himself  
11 testified that this defendant had significant memory  
12 deficit.

13           Then we get to Mr. Ofshe -- or Doctor Ofshe --  
14 whichever one you prefer. But Doctor Ofshe or Mr. Ofshe  
15 -- he can't treat a broken arm. He can't treat your  
16 mind. He's not a licensed psychologist. You can't be  
17 licensed as a social psychologist. He's a professor and  
18 a professional witness. And I will say this, my -- our  
19 -- as Mr. Davis said, he has earned our respect. He is  
20 an expert witness -- an expert at testifying. You  
21 observed him. Do you believe that he would have even  
22 agreed that Mr. Davis' shirt is white if you had asked  
23 him? He probably would have wanted to explain his  
24 answer.

25           Just because you hold yourself out as an expert in

1 something, it doesn't make you an expert. Just because  
2 you come in with a lot of degrees and a Pulitzer Prize,  
3 but if you heard Doctor Rickert it may as well have been  
4 the Heisman Trophy. The Pulitzer Prize has no relevance  
5 to scientific testimony. None. He's from Berkeley,  
6 California, and he came and put on a show, and it was  
7 from my table, pretty entertaining. It may not have been  
8 too entertaining for Brent, but it was pretty  
9 entertaining to watch this expert at testifying testify.  
10 Last year he earned Forty Thousand Dollars just going  
11 around testifying. And how many times could he recall  
12 ever testifying on behalf of the prosecution? Not one.

13 And you might say, "Well, well, but" -- the  
14 prosecution obviously wouldn't want him to come up here  
15 and testify that its a coerced confession, but why, he  
16 says forty percent of the time he looks at these things  
17 and he finds they're not coerced. Well, don't you think  
18 out of that forty percent or whatever thing he said that  
19 one time the prosecution would have said, "Well, they're  
20 challenging the voluntariness of the confession. Would  
21 you come and testify for us?" No, he only testifies for  
22 the defense. Of course, he claims -- you know -- he  
23 doesn't make much money, but he made forty -- Forty  
24 Thousand Dollars. He charges Three Hundred Dollars an  
25 hour, but he's never gotten it. Isn't that what he said?

1 He said he charges Three Hundred Dollars an hour but he  
2 hadn't ever been paid that much. I think he values  
3 himself more than what he's really worth.

4 But let's talk about the substance, and I've talked  
5 a lot about the qualifications and I think you all are --  
6 acutely aware of what the proof is about that. But what  
7 he boils down his opinion to was his problem was about  
8 the same problem that Mr. Holmes had. He had a problem  
9 with that time. Of course, Mr. Holmes said the time  
10 thing was cleared up in the second interview. But Mr.  
11 Ofshe spends all this time talking about the time  
12 problem.

13 Now, I want you to think and you use your own  
14 memory. Don't -- don't rely on what I say, use your own  
15 memory. What scientific basis did he give for concluding  
16 that any of that statement was coerced? What was the  
17 scientific basis that he told you? What was it? He  
18 didn't give you any. He didn't. It wasn't there. He  
19 just said, "It's coerced because I reviewed this", just  
20 like you could review the transcript and listen to the  
21 tapes and say, "Um, there's a problem with time." You  
22 need to pay a guy Three Hundred Dollars an hour to look  
23 and see there's a problem with time? And I don't mean to  
24 make light of it because it's a serious situation. It's  
25 a serious problem. But the defendant is the first one



1 who mentions it happening at night. Then he reverts to  
2 talking about it being in the morning, and why -- why he  
3 did that, why he said that -- I don't know. He -- the  
4 testimony has been he has significant memory problems,  
5 he's huffing gas -- I don't know. But when you analyze  
6 the way he talks in that tape and you analyze what he  
7 said, you find he's not being coerced or manipulated.  
8 He's telling what he thinks is the truth about the time.  
9 And the most significant details of the crime he gets  
10 right.

11 He says the problem is the suggestible questions.  
12 Now, if you've got a person and whether he determined  
13 that this defendant is a suggestible person or not, I  
14 never was clear on it. I never heard him say anything  
15 about that. Now, Dr. Wilkins did, but he didn't have any  
16 basis for it. He couldn't give you any basis for it.  
17 But he says the problem is the suggestible question --  
18 which to me sounds like a leading question. Kind of like  
19 when lawyers always jumps up and objects because it's a  
20 leading question. It sounds about the same. Well, is a  
21 leading question coercive? Well, if the leading or  
22 suggestful question is coercive you just say, "Well,  
23 that's not right." Like, "Whose car were you all in?"  
24 "No, we weren't in a car. We walked." That's pretty --  
25 pretty easy to do and the defendant did it. But if those

1 questions are suggestible and the officers are  
2 manipulating this defendant, don't you think that he  
3 would be agreeing with them when they asked him a  
4 question that's leading or suggestful?

5 Now, let's go through this. Let's look at these  
6 suggestful questions. Start at page four, Detective  
7 Ridge, "What occurred while you're there?" Any  
8 manipulation, suggestion, or leading in that question?  
9 "What occurred while you were there?" And he answered,  
10 he tells them, "I saw Damien hit the boy real bad."  
11 Anything suggestful or leading about that? No.

12 Page six, "Have they got their clothes on when you  
13 saw them tied?" That's a leading question, suggest that  
14 they had their clothes on. He says, "No, they had them  
15 off." From the photographs it's obvious that they  
16 couldn't have been tied with their clothes on. They'd  
17 had to have been tied after their clothes were off. They  
18 couldn't have gotten their clothes off.

19 So there he doesn't buy into these suggestions -- if  
20 you want to call it that -- or the leading. Page seven,  
21 "Where was he cut at?" or "Where did he cut him at?" "He  
22 was cutting him in the face." Anything that was  
23 suggestive that he was being cut in the face? Now, they  
24 said, "Well, he might have been pointing to his face."  
25 Ladies and gentlemen, there's not one iota of evidence

1 that that took place -- not one, and you remember your  
2 oath. You can't base it on speculation. You can't base  
3 it on conjecture. It's got to be on evidence and there's  
4 not any evidence that that took place. "Where was he cut  
5 at" after he talked about cutting him in the face. "At  
6 the bottom." Well, they might say, "Well, he was -- at  
7 the -- there was a reference to the groin area." Well,  
8 they say, "Well, they led him into saying the groin  
9 area," but the officer testified that he was -- when he  
10 said bottom he was pointing at the groin area. "See, you  
11 want to say bottom." Look at the photograph of Chris  
12 Byers and his bottom and see if it's not cut.

13 And he asked, "Which boy was that?" -- talking about  
14 the boy castrated. "That boy right there", and he points  
15 to the boy. There is no evidence that there was any  
16 suggestion made to this defendant about which one of  
17 these victims to select.

18 And you know to believe that they did this, there's  
19 no evidence of it so you couldn't find that. But let's  
20 just say that you said, "Well, they did." You would have  
21 to conclude that these officers were so dishonest and  
22 twisted that they would pin it on an innocent person -- a  
23 person they knew to be innocent.

24 Then on page ten, "Has he ever had sex with them  
25 before?" -- talking about Damien and the little boys.

1 Doesn't that suggest that the officers think that maybe  
2 Damien had sex with them before? And under Ofshe's  
3 theory the defendant should have said, "Yes" and then  
4 tried to figure out what they wanted him to say next. He  
5 says, "No. No. He's been watching them. No, he hasn't  
6 been having sex with them, he's been watching them."

7 And page eleven, talking about the picture and this  
8 next thing he threw out to him, "It has the same three  
9 boys in it?" "Yes." And then Detective Ridge says,  
10 "You're certain of that?" He asked him that on a number  
11 of pages after they give a response that would be a  
12 response that's consistent with the facts. "You're  
13 certain of that?" Now what did Ofshe -- what did he say  
14 when Mr. Davis asked him about that? "You're certain of  
15 that?" What does that mean? Do you think they're trying  
16 to lead him when they say that? Aren't they questioning  
17 his answer when they say that? Well, he says "That's to  
18 reinforce it." To reinforce it. These officers are  
19 skillfully manipulating the defendant and this is the  
20 reinforcement.

21 Well, when we get over here in the second interview  
22 when we're clearing things up, he gets over here and you  
23 know that the medical examiner testified about the  
24 injuries to Stevie Branch's penis. What he called a suck  
25 mark or whatever you want to call it. And there are some

1 little bruises across the penis that you could conclude  
2 are teeth marks when you look at the bruises.

3 In -- the officer goes in there and he asks, "Did  
4 anyone maybe suck theirs or something?" And Jessie says,  
5 "Not that. I didn't see nothing. Neither one of them do  
6 that." Again, the question is leading or suggestful or  
7 whatever you want to call it, does he buy into it? No.

8 And then Inspector Gitchell says, "You didn't see  
9 that?" And Jessie says, "Uh, uh." Gitchell again says,  
10 "Okay. Did they pinch their penis in any way or rough  
11 with it or anything like that?" Jessie, "I didn't see  
12 nothing like that, not rough with them. I just seen" --  
13 and Gitchell says, "You didn't see anyone go down on the  
14 boys?" -- the third or fourth time. "Uh-uh."

15 Gitchell, "Are you sure?" Is Inspector Gitchell now  
16 reinforcing an answer that's inconsistent with the facts?  
17 It's obvious the defendant just didn't see this incident.  
18 Now, when it works to the defense's advantage, Ofshe says  
19 if he asks, "You're certain of that", why that means  
20 you're reinforcing it -- skillfully reinforcing it. But  
21 when it's the other way, what is it? What is it? You're  
22 just asking questions. You're questioning, "Are you  
23 sure?" When they ask, "Are you sure that Chris Byers is  
24 the one that was castrated? Are you sure?" It's giving  
25 him an opportunity to say something else. And he doesn't

1 take that opportunity then and he doesn't take it when  
2 they're asking him about this injury to the penis.

