

1 flag and be indicative of the person giving them a false
2 confession?

3 A. Well, the first thing that you look for is they've got to
4 tell you something that you don't already know. And the
5 second thing that you look for is that whatever he says does
6 not conflict with the evidence or the crime scene analysis.
7 The third thing he should be able to lead you to the fruits of
8 the crime or the crime weapon utilized.

9 Now, in the initial part of the confession, it's always
10 in narrative form where he suddenly just gets it off his chest
11 and is a -- an indication of relief that sets in, and he tells
12 you about it, and you don't have to prompt him or lead him
13 with questions. He just gets it all out at one time. Then
14 when he gets done telling you in a narrative form, that's when
15 you start asking the questions.

16 Also what you look for is that when you do start
17 questioning him to clarify certain points in his confession,
18 if you are wrong in a supposition he will tell you that. He
19 will tell you, "No, that's not the way it happened." He will
20 correct you. You don't have to correct him.

21 And then you always look for little incidental details,
22 and he'll say, "Well, just at the time this was going down, we
23 noticed a man walking a dog across this field", and later on
24 you verify that there was in fact a man walking a dog across a
25 field. So anytime they supply an incidental detail of an

1 happens. That's when you can assess whether or not he's
2 telling you something based on memory or he's just fantasizing
3 it as he goes along.

4 Q. Mr. Holmes, is there a point during the interrogation
5 that the interrogator has to be careful after the suspect has
6 been in there for a while? Is that something that happens
7 that you've got to watch for?

8 A. Mostly your confessions -- particularly in homicide cases
9 -- come in the fourth hour. There's a waning of resistance
10 where the person becomes a victim of what I call a captive
11 audience syndrome, where he almost becomes mesmerized by the
12 relationship between himself and the interrogators. Anything
13 from four hours on is a diminishing resistance that can lend
14 itself to a confession whether it be false or valid.

15 Q. Have you had an opportunity to examine the statements
16 made by Jessie Misskelley, Junior that were given to the West
17 Memphis Police Department on June third, nineteen ninety-
18 three?

19 A. Yes.

20 Q. Have you had an opportunity to listen to the actual tape
21 of the confession?

22 A. Yes.

23 Q. Mr. Holmes, have you identified any of the factors that
24 you just discussed in Mr. Misskelley's statement?

25 MR. DAVIS: Your Honor, excuse me. At this point I

1 think before he can ask that question he needs to also
2 address whether or not he's familiar with the
3 investigative file sufficiently enough that he can answer
4 that question.

5 THE COURT: Is your objection to foundation?

6 MR. DAVIS: Yes, sir.

7 THE COURT: Lay a better foundation.

8 BY MR. STIDHAM:

9 Q. Mr. Holmes, have you also been made aware of some of the
10 aspects of what was found at the crime scene and what -- how
11 the bodies were bound, and things of that nature?

12 MR. DAVIS: Your Honor, I would ask that that
13 question -- object to that question because when he says,
14 "made aware", I don't know if Mr. Stidham told him a
15 version or if he examined the actual documents and files
16 and if he's going to lay a foundation for this man's
17 opinion, he needs to explain it to us---

18 MR. STIDHAM: Your Honor, may counsel approach the
19 bench?

20 THE COURT: Yes.

21 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT
22 OF THE HEARING OF THE JURY.)

23 MR. STIDHAM: Judge, we're getting right back to
24 where we talked about the hearing in Marion. We asked
25 specifically that this witness be allowed to stay in the

1 courtroom to hear the testimony regarding the officers.
2 They objected and the Court refused to allow the witness
3 to stay in here.

4 MR. DAVIS: He had a transcript of the statement he
5 could have---

6 MR. STIDHAM: He was under the rules. We couldn't
7 give it to him. He has examined newspaper articles. He
8 examined parts of the file that I provided him.

9 THE COURT: Well, just ask him what he's examined
10 then.

11 MR. STIDHAM: Your Honor, it's---

12 THE COURT: Well, ask him what he's examined.

13 (RETURN TO OPEN COURT.)

14 BY MR. STIDHAM:

15 Q. Mr. Holmes, can you tell the Court what -- what other
16 items you've examined in this case? Documents or---

17 A. --Well, I -- I examined his two confessions and I
18 examined all the material that you sent me and the
19 investigative reports and, of course, I've listened
20 extensively to the tape itself.

21 Q. Please continue.

22 A. Now, are you asking me for a description of what a false
23 confession is ordinarily?

24 Q. Well, my question is: Have you identified any of the
25 factors that you've discussed in Mr. Misskelley's statement to

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1 the police?

2 A. Not in the quantity that I would want to see, no.

3 Q. Can you elaborate on that?

4 A. Well, the two obvious points that bother me is the
5 mistake on the time. You know, he's saying nine o'clock, then
6 he's saying he went home at twelve. I -- I just don't
7 understand if he was in fact involved in this crime how he
8 made a mistake on the time factor.