3 In fact this shows directly to the contrary of what  
4 Doctor Wilkins and Ofshe say about the suggestibility.  
5 It shows that he is completely able to resist suggestion.

6 There are a number -- there are a number of other  
7 times in there when similar type questions are asked and  
8 I'm not going to go through every one of them. You can  
9 find them for yourself where there are apparently leading  
10 or suggestible questions that he doesn't buy into -- he  
11 doesn't go along with.

12 Then there's this second tape in referring to time  
13 when he talks about five or six, seven or eight,  
14 Inspector Gitchell has a question about that time. And  
15 finally he says, "It was starting to get dark." He  
16 abandoned trying to refer it by time because he has no  
17 concept of time. And he says, "It was starting to get  
18 dark."

19 Page four, "Did you ever see the boys in the water?"  
20 Suggestible, leading, that yes, they were in the water.  
21 Jessie says, "Yes, down by the water." He doesn't buy  
22 into it.

23 Page five, "Did you see the Moore boy? Was he  
24 raped?" Certainly, suggest that he was, right -- leading  
25 question? The answer, "No."

1           Finally, in talking about the boys being sexually  
2 abused. Inspector Gitchell says, "So they both did it to  
3 all three of the boys." Jessie, "Just them two as far as  
4 I know."

5           The purpose of all of this that I've gone through  
6 and I hope I haven't bored you all too much, but Mr.  
7 Ofshe testified and went over and over things that he  
8 claimed showed how suggestible this defendant was and how  
9 the police were manipulating this defendant. These are  
10 just a few examples throughout this transcript where what  
11 you might call leading questions and by no means are all  
12 of the questions leading, but some of the questions you  
13 might consider leading, when the defendant -- as Mr.  
14 Holmes said, "He'll straighten out." And that's what he  
15 did. He didn't cave in and have his will overborne.  
16 This expert when it's the way he wants it to be then it's  
17 police manipulation. But if it's to the contrary, he  
18 ignores it. And the best example of that is about him  
19 saying that "Are you certain" reinforces it. When  
20 Inspector Gitchell asked, "Are you certain" on a question  
21 that he was test -- or stating it was inconsistent with  
22 the facts. You can't have it both ways. It's either  
23 reinforcement or it's not.

24           And then Ofshe -- and we went through this -- now,  
25 why this very skillful expert testifier did this, I don't

1 know. But he testified that night was not mentioned  
2 until page eighteen when Detective Ridge says, "The night  
3 you were in these woods." And if you'll remember back on  
4 page twelve and you'll have that with you back there --  
5 the transcript and the tape -- it was the defendant  
6 himself who first brought up night. Now, why Ofshe tried  
7 to pass off to you all that the police had introduced  
8 night, I don't know. Was he wrong? Just wrong?  
9 Mistaken? Not -- doesn't have a grasp of the facts? Or  
10 was he misrepresenting to you?

11 He then testified in regards to the follow-up tape  
12 that no where in the record does the defendant say seven  
13 or eight until Inspector Gitchell mentioned seven or  
14 eight. Inspector Gitchell testified and explained where  
15 he got seven or eight and it was from the defendant's  
16 mouth.

17 And then on page three -- again why he did this, I  
18 don't know -- Ofshe tells you that where the transcript  
19 shows that Detective Ridge said nine o'clock in the  
20 morning, why the transcript's wrong. That was Jessie  
21 that said that according to Ofshe. Listen to that tape.  
22 I don't believe you'll have any trouble distinguishing  
23 between Detective Ridge's voice and the defendant's  
24 voice, and it's clearly Detective Ridge saying, "Nine  
25 o'clock in the morning."



1           Now, if these officers are going to skillfully  
2           manipulate this defendant after he says it was in the  
3           morning, why would he say nine o'clock in the morning?

4           Finally, in regards to Mr. Ofshe this is the same  
5           man that despite all of these flowery explanations for  
6           why this occurred, the same man who in the State of  
7           Washington testified that a man had given a coerced  
8           confession, a wrong untrue confession when his two -- not  
9           minor daughters or mentally handicapped daughters or  
10          anybody else -- his two adult daughters said that he had  
11          molested them. His wife said that it happened and he  
12          said that it happened and confessed to it, pled guilty,  
13          and not until the expert testifier goes and talks to him  
14          does he suddenly say -- this is after more than five  
15          months of maintaining his guilt -- that "I'm not guilty."  
16          All of these people -- were all of these people  
17          skillfully manipulated and coerced into saying these  
18          things? Well, the State of Washington and their courts  
19          thought not and discounted his opinion.

20          **The bottom line in this case is these officers'**  
21          **integrity** -- Inspector Gitchell and Detective Ridge --  
22          **there is absolutely not one iota of evidence that they**  
23          **have told anything other than the truth in this**  
24          **courtroom, anything other than the truth about what**  
25          **happened there -- there's no evidence of that. There's**

1 no evidence of coercion. There's no evidence of them  
2 yelling at him. Inspector Gitchell said, "Sometimes you  
3 have to do that. In this case it was not necessary."  
4 There's no evidence of any form of coercion. What is --  
5 what is -- what's the defense -- are they saying that the  
6 defendant was brainwashed? Is that what they're saying?  
7 This defendant knew facts that nobody else knew.

8 Now, when you look at these documents that the  
9 defense introduced I believe it's going to be clear that  
10 he was giving information that nobody else knew. The  
11 newspapers, what they printed was that all of the boys  
12 had been sexually mutilated. Well, if that's the  
13 information he had, why didn't he say, "Well, all three  
14 of them were cut" in that place instead of one and pick  
15 out the right one.

16 Got a little report here from an interview with some  
17 guy named Kelly -- rumors -- "castrated and mutilated,  
18 beaten to death." Did it say one was castrated,  
19 mutilated? Anything about cuts in the face? No. And  
20 then another one, in response to the question nine which  
21 is "How do you think they died?" Pointed to his penis  
22 and said, "Heard it was cut off," or "It was cut off and  
23 they were beat up." He didn't say it was cut off of one  
24 or two or three. There's no evidence that -- who was cut  
25 or how many was cut with common knowledge. You've got

1 injuries to the ears that nobody knew about. The  
2 defendant described the way that it would have happened.  
3 You've got injuries to the genital area where he  
4 identified the specific person. Yes, there's information  
5 that all of them had had that and that was not true.  
6 That was wrong information. And he picked out the one  
7 person who it was done to. Injuries to the face were not  
8 common knowledge.

9 Finally, finally, we get to Bojangles defense which  
10 we've already talked about briefly. And use your common  
11 sense to judge these. You can take it back to the court  
12 -- to the jury room with you. If somebody that's going  
13 to go to all the trouble that these defendants went to to  
14 clean up that scene, are they going to then -- is he then  
15 going to go into a public place and leave blood all over  
16 the place?

17 In this system we all have duties. Barbara's duty  
18 is -- you notice she's not doing her little typing thing  
19 -- she's still taking everything down by tape recorder.  
20 In the courtroom that's her job is to take down  
21 everything that's said. The Sheriff's office -- actually  
22 the bailiff provides security and they've done their  
23 duty. Inspector Gitchell and his men investigated this  
24 crime to the very best of their ability. And keep in  
25 mind what the medical people said -- let me digress a

1 minute.

2 This was a clean scene. Not like being in a house  
3 where the evidence is contained. This is outside in the  
4 woods. But yet not a drop of blood. They might say,  
5 "Well, it must have happened somewhere else and they  
6 carried them in here." There's no trail of blood leading  
7 out there either and this guy going in Bojangles leaves  
8 blood dripping all over the place. There's not any blood  
9 out there because it had been wiped down. You got the  
10 pictures and you can see in the pictures the condition of  
11 that bank where it had been cleaned off. You've got the  
12 most destructive thing to evidence that you can have --  
13 water. You've got the bicycles in water. You've got the  
14 kids in water. You've got their clothes in water, and  
15 despite all of those problems the forensic people at the  
16 crime laboratory were able to obtain fibers that matched  
17 both Damien Echols and Jason Baldwin -- despite all of  
18 those problems. And they also found -- and this is  
19 somewhat confusing in the testimony -- at least it was  
20 for me -- some of you all may be scientists or science  
21 people -- but the testimony from doctor -- from Mr.  
22 DuGuglielmo about DNA.

23 Now, if you'll recall Kermit Channell from the crime  
24 lab said that on -- in his tests -- on the little boy's  
25 pants that he ran screening tests ran one screening test

1 and it came back positive -- positive for semen. He ran  
2 a second screening test -- positive for semen. He looked  
3 under a microscope and the pants are all muddy and  
4 everything and he couldn't see any sperm but he had these  
5 two positive tests for semen. So he sent those cuttings  
6 from the pants to Genetic Design in North Carolina and  
7 that was the man from North Carolina. And what did he  
8 tell you? We boil it all down -- if I can boil it down  
9 -- he tells you that in his opinion the DNA that he found  
10 from those cuttings was from sperm. Did he see any  
11 sperm? No. Because he doesn't look at things under the  
12 microscope. His are DNA tests. He says they ask ← Mr.  
13 Stidham said, "Are you saying positively that there is  
14 sperm there?" He said, "Well, no, you can never say  
15 positively unless you look under a microscope and are  
16 able to see it. But if I had done that it would have  
17 used up part of the sample and we were trying to preserve  
18 the sample." But with his opinion, with the test that he  
19 ran, if you'll remember there's the epithelial -- what he  
20 calls the fractions -- and the male or sperm fractions.  
21 Remember the way he was describing how you split out the  
22 two and you've got more than one suspect and you split it  
23 out so you'll be able to divide them up? The epithelial  
24 fraction is the non-male fraction. If it's something  
25 other than sperm it's going to show up in that -- like

1 blood.