9 And the time that really bothers me is the ligature --
10 what was used to tie up the victims. You know, he certainly
11 knows the difference between shoelaces and a rope.

12 Those are the two most prominent things, but there's a
13 multitude of questions in my opinion that he should have been
14 asked to ascertain the validity of his confession. And the
15 first time that -- that he came out with the wrong time
16 factor, that should have been a signal that something was
17 radically wrong. That's when the questions should have been
18 more probing to determine whether or not he was making it up
19 or giving a valid confession.

20 Q. What type of questions were the officers using to elicit
21 the statement from the defendant?

22 A. Well, first of all you don't ask any questions in the
23 initial part of the confession. You just let them spill it
24 and get it out, so you just sit there and you listen -- a non-
25 directive approach.

1 Q. Is that what you're referring to when you mention the
2 narrative?

3 A. The narrative -- that's the way most confessions come.
4 All of a sudden the suspect goes belly up or resignation sets
5 in. They want to get it off their chest and they just blurt
6 it out, and there's a tremendous emotional relief. You just
7 sit there quietly and you listen, then when they get done
8 discussing what happened, then the points that you want to
9 cover, you start asking the questions.

10 What I didn't like about this confession is that most of
11 it emanated from questions right off the bat without --
12 without any narrative of any -- any length at all -- without
13 any descriptions about feelings or conversations or anything.
14 It's all in response to questions. When it appears that it
15 wasn't on the money, then they'd change it around and say,
16 "Well, in effect could it have been this way?".

17 And particularly disturbing---

18 MR. FOGLEMAN: Your Honor, I object to that
19 statement unless he can point to a specific place in
20 there where the officer says, "Could it have been this
21 way?".

22 MR. STIDHAM: Your Honor, I think it was throughout
23 the entire statement itself.

24 THE COURT: I'm going to sustain the objection. If
25 he's going to refer to and if we're going to continue

1 along those lines, I need him to be more specific in the
2 area of the statement that he's referring to. I'll
3 sustain the objection in that regard.

4 BY MR. STIDHAM:

5 Q. Can you mention a specific---

6 A. --Well, both of them at one time mentioned that they were
7 disturbed by what they were hearing. One said, "I'm disturbed
8 by this time factor." And another one came right out and
9 said, "I think that" -- I don't remember which one that he
10 didn't think that he was telling all of the truth.

11 So, either he's totally innocent and just made it up and
12 doesn't know the case facts, or two, he was so doped up he
13 doesn't remember what happened, or three, he's psychologically
14 impaired, which the ramifications are a faulty memory, or he
15 wanted to get somebody off his back and he decided, "Well,
16 I'll just give them a bunch of baloney, the wrong case facts,
17 and then recant later."

18 You know, there's no doubt in my mind that there's false
19 information in the confession -- the whole question is why?
20 Is it because he's innocent or because he's duplicitous and
21 cunning and decided to offer a false confession and retract
22 that later on.

23 Q. Are you aware of any literature with regard to
24 personality traits of people who are likely to falsely
25 confess?

1 A. Well, from reading and from my own experience, yes.

2 Q. What are those?

3 MR. DAVIS: Your Honor, at this point in time when
4 we start talking about personality traits, they've got a
5 psychologist who is going to be here and anticipate --
6 I'm anticipating he will be -- and this man is a thirteen
7 year law enforcement officer---

8 MR. STIDHAM: Thirty-nine years, your Honor.

9 MR. DAVIS: Thirteen years working for law
10 enforcement agencies, and, your Honor, his qualifications
11 as to expertise as to personality traits, we do not agree
12 that he's an expert in that area. We've agreed he's an
13 expert in the field of interrogation.

14 THE COURT: Sustained.

15 BY MR. STIDHAM:

16 Q. Mr. Holmes, is it important when you're corroborating a
17 confession that you find things that are independent of the
18 confession that links the suspect to the crime?

19 A. That's the whole quest of your questioning after he comes
20 out with a narrative form of the confession. If you get
21 something you can hang your hat on independent of what he's
22 telling you. One other human being who can verify it. One
23 piece of physical evidence. One piece of documentation where
24 you know it's irrefutable corroboration of what he tells you.
25 Because what you're concerned about is he may recant it later

1 on so you want to have something that he just can't lie
2 around. That's what you look for some irrefutable piece of
3 evidence to corroborate the confession. And when you don't
4 have that, you're in trouble.