2 Well, when you got the DNA test back and the  
3 epithelial back, nothing. No DNA. On the male fractions  
4 -- the sperm fractions -- it was positive for DNA and he  
5 stated that in his opinion that this indicated the  
6 presence of sperm on those pants. So despite not enough  
7 -- not enough to connect in his opinion but it wasn't  
8 enough to connect to anybody. It's not as if you had  
9 something that just didn't connect to this defendant. It  
10 wasn't enough to connect to anybody because there's just  
11 not enough of a sample. So despite this clean crime  
12 scene the forensic people at the lab and through the work  
13 of the police department they were able to come up with  
14 that corroborating factor, the fibers that matched Damien  
15 and Jason, and then you've got the Judge and back to the  
16 duties.

17 Judge Burnett's job is to keep us all in line and  
18 you've seen probably more objections and approaching the  
19 bench than you ever want to see, but those things are --  
20 as Mr. Davis pointed out to you -- voir dire is sometimes  
21 necessary and we have to do those things. But his job is  
22 to be the judge of the law and to give you the law that  
23 you're to follow.

24 Mr. Stidham and Mr. Crow -- it's their job to  
25 represent this defendant and they've done that. It's Mr.

IN THE CIRCUIT COURT OF CLAY COUNTY, ARKANSAS  
WESTERN DISTRICT  
CRIMINAL DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

NO. CR-93-47

JESSIE LLOYD MISSELLEY, JR.

DEFENDANT

PRETRIAL AND TRIAL PROCEEDINGS

CORNING, ARKANSAS

VOLUME 10

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BEFORE THE HONORABLE:

DAVID BURNETT, CIRCUIT JUDGE

BARBARA J. FISHER  
OFFICIAL COURT REPORTER  
P. O. BOX 521  
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1 Davis' and my job to present to you the State's case and  
2 we've done that. And now we're about to enter the phase  
3 where really the job becomes yours -- the entire job  
4 becomes yours.

5 To judge whether or not based solely and exclusively  
6 on the evidence that you've got before you whether the  
7 State has met its burden of proving this defendant guilty  
8 of three counts of capital murder. I submit to you that  
9 the State has met its burden of proof. I submit to you  
10 that you should go back and deliberate, take your time --  
11 this is not something to rush through and listen to those  
12 tapes and return a verdict of guilty. Thank you.

13 THE COURT: I'm going to take a recess.

14 Alright, ladies and gentlemen, with -- Sheriff, I  
15 want the whole hallway cleared out back there for the  
16 jury to use both rest rooms -- have somebody on both  
17 doors.

18 (RECESS.)

19 THE COURT: Alright, Court will be in session. You  
20 may proceed.

21 MR. STIDHAM: Thank you, your Honor.

22 I'd like to take this opportunity to also thank you  
23 for your patience and your ability to listen throughout  
24 this long trial. There have been a lot of objections and  
25 there have been a lot of approaches to the bench, and I



1 also thank you for that.

2 During the prosecution's closing argument I got a  
3 little confused. For a minute there I actually thought  
4 Doctor Richard Ofshe was on trial instead of Jessie  
5 Misskelley. I think there's a reason for that, ladies  
6 and gentlemen of the jury, and I think the reason is  
7 clear. The prosecutor spent most of his time talking  
8 about our defense, Mr. Holmes and Doctor Ofshe. The  
9 reason for that is that they don't have a case against  
10 Jessie Lloyd Misskelley, Junior.

11 In order for you to find Jessie Lloyd Misskelley,  
12 Junior is guilty of three counts of capital murder you  
13 must find him guilty beyond a reasonable doubt. And we  
14 talked about that in voir dire, and I want to talk about  
15 it again.

16 As we talked about in voir dire, ladies and  
17 gentlemen, there are three legally recognized burdens of  
18 proof in the law. The first one is by a preponderance of  
19 the evidence. That's the lowest standard. The middle  
20 **standard** is clear and convincing evidence. That means  
21 **you have** to have evidence which is clear and convincing.  
22 **And then** there's the top standard, beyond a reasonable  
23 doubt. The highest standard recognized in the law. For  
24 you to find Jessie Lloyd Misskelley, Junior guilty you  
25 must find that the State proved its case beyond a

1 reasonable doubt.

2 Ladies and gentlemen of the jury, I would submit to  
3 you that there is a reasonable doubt about the  
4 defendant's guilt. In fact we would submit to you that  
5 there's many, many reasonable doubts, and that's what I  
6 would like to go over with you in closing is these  
7 reasonable doubts, and I want to talk to you about each  
8 and every one of them.

9 The first area of reasonable doubt is Jessie's  
10 stories that he gave the police. What evidence does the  
11 State introduce against Jessie in this trial? His  
12 statement. That's all they've got. There's nothing  
13 else. This wild story that he told the authorities on  
14 June the third, nineteen ninety-three. In this story  
15 Jessie says that Jason called him at nine P. M. on May  
16 the fourth. He also says that Jason Baldwin called him  
17 at nine A. M. on May the fifth. That's can't be true.  
18 Jessie wasn't home. He spent the night with Josh Darby  
19 on May the fourth. He went wrestling at nine A. M. the  
20 next morning and that was testified by two witnesses.  
21 Josh Darby doesn't have a telephone. How could he have  
22 gotten these phone calls?

23 The next reasonable doubt, ladies and gentlemen of  
24 the jury, is that the victims were sodomized. Jessie  
25 told the police that these little boys were raped.

1 There's no evidence of that. The medical examiner sat  
2 right there in that chair, he told you that there was no  
3 evidence of physical trauma to those little boys that  
4 suggested the fact that they had been sodomized.

5 The next reasonable doubt when Jessie in this story  
6 tells the police, "Well, I was up there by the service  
7 road when this was happening." Do you remember where the  
8 service road is on the diagram of the crime scene? About  
9 four hundred fifty feet through dense vegetation. It was  
10 impossible -- a witness testified that it's almost  
11 impossible to see through there now in January. Imagine  
12 what it would be like in May when you have all of that  
13 forest. It's not possible.

14 Probably the biggest reasonable doubt we've heard in  
15 the course of this trial is that Jessie says the murders  
16 took place at noon. Everyone agreed that that's not  
17 true. It can't be true. The victims were in school all  
18 day. Jason Baldwin was in school that day and Jessie was  
19 roofing until past noon. So we know that this could not  
20 have happened.

21 The next reasonable doubt, Jessie says that he went  
22 to West Memphis with Damien and Jason at nine A. M. on  
23 May the fifth. Again, we know that's not the case.  
24 Jason was in school all day and Jessie was roofing with  
25 Rickey Deese and Josh Darby. We know that that's not

1 true. It can't be true.

2 Another one of the major major reasonable doubts is  
3 a brown rope. The victims were not tied up with a brown  
4 rope. Jessie tells Gitchell they were tied up with a  
5 brown rope. It just didn't happen. Everyone knows that  
6 the victims were tied with shoe strings.

7 Another reasonable doubt, ladies and gentlemen of  
8 the jury, Jessie says that Damien choked Chris Byers with  
9 a big old stick. The medical examiner says that didn't  
10 happen. No evidence on the body to suggest that Chris  
11 Byers was choked or that any of the victims were choked.  
12 It just didn't happen.

13 The prosecution wanted you to forget about these  
14 major, major impossibilities. They want you to believe  
15 only the things that Jessie may have gotten right. They  
16 want you to forget about all of these big, big reasonable  
17 doubts. That's why we're here today, ladies and  
18 gentlemen of the jury, to talk about reasonable doubt.

19 The next area of reasonable doubt deals with  
20 **Jessie's** alibi. The prosecution would have you believe  
21 **that Jessie** somehow has a mystical magical time machine  
22 **which** enables him to be in two places at one time, but he  
23 can't do that. We can't do that. Nobody can do that.  
24 He can't be in two places at one time.

25 May the fifth, nineteen ninety-three, the

1 prosecution would have you believe that that's just like  
2 any other day. No special reason to remember what you  
3 were doing that day. Well, that may be true for the  
4 people who did live in West Memphis -- excuse me -- for  
5 people who didn't live in West Memphis. But the people  
6 who did, people who lived in Highland Trailer Park and  
7 other parts of the city, May the fifth was an important  
8 day. There are several reasons why it was an important  
9 day. And before we talk about this I will ask each and  
10 every one of you to think about how is it that you  
11 remember this. How do you remember events and dates?  
12 You go back and look at calendars, you look at birthdays,  
13 you look at events and you go back and try to tie those  
14 times references together. That's common sense.

15 The Dollar incident happened on May the fifth.  
16 Everyone in Highland Trailer Park was outside looking at  
17 the incident. Cody Rameriz was pulled off the bicycle by  
18 the head of his hair. Everyone was out there and seen  
19 that. The police were out there. The police testified  
20 that they were there. The police log shows that they  
21 were there. Everyone was outside. Kevin Johnson was on  
22 the search and rescue squad, he was at a meeting that  
23 night. He remember that night. He testified that he  
24 remembered that night. He told you that he was supposed  
25 to go wrestling with his brother. He invited his

1 brother, Keith Johnson, to go that night. But he went to  
2 a search and rescue meeting and at that search and rescue  
3 meeting he heard about the boys missing. He didn't know  
4 whether they would have to go out and look that night.  
5 He didn't go wrestling. Keith Johnson only went  
6 wrestling that one night, and that's the night that his  
7 brother was at a search and rescue meeting.

8 Also, ladies and gentlemen of the jury, Jessie,  
9 Senior was at D. W. I. School that night. You've seen  
10 the receipt evidencing the fact that he was there.  
11 You've seen the roll sheet where he was present at the  
12 meeting.

13 Also, the boys were missing that night. Everyone in  
14 town knew that especially the folks who were on the  
15 search and rescue squad. The next day the bodies were  
16 discovered. And that was on not only the local news, but  
17 the national news covered that. Everybody in West  
18 Memphis can remember that day. Everybody, not just  
19 people in Highland Trailer Park. Not just people who  
20 wear yellow ribbons. Everyone can remember that.

21 May the fifth, nineteen ninety-three, I've prepared  
22 a time line to demonstrate to you the aspects of Jessie's  
23 alibi all day. At nine A. M. Jessie is roofing with Josh  
24 Darby and Ricky Deese. At one P. M. Ricky Deese drops  
25 Jessie off at home. He was in the trailer park at one

1 o'clock -- not in Robin Hood Hills witnessing three boys  
2 getting killed at noon. At two-thirty P. M. Jessie began  
3 baby-sitting for Stephanie Dollar. Three-thirty P. M.  
4 Susie Brewer comes home, goes in the trailer park, she  
5 joins Jessie at Stephanie's and helps him baby-sit the  
6 children. Four to six P. M. many of the people that  
7 testified during the course of the trial told you that  
8 they seen Jessie between the hours of four and six P. M.  
9 in Highland Trailer Park.

10 Six-fifteen P. M. Jim McNease has to close down  
11 Jim's Repair Shop because Jessie, Senior is at D. W. I.  
12 School. He testified that at six o'clock -- about that  
13 time -- he closed the shop. He went home and at six-  
14 fifteen P. M. Jim McNease seen Little Jessie and Dennis  
15 Carter out in the street. He talked to them and they  
16 talked about wrestling.

17 Six-thirty to seven P. M. again is the Dollar  
18 incident. There's lots of people outside watching and  
19 trying to figure out what was happening. The police were  
20 there. Everybody is outside wondering what's going on.

21 Louis Hoggard the trucker, and you've seen his truck  
22 log, he told you when he was in town -- May the fifth.  
23 He sees Jessie. Carl Ashland, he sees Jessie. Susie  
24 Brewer, Stephanie Dollar, Christy Jones, Dennis Carter --  
25 these people are with Jessie at Highland Trailer Park.

1           Seven-fifteen P. M. Jessie, Senior comes home from  
2 D. W. I. School, the police are leaving the trailer park,  
3 he's afraid because he's driving on suspended license.  
4 That's how he can remember. He quickly goes home so he  
5 doesn't get caught by the police for driving on suspended  
6 license. He sees Jessie, Junior at the trailer.

7           At about seven-thirty P. M. Little Jessie Misskelley  
8 leaves for Dyess with these individuals -- Fred Revelle  
9 who testified, Will Cox who didn't testify, Barbara  
10 Jones, Dennis Carter, and Johnny Hamilton, whom we were  
11 able to find right before the trial in which the defense  
12 started presenting its case. All of these people, ladies  
13 and gentlemen of the jury, testified to you under oath  
14 that Jessie Misskelley was with them in another county  
15 about forty miles away from West Memphis on May the fifth  
16 at the time that these little boys are being murdered.

17           Eight P. M. Jessie and the other wrestlers meet  
18 Keith Johnson at the Exxon station at the junction of  
19 Highway Sixty-three and Interstate Fifty-five. They pick  
20 up Keith. They go on to Dyess, and it was about eleven-  
21 thirty Jessie and the others arrived back at Highland  
22 Trailer Park. From eleven-thirty to midnight Little  
23 Jessie spends time with Robert Jones and Jennifer Roberts  
24 at their trailer. That accounts for him the entire day  
25 -- the entire day.



1           The next area of reasonable doubt, ladies and  
2 gentlemen of the jury, is a very, very important one. No  
3 physical evidence linking Mr. Misskelley to the crime  
4 scene or to the homicide. None -- not just a little --  
5 not even a little bit -- none. There's no footprints of  
6 the blue Adidas shoes or any other shoes they looked at.  
7 No fingerprints. No hairs. Lisa Sakevicius says,  
8 "That's the best I can do and I'm sorry." She testified  
9 that she had examined hundreds of hairs, none of which  
10 matched Little Jessie Misskelley. No fibers. No fibers  
11 matched Mr. Misskelley. None -- no physical evidence.

12           Well, one item of physical evidence which the  
13 prosecution would have you just bypass and ask you to not  
14 consider it. It's not very important and it's not  
15 logical. I would submit to you, ladies and gentlemen of  
16 the jury, that when three little boys are murdered at  
17 approximately the same time that a gentleman stumbles  
18 into a fast food restaurant minutes from the crime scene  
19 covered with blood and covered with mud, and the police  
20 aren't even interested enough to come in the store and  
21 check it out until the next day, to take blood samples.  
22 Were the blood samples ever submitted to the crime lab?  
23 Were the sun glasses ever submitted to the crime lab?  
24 Who knows? I call that a reasonable doubt.

25           On Christopher Byers the boy who was mutilated, some

1 Negroid hair was found on the sheet covering his body.  
2 Is that a coincidence as the prosecution would have you  
3 believe? I don't think so. I call it a reasonable  
4 doubt.

5 The next area of reasonable doubt, ladies and  
6 gentlemen of the jury, is this cult business. Officer  
7 Ridge testified that he couldn't confirm any of the  
8 people on Jessie's list of cult members. None.  
9 Detective Ridge also testified that there were no cult  
10 artifacts at the crime scene. He said there were no cult  
11 artifacts at Turrell Switch which this alleged cult  
12 meeting was supposedly taking place. There's no evidence  
13 that this is a cult homicide. No evidence.

14 The next area of reasonable doubt, ladies and  
15 gentlemen of the jury, is the fact that Little Jessie  
16 Misskelley has a mental handicap. He has a low I. Q. He  
17 has low self-esteem. He's very suggestible. He's co-  
18 dependent. He feels the need to conform to authority  
19 figures. And that's why some of the most compelling  
20 testimony that came out of this witness chair was from  
21 two expert witnesses -- Mr. Holmes and Doctor Ofshe. The  
22 most compelling testimony came from those two witnesses  
23 about these very ideas and more specifically about the  
24 profile of one who falsely confesses to something they  
25 didn't do.

1           Mr. Holmes who doesn't have thirteen years of  
2 experience -- thirty-nine years of experience with the  
3 Miami Police Department, lecturing to the F. B. I., the  
4 C. I. A. -- this gentleman worked John F. Kennedy's  
5 assassination, Martin Luther King's assassination, and  
6 Watergate, the Boston Strangler case, the Hampton case in  
7 Louisiana -- thirty-nine years of experience -- and what  
8 does he tell you? The profile of a false confessor is  
9 someone with a low I. Q. and a weak personality. He also  
10 told you that there were several problems with Jessie's  
11 statements. A, no corroboration. Jessie Misskelley  
12 didn't tell the police anything that they didn't already  
13 know. Nothing. There's no narrative in his statement.  
14 The prosecutor has asked you to go back to the jury room  
15 and listen to the tape. I want you to do that, too. And  
16 when you're listening to the tape, ask yourself this  
17 question, "Does this sound like a kid who is telling me  
18 about something that he's seen or is he telling me  
19 something about that he's made up or that was suggested  
20 to him?" There's no narrative in this statement. Every  
21 time the police officers asked him to elaborate about a  
22 detail he says, "Well, they were doing this and stuff.  
23 And they were doing this and stuff. Then we did this and  
24 stuff." Does that sound like someone who witnessed three  
25 homicides -- telling about it? There's no narrative.

1 Mr. Holmes also testified that Mr. Misskelley was  
2 wrong on too many points, and we talked about those  
3 earlier. Mr. Holmes concentrated on two of the big ones  
4 -- time and ligature. Two very, very important things  
5 about the crime that Jessie Misskelley got wrong.

6 Mr. Holmes also testified that the officers were  
7 very leading and very suggestive. They led him through  
8 this entire taped statement. And, ladies and gentlemen  
9 of the jury, we don't know what happened before they  
10 turned the tape recorder on. They didn't videotape it.  
11 The officer didn't take notes on all of the questions and  
12 testified to that. They even testified they couldn't  
13 remember some of the things they asked him. How do we  
14 know what really happened?

15 And that's where we get to Doctor Ofshe. Doctor  
16 Ofshe is a doctor. He's not a medical doctor, but he is  
17 a doctor, and I would submit to you, ladies and  
18 gentlemen, that this testimony is riveting. His  
19 testimony was very very helpful in trying to establish  
20 what happened in this interrogation. Doctor Ofshe also  
21 testified that the profile of a false confessor is  
22 someone with a low I. Q. and someone who has low self-  
23 esteem. His expert opinion, ladies and gentlemen of the  
24 jury, this is what he told you that the West Memphis  
25 Police Department used coercive psychological tactics

1 to get a statement from Jessie Misskelley. The police  
2 were suggestive and they led Jessie through the entire  
3 statement. When you listen to the statement, when you  
4 read about the statement, think again about the  
5 narrative, and think about the way these officers led him  
6 through the entire statement. The way they suggested  
7 things to him through the entire statement.