5 MR. STIDHAM: Pass the witness.

6 CROSS EXAMINATION

7 BY MR. DAVIS:

8 Q. Mr. Holmes, my name is Brent Davis. I met you previously
9 at another hearing.

10 A. Yes.

11 Q. If I ask you any questions that you don't understand,
12 please ask me to rephrase them and I'll be glad to do so.

13 A. Alright, sir.

14 Q. And it's my understanding that primarily what you do now
15 is lecture to police agencies, law enforcement agencies on
16 interrogation tactics. Is that correct?

17 A. True.

18 Q. Okay, and would it be fair to say that you're basically
19 training officers on how to conduct an interrogation?

20 A. True.

21 Q. Okay, and would it be accurate to say that when you train
22 officers to conduct interrogations that you tell them that at
23 a minimum in an important case that you want them to go four
24 hours uninterrupted with the suspect?

25 A. True.

1 Q. So in this particular case the time period that the
2 officers are with the suspect doesn't pose any problems for
3 you, does it?

4 A. No.

5 Q. That would be what you would recommend them to do if you
6 were advising them, correct?

7 A. I would have done exactly what they did.

8 Q. Now, the basis -- you said that you listened to the tape
9 extensively. Is that correct?

10 A. Um-hum.

11 Q. Now, you previously testified at another hearing in this
12 matter and indicated that you have never heard the tape.

13 A. That's true.

14 Q. Okay, and when you had never heard the tape you said
15 basically the same thing or rendered the same opinion as you
16 have since you've heard the tape, correct?

17 A. True.

18 Q. So I assume that your opinion was already set before you
19 even listened to the tape of Jessie Misskelley.

20 A. True.

21 Q. Now, you said that there needed to be some specific facts
22 that was unique or that could be corro -- could identify that
23 this person was there at the crime, correct?

24 A. True.

25 Q. Alright, and in a situation where a defendant describes

1 that one of the three victims was castrated and he's able to
2 identify which of those three victims was castrated, wouldn't
3 that indicate to you that that defendant had some peculiar
4 knowledge that only a person that was there would know?

5 A. Providing you know all of the antecedent conditions that
6 led up to that statement. I don't know what inferences or
7 suggestions were made by the interrogators prior to him making
8 that definitive statement. But if that was done just suddenly
9 blurted out, yes, that's significant. But if that was
10 suggested in some way through hours of interrogation, then
11 that negates its weight.

12 Q. But that's one of those things that you would look for in
13 determining whether that confession was accurate?

14 A. Absolutely.

15 Q. And if the witness said, "Yes, one of the three victims
16 was castrated", and that person was able to identify which one
17 of the three was accurately, then that would be an important
18 factor for you to consider?

19 A. Absolutely.

20 Q. Okay. Now, if there were also reports from a medical
21 examiner that there were bruising to the victims' ears,
22 significant trauma to each one of the three little eight-year-
23 old boys' ears, and in the course of the interrogation the
24 defendant tells you upon questioning that in fact these
25 persons had grabbed the victims by their ears in the course of

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1 performing -- having them perform oral sex, that would be
2 significant, too, wouldn't it?

3 A. Yeah, but not as significant as not knowing what time the
4 crime occurred or how they were tied up.

5 Q. Well, is the -- if the parents of the little boys didn't
6 even know that injuries had existed to their ears and only the
7 medical examiner and a few very limited law enforcement
8 officers knew that, then that becomes a pretty significant
9 thing, doesn't it?

10 A. It does providing he can't explain how he got that
11 information by inference or otherwise through the
12 interrogators and if he can't say that, then that is
13 significant, yes.

14 Q. Okay. So the only way that you would discount that
15 information as being important would be if there was some
16 independent source where he would be able to obtain that
17 information.

18 A. Right.

19 Q. Okay. Absent that independent source, that's one of
20 those factors you're looking for to nail down that this
21 confession is true?

22 A. Right.

23 Q. Now, during an interrogation you've told us that it's
24 important to go for at least four hours in an interrogation.
25 It's also what you train officers that it's important once

1 they're in an interrogation to keep them talking, right?

2 A. True.

3 Q. Okay. So if something happens during the course of an
4 interrogation and something comes up that may be unexpected or
5 whatever, you don't throw your hands up and go, "Oh, my God,
6 you said something that was wrong." You let them keep talking
7 and explaining what's going on, correct?

8 A. Well, not in this instance. When he comes up with the
9 wrong time and he doesn't know what the victims were tied up
10 with, right then you should have said to yourself, "Hey, wait
11 a second, there's something wrong here."

12 Now, why didn't they try to clarify that when they took
13 the confession? They steered totally away from that. The
14 minute they saw something was wrong with the time factor and
15 the ligature, they never asked any questions to try to clarify
16 it. Only after they turned the tape recorder off, then they
17 clarified the time factor in the second taping but they
18 omitted clarifying the difference between shoelaces and rope.