8 Ladies and gentlemen of the jury, what I'm about to  
9 tell you is the most important thing that you will hear  
10 throughout the course of this trial. A very learned  
11 judge in the State of Florida once said in one of our  
12 opinions, he said, "The killing of one human being by  
13 another is a most heinous act only excluded by the  
14 killing of an innocent man by the state." Ladies and  
15 gentlemen of the jury, my client, Little Jessie  
16 Misskelley, is an innocent man. He's innocent and I will  
17 ask you to go back to that jury room and bring back a  
18 verdict that renders justice -- truth and justice -- and  
19 I would ask you to bring back a verdict that you can live  
20 with for the rest of your life. Thank you.

21 THE COURT: Do you want to take a stretch break?  
22 About two minutes in place.

23 (RECESS.)

24 THE COURT: Alright, Court will be in session.  
25 Alright, you may proceed.

1 MR. DAVIS: If it please the Court, Mr. Stidham,  
2 ladies and gentlemen of the jury, I know at this point  
3 we're all tired. We've spent weeks in preparing this  
4 case while a lot of times while you all have been out in  
5 the halls we've been in here at each other's throats and  
6 we're all tired and we all have a great deal of  
7 responsibility. Fortunately, my responsibility is going  
8 to end when I sit down and yours is going to just begin.

9 What I want to do briefly and I'm not going to recap  
10 everything. I think Mr. Fogleman did an excellent job of  
11 detailing what the testimony was and showing you the  
12 specific facts that you should concentrate on. But what  
13 I want to do is try to boil it down to what really the  
14 issue of this case is. I think it's something that Mr.  
15 Stidham is nearly afraid to articulate. Because what  
16 their whole premise to their case is is that their client  
17 lied. He's a liar and the police are liars because they  
18 won't tell you what happened when he was being  
19 interrogated and as a result you should throw a  
20 **confession** out the window and find the defendant not  
21 **guilty**. And that's his case.

22 Now, he tries to couch in in different terms and to  
23 put it in a different form or fashion but that's what it  
24 boils down to. Personally I find it repugnant with this  
25 evidence that Mr. Stidham would make such allegations.

1 It is the first time in my career that I've had to stand  
2 up here and deal with a defense attorney claiming that  
3 his client lies. It is so incredibly a reversal of roles  
4 for the defense, but what else can they do? Their client  
5 confesses to his involvement. He tells specific  
6 instances of his involvement. He describes details that  
7 only a person that is there could possibly know, and I  
8 don't care what he says. He can say it was newspaper  
9 articles or what else. But you can read in that  
10 statement that he described the castration of that  
11 particular boy. That is a fact that only someone who was  
12 there would know. And when he described that the other  
13 two individuals forced them to perform oral sex on them  
14 and grabbed them by the ears, those are facts that only a  
15 person there would know.

16 When he described the cutting on the side of one  
17 boy's face, those are facts that only a person that was  
18 there would know. Unless -- unless he successfully  
19 convinces you that the police officers got up here and  
20 they are the ones that are lying, and they are the ones  
21 that are lying to you. And I hope that you have the  
22 integrity and good sense not to buy that because it  
23 doesn't mesh with the facts and evidence in this case and  
24 that's what you make your decision on.

25 The other issue that is involved in this case I'll

1 address in a minute, but that is going to be whether the  
2 defendant was involved enough to be convicted of capital  
3 murder. But let me address some of the specifics that  
4 Mr. Stidham brought up.

5 On the one he started off by saying that Mr. Ofshe  
6 was on trial. For what Mr. Ofshe gets paid and for his  
7 willingness to go out on a limb and make the statements  
8 that he makes based on the flimsy information he  
9 possesses -- well, that -- he -- he was on trial to some  
10 extent. It reminds me -- in preparation of this case I  
11 listened to a tape recording of Warren Holmes, their  
12 other expert, and he said in that, he said, "The  
13 difference between a Ten Thousand Dollar a year salesman  
14 and a hundred thousand dollar a year salesman is one is a  
15 better liar." And we've got a Forty Thousand Dollar a  
16 year salesman who came and talked to you.

17 He says that the reasonable doubt that exists -- and  
18 this is his first point. I'm going along -- we couldn't  
19 see the chart, but I assume this is what he did. The  
20 first reasonable doubt is Jessie's story. "My client's a  
21 liar. Therefore, you should have a reasonable doubt."  
22 That's his first premise.

23 Then he goes and he says, "Well, the victims --  
24 there's no evidence that the victims were sodomized."  
25 Well, if you'll recall the Doctor's testimony was that in



1 all three instances there was anal dilation. That there  
2 were abrasions and bruises about the buttocks and the  
3 anal rectal area and then as Mr. Fogleman described and I  
4 know it was hard to follow, but the DNA guy said that  
5 there was DNA consistent as coming from a source of male  
6 sperm on the pants of one of the boys. And Mr. Stidham  
7 says, "No evidence." Well, ladies and gentlemen, you  
8 make your decision on the evidence in the case.

9 He talked about the time and, granted, there are  
10 inconsistencies in the time. You've heard the expert say  
11 number one, this defendant has a disorder in terms of  
12 memory, and number two, all of a sudden we're sitting  
13 here talking about, "Well, gee, a defendant who committed  
14 three murders tells us something that's not true, we must  
15 believe that all those other facts that he could only  
16 have acquired if he was there, must not be true either."  
17 And that doesn't make good sense, ladies and gentlemen.

18 All defendants -- all criminal defendants do not  
19 immediately tell you the truth. In fact, Mr. Stidham  
20 forgets that his very own expert, Mr. Holmes, told you  
21 that ninety-nine percent of the time there will be  
22 details that wouldn't be consistent, that would be left  
23 out, there will be threads that don't connect, and that  
24 in ninety-nine percent of those cases the defendant is  
25 guilty.

1           Mr. Holmes also told you that in situations -- I  
2 asked him, I said, "Mr. Holmes, does it worry you if a  
3 defendant recants and says after he confesses all of a  
4 sudden he said, 'No, not me. I didn't do it. I lied to  
5 the police.'" And he says, "That doesn't worry me at  
6 all. In ninety-nine percent of the cases when that  
7 occurs the defendant is guilty. "If there are admissions  
8 in that first statement that go to show his guilt that no  
9 one else could know" -- and I put to you those are what  
10 we have in this case -- and that is why this defendant is  
11 guilty.

12           Now, he also talks about Jessie's alibi and I nearly  
13 laughed at this -- seriously. He said -- you know -- he  
14 said the State -- for him to commit this murder -- must  
15 think that he could be in two places at one time. Well,  
16 as you listen to his alibi testimony, he was. Because  
17 there were people that testified and I -- you go back and  
18 look at your testimony -- that he's sitting on the front  
19 porch for an hour and a half with somebody, and at the  
20 **same time**, he's with his girlfriend, and they're two  
21 **different** people, and then all of a sudden at the time  
22 **that the Sheriff's Deputy** got there, he's with Dennis  
23 Carter, and you remember Dennis Carter got up here and  
24 testified when he talked to the police the first time he  
25 gave them a statement and said he hadn't seen Jessie all

1 day. In fact he said he hadn't been with Jessie all day.  
2 The second time he talked to him he had been with Jessie  
3 all day and this is right. A week -- ten to thirteen  
4 days after Jessie's arrest. This is his friend. This is  
5 the guy that's in jail and he's concerned about him, and  
6 where is the yellow ribbon? That close in proximity he  
7 never says a word about being with Jessie that day.  
8 Never says a thing about it. One of them was a  
9 handwritten statement now, and only to say Mr. OfShe  
10 would say they coerced that out of him. He wrote it out  
11 himself. And yet he never mentions the same until he  
12 gets up here, and the reason -- go back and look and see  
13 why these people -- and some of them -- some of them I'm  
14 putting to you are just flat liars. Some of them I think  
15 after a month had elapsed and the Misskelleys came and  
16 approached them and they came in with these police  
17 reports and said this happened on this day, and they came  
18 in with these things that they wanted to help their  
19 friend and neighbor, and they wanted to do what they  
20 could. And so when they were told, "Don't you remember  
21 this? Don't you remember that?", they bought into it.  
22 But when you listen to it, if they were telling the  
23 truth, there would be consistencies. And if they knew  
24 where Jessie was on the fifth, they would have told it  
25 when they talked to the police the first time, not nine

1 months later. And if they knew where he was and those  
2 that didn't talk to the police, they would have reported  
3 it.

4 What happened though is Fred Revelle was the one  
5 person who reported it. And he came up with this theory,  
6 "Well, I know where he was 'cause that's when he got --  
7 that's when we paid the money." And he did report it.  
8 He told the police, then they checked it out, and said,  
9 "No, I'm sorry, Fred, you're wrong. It was April twenty-  
10 seventh." And once that word got out I didn't see a soul  
11 bother to report their alibi information because they  
12 didn't want it to get under scrutiny of the eye of the  
13 police department.

14 Now, I put to you the reason for that is -- the  
15 reason why it doesn't jive -- the alibis don't jive --  
16 the reason why he's in two places at the same time is  
17 because those alibis are not accurate, and those alibis  
18 are not true.

19 Mr. Stidham says, "Gosh, when this incident happened  
20 that late, sure everybody was out there." Well, from my  
21 recollection of the testimony was that there were four or  
22 five people out there at times. Some of his witnesses  
23 put Jessie up there talking to the Sheriff's Deputy.  
24 Now, I guess conceivably you could say, "Well, with four  
25 or five people out there, Officer Dollahite may not have

1        seen him." But their witnesses say that he was within  
2        five yards of the car. There's only three or four people  
3        there and two or three of their witnesses said he was  
4        talking to the officer. Now, maybe you could say, "Well,  
5        you know, gee, these officers run into a lot of people  
6        over the course of the day, runs into a stranger out  
7        there, maybe he wouldn't recognize him." Well, these  
8        officers all knew Jessie Misskelley, Junior. They were  
9        all familiar with him -- acquainted with him -- before  
10       they went out there, and those officers -- all three of  
11       them -- who say, "Jessie Misskelley, Junior wasn't  
12       there."

13       Ladies and gentlemen, when you look at that and  
14       compare that with these other alibis that put him in the  
15       same place -- or two different places at the same time,  
16       it just doesn't jive and it just doesn't work.

17       He also refers to Jim McNease. Now, Jim McNease is  
18       the one that puts him with Allen Carter. Jim McNease is  
19       the one who refused to even talk with the police when  
20       they wanted to talk to him back in June. He refused to  
21       communicate with them and he gets on the stand and says  
22       that night he saw him with Allen Carter. Well, that's  
23       fine because he's got him walking down the street with  
24       Allen Carter and Mr. Hoggard has him walking down the  
25       street by himself. Mr. Hoggard has him up there talking

1 to the Sheriff's Deputy. Mr. Hoggard has the Sheriff's  
2 Deputy's car in Stephanie Dollar's driveway, which the  
3 officer testified he never was in her driveway.

4 But when you look at that, if that's really -- if  
5 they are accurately recalling based on that event, you  
6 would not have those blaring inconsistencies, because to  
7 my knowledge there was no evidence that any of those  
8 people have memory deficits or anything of that nature,  
9 and you would expect that information to at least give  
10 more significantly than what it does with the facts you  
11 hear from the witness stand.

12 He also refers and he says -- and I don't know if  
13 they just missed part of the last testimony or not -- but  
14 he said part of the reason why the alibi is good is  
15 because Jessie, Senior comes home from D. W. I. School  
16 and meets the officer driving out of the park, which is  
17 rather unusual since he got out of D. W. I. School at a  
18 quarter 'til eight and the officers left the scene about  
19 ten 'til seven, which would again he's accusing us of  
20 putting Jessie two places at once. It seems like Jessie,  
21 Senior also has that ability to be in D. W. I. School at  
22 a quarter 'til eight and he's driving home at ten 'til  
23 seven.

24 Also, the witness that we put on in rebuttal, Mr. --  
25 I think it's Mercier and Mercer -- look at this, please.

1           When everybody that got up here testified that at times  
2           whenever they were there -- they signed this. It hasn't  
3           got a date one. If you'll look and see whose the last  
4           name on there and he told you he wasn't friends with  
5           anybody, didn't appear to have any bias, Mr. Stidham  
6           didn't attack him in any way in that nature. He just  
7           said, "I was only there once and I signed that document  
8           then and that was before the boys were murdered."

9           Now, he says there's no physical evidence linking  
10          Jessie Misskelley, and Friday -- I think it was last  
11          Friday -- I'm not even sure what today is -- but last  
12          Friday after all of the testimony we put on the guy from  
13          the crime lab, Lisa S. and all these people that  
14          testified about various physical evidence, and the next  
15          morning I read the paper and it said nothing -- it said  
16          nothing happened, nothing really significant occurred  
17          yesterday, but what we were doing -- you have to  
18          understand and I'm sure unless you have been in a  
19          criminal trial before -- if we don't put on evidence that  
20          a fingerprint expert looked at everything at a crime  
21          scene and says, "I looked at everything there was. There  
22          were no fingerprints." Then the defense jumps up and  
23          screams, "They didn't even try to get fingerprints." So  
24          we put on a fingerprint expert to say they submitted all  
25          sorts of things -- these sticks -- everything in the

1 world. We looked at them. We examined them. We  
2 couldn't find latent prints. We also put on the DNA  
3 people. He testified he had a number of things submitted  
4 to him. They examined all sorts of things. It wasn't  
5 that they found evidence that somebody else was connected  
6 or evidence that couldn't be explained because we didn't  
7 know who it belonged to -- which would be permissible.  
8 You know if there's fingerprints out there that we can't  
9 match up then somebody else might have been there and  
10 it's not this defendant. But that's not the case.  
11 That's not the case.

12 The evidence that we presented was that all of these  
13 efforts were made to procure physical evidence and what  
14 physical evidence was obtained and was identifiable goes  
15 back to Damien and Jason. We didn't find anything with  
16 Jessie. But the fact that the evidence does connect  
17 those two is certainly consistent with what his statement  
18 was that he told the police. And it in no way gets him  
19 out of responsibility by saying, "Well, gee, there was no  
20 evidence connecting him, he couldn't have been there."  
21 This whole crime scene out in the woods you've heard how  
22 clean it was, how devoid of physical evidence -- out of  
23 the entire investigation -- and it was massive and it was  
24 meticulous. There was just a handful of fibers and I  
25 think ten hairs that were even suitable for comparison.



1 And for them to say that because you don't have something  
2 that directly links Jessie then he wasn't there is  
3 absolutely preposterous. We put that evidence on to show  
4 you what we did, what we had, and who it connected to,  
5 and it's consistent with what he told you in his  
6 statement.

7 They talk about Bojangles. Do you think if the  
8 blood sample that was obtained at Bojangles had indicated  
9 in its examination that it belonged to somebody or some  
10 thing or would have any evidentiary value, don't you  
11 think that you would have heard some evidence about it  
12 from the defense? Don't you think they would have put  
13 something on? The reason that -- and that's one of those  
14 things -- one that we call a red herring -- and I think  
15 the reason they call it a red herring is because it's  
16 something if you throw it in the jury box and leave it  
17 there long enough it's going to create a big stink. And  
18 that red herring is thrown in there to try to throw you  
19 off, but like Mr. Fogleman said, the person that was in  
20 Bojangles -- I don't know if they investigated him --  
21 whatever happened to him -- whatever caused him to be  
22 bleeding -- that person was not the same person who  
23 meticulously cleaned this area, who jammed the clothes  
24 down in the water, who submerged these three little  
25 victims and left no trail of blood anywhere in those

1 woods. That person is not the same person that was in  
2 Bojangles. And you all agreed with me during voir dire  
3 you'd apply your common sense. And common sense tells  
4 you that that is -- is -- I guess -- blowing smoke on the  
5 part of the defense because it's just not something that  
6 makes any common sense whatsoever.

7 Now, he says another thing that's reasonable doubt  
8 is the cult. That there is no -- no evidence that these  
9 other people were in the cult. Well, the only evidence  
10 is that a witness testified that this defendant along  
11 with Damien Echols went with -- or took her to a cult  
12 related activity. You heard in his statement where he  
13 talked about how they would kill animals and eat meat off  
14 their hind legs. He talked about being involved with  
15 cult related activity. You seen the book that they  
16 confiscated from Damien's house and when this Hutchison  
17 lady wanted to get hooked up with Damien who was it she  
18 was able to go through to make that connection? It was  
19 Jessie Misskelley.

20 Now, they say there's no connection between him and  
21 a cult and I guess technically there's no scientific  
22 evidence that says this was a cult killing. But there is  
23 certainly evidence and I think it's clearly showed that  
24 more than one person was involved because we have three  
25 separate weapons. We have three separate type knots in

1 the ligature. We have three different type bruises to  
2 these children. Now you can -- just from your own common  
3 sense three eight year olds -- to corral and do what they  
4 did to these children, it's going to take more than one.  
5 And then to perform the sadistic acts they did on them I  
6 don't know what the definition of the cult is. I don't  
7 know if it has to mean that they go once a week and  
8 worship the devil or what, but when three -- more than  
9 one -- and I put to you the evidence is that all three of  
10 them are involved in this type of activity -- that's a  
11 cult in my book and I think that Mr. Stidham finds that  
12 there's a different definition then at least for  
13 standards of northeast Arkansas, maybe he ought to move  
14 to Berkeley, California, with Mr. Ofshe.

15 He says that there is no narrative in the -- in the  
16 tape recording. You listen to that and be the judge.  
17 Also, remember that all of the tests indicated that  
18 Jessie has some verbal problems and granted, he does not  
19 -- there are not long orations on Jessie's part, but when  
20 you go through there you will see areas -- in fact one  
21 area is where he's mentioning where somebody lives, and  
22 he describing to the officers where somebody lives and  
23 it's about five or six lines long. And it's a  
24 description -- "You go down this street, you turn left,  
25 you go down about four blocks and then it's the third

1 house on the right. There's a truck across -- there's a  
2 goal post next to it." It's a very detailed statement  
3 that flies in the face of this poor little innocent  
4 fellow that's had his head tucked down all during the  
5 course of this trial that wouldn't look you in the eye.  
6 It's not consistent with what you've seen here.

7 And Mr. Fogleman touched on it. They're claiming  
8 police officers were deceptive and they're claiming that  
9 the police officers have lied to you and have been  
10 involved in deceit and have created this entire statement  
11 so that you'll convict Jessie Misskelley, Junior. And  
12 that they're staking their professional integrity on  
13 doing something like this in order to solve this crime.

14 Well, when you look at these photographs of this guy  
15 right here and then you look at what you've been staring  
16 at for the last two or three weeks sitting over there  
17 with his head bowed down, different attire, different  
18 hair cut, please tell me who it is that's the deceptive  
19 party in this whole situation.

20 What Mr. Stidham pointed out about their expert,  
21 what they told you was that there are these certain items  
22 that you can look at that can indicate a person can be as  
23 easily suggestible or can be influenced. Well, to  
24 determine whether a person actually was you need to know  
25 what happened there and you need to look at how the

1 questions were asked. Mr. Fogleman has gone over with  
2 you all those questions where if they were suggestive,  
3 coercive, and influencing him improperly he would have  
4 said what they wanted him to. If these officers were so  
5 diabolical and manipulative and to hear Mr. Ofshe say  
6 there's some sort of book where they have these  
7 interrogation tactics that they could get you or I to go  
8 in their office and after a short period of time we would  
9 confess to multiple homicides. But if they're so  
10 diabolical and they're so good in such a science that  
11 they can prey on somebody in this -- and this poor  
12 defendant is just so easily suggestible, why didn't they  
13 get a better statement? Why didn't they make it perfect?  
14 Why would they ask him -- why would Ridge say, "What  
15 about nine o'clock in the morning?" Why would they ask  
16 him when he says, "It's the Byers child who's been  
17 castrated?" Why would they say, "Are you sure?" Heck,  
18 they got what they wanted, let's move on and pin him down  
19 to the next thing we're going to try coerce him on.

20 **But** when you get to areas like that then Doctor  
21 **Ofshe**, who is a little slippery, he comes up and he wants  
22 **to talk about something else.** But please look at that  
23 because -- and think about it -- because what he accused  
24 the police of doing was having a brainwashing mind  
25 control ability over this defendant, and that they were

1           able just to get him to say what they wanted and if  
2           that's true, then why isn't the statement perfect? Why  
3           are there -- why are there still some inconsistencies in  
4           it? Why would they do that? It doesn't make sense if  
5           you believe the defense theory.

6           The other thing is, too, they want it both ways.  
7           They want you to believe that this defendant is so -- and  
8           they call him handicapped -- but he's got such a low I.  
9           Q. that he is practically just like putty in the hands of  
10          these police officers. His -- you know -- to think of  
11          it, no matter what situation he were in to confess to the  
12          horrendous -- to running down a boy -- an eight year old  
13          boy and dragging him back to his death -- just think what  
14          pressure would be required to cause you to do that.  
15          Think of it. And what they're telling you is that this  
16          person -- because he has such a low I. Q. was persuaded  
17          and coerced into doing it yet the way he was able to give  
18          a statement that -- on the tape that you heard that had  
19          such good facts is because although he's so slow he's  
20          easily suggestible, he's also so smart he can pick up all  
21          this stuff while they're questioning him and then spit it  
22          back out to you in a statement.

23          So it's really -- he's slow for one purpose, but  
24          he's very intelligent for another purpose. And they  
25          can't have it both ways because it doesn't make sense,

1 and if it doesn't make sense then it shows that this  
2 defendant is guilty.

3 The second issue is -- and I think it's one that's  
4 crossed your minds from the time you heard the confession  
5 -- is that the law requires the State to prove that this  
6 defendant acted with premeditation and deliberation with  
7 the purpose of causing the death -- him or an accomplice  
8 -- even under the tape, how do we find that this  
9 defendant committed capital murder? Because what he says  
10 in his tapes that his involvement is relative;y slight.  
11 Well, examine what his statement says. He ran the Moore  
12 boy down and brought him back. At the time he did that  
13 Damien had already -- was already beating up one of the  
14 boys and he brings him back. Now, he'll say somewhere in  
15 that statement -- he'll say, "Well, that's when I saw  
16 what was happening, I left." But that's not true. It  
17 can't be because in his statement he then proceeds to  
18 detail how the boy was cut in the face. He detailed how  
19 the boy was castrated and he doesn't just say castrated.  
20 When they say, "Are you sure?" He said, "Yes." And they  
21 say, "Well, how did they do it?" And he said, "They got  
22 him down on his back. They were both on top of him. One  
23 of them was sitting on him and then I saw the blood."

24 Now, if his involvement was that he ran and chased  
25 the boy down and brought him back and then he took off,

1           how was it he saw all of those things? How was it that  
2           three weapons were used to inflict these wounds with if  
3           there's only two people that are left there? And in  
4           talking about his involvement -- an accomplice -- he's  
5           guilty as an accomplice if he aids or agrees to aid in  
6           the participation of the offense or aids or agrees to aid  
7           another in the commission of the offense. It's with the  
8           purpose -- and when you get back there and read the  
9           instructions -- purpose is defined as consciously  
10          engaging in conduct of a certain nature. If he  
11          consciously engaged in conduct that involved him in this  
12          act, then he's guilty of capital murder if that's the  
13          result.

14                 See this picture? (INDICATING.) This is the Moore  
15          boy and this defendant won't look up and won't look at  
16          you. But this defendant's actions -- and you just think  
17          about it -- if this defendant does not chase down Michael  
18          Moore, if he does not run through the woods and chase him  
19          down and bring him back, Michael Moore lives. Michael  
20          Moore gets to go home at night and his parents get to be  
21          with him. But because of this defendant's actions,  
22          because of what Jessie Misskelley, Junior did and what he  
23          told you about in that taped statement, Michael Moore,  
24          Junior -- Michael Moore doesn't go home any more. And  
25          because if he hadn't of chased him down, Michael Moore



1 gets away. It's only a few hundred yards to the truck  
2 stop. And certainly Michael Moore is going to report  
3 what's happening and if Michael Moore gets away, maybe  
4 the others decide that this isn't a good thing to engage  
5 in and they get out. Maybe it's just a kidnapping or  
6 battery. Maybe they're just seriously hurt. Ladies and  
7 gentlemen, we'll never know for Jessie Misskelley, Junior  
8 didn't let Michael Moore get away. He chased him down  
9 like an animal and brought him back and as a result of  
10 his actions, Michael Moore's dead, Steven Branch is dead,  
11 and Chris Byers is dead, and there's no getting around  
12 it. And you can cut it any way you want to. You can sit  
13 there and look over it, but when you read that tape and  
14 listen to that tape, and you look and go over this  
15 evidence, the actions of this defendant certainly meets  
16 the acts of an accomplice in aiding or agreeing to aid or  
17 assisting in the commission of capital murder and, for  
18 goodness sakes, in a case like this -- I know there's a  
19 lot of -- there's a lot of pressure, there's a lot of  
20 attention on it, and it's a great responsibility to go  
21 back to, because the person you've looked at for two  
22 weeks looks young and it's easy to empathize and  
23 sympathize with him. But, please, for goodness sakes go  
24 back there, follow the law, and when I asked you in  
25 opening -- or in voir dire about using your common sense,

1           what I meant was in this case you will be presented --  
2           you are presented with a confession. A confession that  
3           gives details that only this defendant could know. And  
4           under any other circumstances you would probably say it  
5           would be ludicrous not to say, "Well, gosh" -- I mean --  
6           the reaction is if a person confesses and they know the  
7           details, then they're guilty. But the defense through  
8           bringing in so-called experts such as Mr. Ofshe have  
9           tried to smoke and mirrors to make it sound like a person  
10          that confesses to such heinous crimes and admits their  
11          involvement and gives you specific details of the  
12          involvement, that's indicative of someone who was forced  
13          or coerced to confess.

14                 I think when you go back and you apply your common  
15          sense and you do what's right, and you think about the  
16          evidence in this case, you're going to know that what the  
17          evidence shows is that this defendant ran down Michael  
18          Moore. That this defendant was there and was involved  
19          and he's guilty of three counts of capital murder.

20                 You will have a verdict form that will be given to  
21          you and you'll take back all of these instructions. And  
22          that verdict form will say, "We, the jury find the  
23          defendant, Jessie Misskelley, guilty of capital murder,  
24          Count One involving Michael Moore, Count Two, Steven  
25          Branch, and Count Three, Chris Byers", and the Judge will

1 tell you there are some lesser included offenses that are  
2 mentioned. You only -- it's not like you take all of  
3 these options and spread them out on the table and say,  
4 "Gee, this looks like a good one." You start at the top.  
5 You start with capital murder and if this defendant, from  
6 the evidence you find beyond a reasonable doubt that the  
7 defendant is guilty of capital murder to each of those  
8 counts, you check those boxes and the lesser included  
9 offenses are not even to be considered.

10 And I trust that when you go back there -- you'll  
11 carry a heavy responsibility -- but you'll do what the  
12 law and the facts require and you'll return a verdict of  
13 guilty. Thank you very much.

14 THE COURT: Alright, ladies and gentlemen, when you  
15 reach the jury room you should elect one of your number  
16 as foreperson and you will consider and complete one of  
17 the following verdict forms and I'm going to read those  
18 to you.

19 You will first take up and consider the charge --  
20 charges of capital murder and that verdict form reads as  
21 follows:

22 "We, the jury find Jessie Lloyd Misskelley, Junior  
23 guilty of capital murder in the death of Michael Moore,  
24 Stevie Branch, and Chris Byers", and there are three  
25 separate blocks.

1           If that is your unanimous verdict, then you would  
2 check the blocks that are applicable to your findings  
3 because they're individual verdicts and the foreperson  
4 would sign. However, all twelve of you must agree to  
5 arrive at any verdict. And the foreperson would sign in  
6 the place provided if that is your verdict.

7           If you are unable to arrive at a verdict on capital  
8 murder, you would then take up and consider the charge of  
9 first degree murder. You'll be given a verdict form that  
10 reads as follows:

11           "We, the jury find Jessie Lloyd Misskelley, Junior  
12 guilty of first degree murder in the death of Michael  
13 Moore, Stevie Branch, and Chris Byers", and again, there  
14 are three separate findings. If any one of those are  
15 your findings, then you would check the appropriate block  
16 and the foreperson would sign in the space provided, and  
17 again, you're reminded that your verdict or verdicts must  
18 be unanimous. That is, all twelve of you must agree.

19           If you are unable to arrive at a verdict on the  
20 charge of capital murder or first degree murder, you  
21 would then take up and consider the charge of second  
22 degree murder. That verdict form reads similarly as  
23 follows"

24           "We, the jury find Jessie Lloyd Misskelley, Junior  
25 guilty of second degree murder in the death of Michael

1 Moore, Stevie Branch, and Chris Byers."

2 Again, there are three separate findings. If any  
3 one of those is your finding that is unanimous then you  
4 would check appropriately and the foreperson would sign.  
5 If you are unable to arrive at -- strike that -- if you  
6 unanimously agree that the defendant is not guilty you  
7 would complete and sign the following verdict form which  
8 reads as follows:

9 "We, the jury find Jessie Lloyd Misskelley, Junior  
10 not guilty."

11 If that is your unanimous finding then the  
12 foreperson would sign in the space provided.

13 In just a second I going to have the Sheriff --  
14 we've tried to clean up the jury room back there and I'm  
15 going to have the Sheriff escort you to the jury room and  
16 the two ladies that have been the alternate jury --  
17 jurors, I'm going to excuse you at this time with the  
18 special thanks of the Court for your patience and your  
19 participation. You're welcome to remain. I'm going to  
20 feed the rest of them -- stay and eat, too, if you care  
21 to. You just won't be able to participate in their  
22 deliberations.

23 I'll probably send the Sheriff back to -- it's four-  
24 twenty -- we have -- when we order food it will take  
25 about an hour to get here, so we'll probably allow you to

1 write out what you want and we'll see to getting it here.

2 The evidence will be also delivered back to the jury  
3 room. So, at this time the two alternates will be  
4 excused---

5 MR. FOGLEMAN: Could we approach the bench?

6 THE COURT: Yes, what did I do?

7 MR. DAVIS: Nothing. We just wanted to approach one  
8 more time.

9 THE COURT: Okay.

10 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT  
11 OF THE HEARING OF THE JURY.)

12 MR. DAVIS: As a cautionary matter with this flu and  
13 stuff going around, in the event the deliberations lasted  
14 any length, do you think it might be a good idea to at  
15 least keep the first alternate sequestered or something  
16 so that---

17 THE COURT: Well---

18 MR. DAVIS: ---so that in case somebody got sick we  
19 could have somebody to substitute?

20 THE COURT: Well, the only problem is is there is a  
21 case out of Harrisburg where Judge Pearson -- well, of  
22 course, he sent the juror home and then sent after them  
23 and then put them back in.

24 MR. DAVIS: I mean I hate to do that to somebody,  
25 but I'd sure hate to have to try this because somebody---

1 THE COURT: Okay. Okay, I think that's a good  
2 point.

3 (RETURN TO OPEN COURT.)

4 THE COURT: Alright, I'm going to -- the lawyers  
5 have pointed out a point that I have to agree with. To  
6 my two alternates rather than send you home I'm going to  
7 require that you stay here sequestered -- which means you  
8 can sit in the jury box there or a comfortable place that  
9 we find for you -- and ask that you stay in the event  
10 that one of the twelve that goes back and deliberates  
11 becomes ill. It being the flu season and I've heard an  
12 unusual amount of coughing, so if I send you home then I  
13 couldn't replace one of the jurors with you. So I'm  
14 going to ask that you stay for at least a reasonable  
15 period of time. Okay?

16 Alright, the twelve principal jurors can now retire  
17 to the jury room to consider your verdicts.

18 (JURORS EXITING THE COURTROOM AT 4:20 P. M.)

19 (THE FOLLOWING HEARING WAS HELD OUT OF THE PRESENCE  
20 OF THE JURY.)

21 THE COURT: Alright, let the record reflect that  
22 this is a hearing out of the presence of the jury and  
23 after the jury has proceeded to deliberations.

24 MR. CROW: Your Honor, we would move for a mistrial  
25 on the following basis.

1           First, during the summation of Mr. Davis I believe  
2 he made a veiled comment on the silence on the -- on Mr.  
3 Misskelley's failure to testify. He talked about him  
4 sitting there with his head bent over, in different  
5 clothes, different hair cut, and won't look you in the  
6 eye. We thought it was -- I don't have the exact quotes,  
7 but the record will reflect exactly what all he said, and  
8 I thought that was a veiled reference to this.

9           MR. STIDHAM: Your Honor, it amounts to a comment  
10 that the defendant didn't testify.

11           THE COURT: Do you want to respond?

12           MR. DAVIS: Judge, I can't recall during -- exactly  
13 what I said, but it certainly wasn't intended to be a  
14 comment on his not testifying. It was a comment on the  
15 fact that his appearance here in the courtroom has been  
16 that of a meek, mild juvenile -- a pre-juvenile --  
17 contrary to what his picture showed and contrary to what  
18 his action indicated in the tapes. I don't think I made  
19 any comment whatsoever on his failure to take the stand.

20           THE COURT: No, in fact he used the term "veiled",  
21 Mr. Stidham. The Court was conscious and aware of the  
22 comment made and did not feel at the time that it was an  
23 inappropriate remark that would single out or call to the  
24 attention of the jury the defendant's failure to testify.  
25 It just simply was too remote to do that in my opinion



1 and a mistrial after several days of trial would be a  
2 drastic remedy and if there was any error in that it was  
3 so miniscule that it was harmless. And I frankly didn't  
4 feel that from my observation of the closing argument,  
5 the tactic that it was employed was a proper inference  
6 that the jury could draw from the appearance of the  
7 defendant from the photographs that were introduced and  
8 his appearance during the trial, and, if anything,  
9 reflected his demeanor during the trial, and not his  
10 failure to testify in his own behalf and recant or deny  
11 any statement he made.

12 So the motion for mistrial will be denied and the  
13 record is made on that issue.

14 MR. CROW: Thank you, your Honor.

15 MR. STIDHAM: Thank you for your consideration, your  
16 Honor.

17 MR. CROW: I have a couple of other ones, your  
18 Honor, just real briefly.

19 I also ask for a mistrial on the ground of  
20 prosecution's remarks during closing. He talked about  
21 ninety-nine percent of the cases on people who confess,  
22 they're guilty. I objected in the trial when that  
23 response was solicited from Mr. Holmes -- that while he  
24 was our witness, we certainly didn't ask that question,  
25 your Honor. I objected. I thought that was using other

1 people's guilt or innocence to reflect on the guilt or  
2 innocence of Mr. Misskelley. That has now been  
3 compounded by the prosecutor's comment during closing,  
4 and I feel that at this point we're entitled to a  
5 mistrial.

6 THE COURT: Well, for several reasons I will deny  
7 the motion for a mistrial. One, and perhaps the most  
8 important reason for denying it is no objection was made  
9 at the time. The Court was not given an opportunity,  
10 therefore, to rule upon any objectionable comment, nor  
11 was the Court given an opportunity to caution the jury on  
12 excessive language that any attorney might use other than  
13 the standard instruction that's given in one oh one. So  
14 your failure to object at the time in my estimation is a  
15 waiver of that objection.

16 Secondly, it seems to me to be fair comment based  
17 upon the evidence and testimony in the nature of the  
18 defense. Inasmuch as the defense called ex -- so called  
19 experts or experts in the field of interrogation, and  
20 suggested to the jury that the statement was contrived,  
21 manipulated, coerced, and otherwise involuntary, that it  
22 was an appropriate line of inquiry, and that the very  
23 nature of the defense invoked those inquiries and made  
24 that a pertinent subject matter of inquiry.

25 That would be my second reason for it.

1 MR. CROW: Thank you, your Honor.

2 (JURY ENTERING COURTROOM AT 12:10 A. M.)

3 THE COURT: Alright, ladies and gentlemen, you've  
4 been deliberating a pretty good while now, and I'm going  
5 to release you to go home for the evening and ask that  
6 you report back at nine-thirty in the morning, and when  
7 you report back you can just proceed to the jury room and  
8 resume your deliberations. However, you can't begin your  
9 discussion or deliberation until all twelve of you are in  
10 the jury room where you comprise the jury, and I'm going  
11 to give you the usual and same admonition that even  
12 though you are a jury now, you're not to discuss this  
13 case with anyone. You shouldn't read any media account  
14 of it, watch it, listen to it, or let anyone, including  
15 spouses, loved ones, neighbors, friends, or anyone  
16 suggest to you what your verdict should be. And with  
17 that admonition and warning, you're free to go until in  
18 the morning at nine-thirty where I'll ask you to return  
19 and resume your deliberations.

20 Wait just a minute. Everybody be seated.

21 While I know you've worked hard we've put a lot of  
22 time into the case and I'm going to ask that you continue  
23 your deliberations for a reasonable period tomorrow. So  
24 everyone just stay in the courtroom and let me have some  
25 deputies take the jury out the back way to their vehicles

1 and you're free to go until in the morning at nine-  
2 thirty.

3 (ADJOURNMENT.)

4 CORNING, ARKANSAS, FEBRUARY 4, 1994, AT 9:30 A. M.

5 (JURY ENTERING JURY ROOM AT 9:30 A.M.)

6 (JURY ENTERING COURTROOM AT 12:00 P. M.)

7 THE COURT: Alright, ladies and gentlemen, have you  
8 arrived at a verdict?

9 FOREPERSON: Yes.

10 THE COURT: If you would hand it to the bailiff,  
11 please, or the Sheriff, please.

12 FOREPERSON: (COMPLYING.)

13 THE COURT: (EXAMINING.) Alright, ladies and  
14 gentlemen, your verdicts are in good form and will be  
15 accepted by the Court and I'll announce your verdict in  
16 just a second.

17 Alright, ladies and gentlemen, I -- in the audience  
18 -- I am acutely aware that your feelings are on edge,  
19 that there is a great deal of emotion involved, and I  
20 **certainly** can understand that, and everyone that  
21 **participates** here can. But the Court cannot tolerate and  
22 **will not** tolerate any verbal outburst, any display of  
23 emotion whatsoever. So you're cautioned and warned as I  
24 read the verdicts that you are not to show any outburst,  
25 any emotion, or any display, and I recognize that that's