19 Q. So you recall a difference between the shoelaces and
20 ropes involved in the first statement. Is that correct?

21 A. Well, they didn't clarify that in the second -- in the
22 second tape. They did clarify the time factor, but, you know,
23 some of this stuff is miniscule, but by comparison the time
24 factor and the ligature to me is the key to this whole case.

25 Q. But you say it's miniscule, but the fact that this

1 defendant knew which of the victims had been castrated, that's
2 pretty dadgummed important, isn't it?

3 A. Well, that's presumptuous to assume that that emanates
4 from guilt. That could emanate from that -- he may have
5 glimpsed that through the interrogation. He was with these
6 guys for hours. You're bound to absorb something when you're
7 with investigators for hours. Indirectly or directly, they're
8 going to reveal something.

9 Q. So basically when you -- when you place less significance
10 on that you're doing it because you're assuming that officers
11 imparted that information to him, correct?

12 A. In this case, yes.

13 Q. Okay. And the truth of the matter is you've never heard
14 what the officers' testimony was regarding what went on there,
15 correct?

16 A. Correct.

17 Q. You've never reviewed any transcripts of what the
18 officers said, correct?

19 A. Correct.

20 Q. Okay. So as far as what went on during this
21 interrogation process the only thing you know is what you've
22 seen or heard on that tape. Is that accurate?

23 MR. STIDHAM: Your Honor, I think the jury -- your
24 Honor, I would like to make an objection. The prosecutor
25 objected to the witness hearing that. We asked that the

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1 witness be allowed to hear that.

2 MR. DAVIS: Your Honor---

3 MR. STIDHAM: And the prosecutor objected. We would
4 ask that he shouldn't be allowed to impeach him with that
5 information.

6 THE COURT: I think they asked for the rule to be
7 applied to him. I don't know why any material necessary
8 for him to formulate an opinion couldn't have been
9 supplied to him, if that's what you're saying.

10 MR. STIDHAM: Well, your Honor, if he can't be in
11 the courtroom to listen to them testify, how can we
12 provide him with transcripts of it? And why should the
13 prosecutor be allowed to impeach him on that basis? We
14 specifically requested that Mr. Holmes be allowed to hear
15 the testimony of the officers and formulate his opinion
16 in this case. The State objected and now they're trying
17 to impeach him because he doesn't have that information
18 for it. I think that's improper.

19 THE COURT: Overruled. Go ahead.

20 MR. DAVIS: Your Honor, for the record, they did
21 have a transcript of the entire testimony of the officers
22 that they could have supplied.

23 BY MR. DAVIS:

24 Q. Now, Mr. Holmes, would you agree -- let me back up just a
25 minute.

1 Have you talked with the defendant in this case
2 personally?

3 A. No. No.

4 Q. Okay, so you've never interviewed the defendant to get
5 any gauge as to his demeanor, character, intelligence,
6 anything of that nature?

7 A. No. The only feel I got for that was the tape.

8 Q. Okay, and you would agree with the statement that a lot
9 of people who don't have a formal education has what we call
10 street smart, correct?

11 A. Well, that's called social intelligence.

12 Q. Alright, and---

13 MR. STIDHAM: Your Honor, is he asking the witness
14 to testify about things that he didn't want him to
15 testify when I asked him questions about -- the
16 psychological nature? It sounds like the same thing to
17 me.

18 THE COURT: Wait a minute. I know you're trying to
19 make an objection, but tell me what it is.

20 MR. STIDHAM: Your Honor, I asked him if people who
21 are -- give false confessions---

22 THE COURT: What is your objection?

23 MR. STIDHAM: Your Honor, my objection is I asked
24 the witness if he could testify as to psychological
25 profiles of people who give false confessions. The

1 prosecutor objected and said that was improper and the
2 Court sustained it. Now, he's asking him the same
3 questions. I object.

4 THE COURT: No, I'm not allowing him to testify -- I
5 don't -- is that what you're asking him, Mr. Davis? What
6 is the psychological profile of---

7 MR. DAVIS: Judge, it's been so long since I asked
8 the question. I may have to go back and rephrase it and
9 give Mr. Stidham an opportunity to object again---

10 THE COURT: --Well, I'm not going to allow either
11 one of you to ask this witness to give a psychological
12 profile of anyone or even a hypothetical psychological
13 profile unless it falls---

14 First of all, are you prepared and capable from your
15 experience, training, and education to give such a
16 profile?

17 THE WITNESS: Yes.

18 THE COURT: Well, I might allow it.

19 MR. DAVIS: I don't think I'm asking that question
20 yet.

21 BY MR. DAVIS:

22 Q. Would -- would it be accurate to say that one of the
23 first things you teach people to do in an interrogation is to
24 assess the mental capabilities of the person they're
25 interrogating?

1 A. You get a thumbnail sketch of the individual you're
2 interrogating. You have to know his basic of personality
3 structure.

4 Q. But isn't it true that when you teach your courses that
5 you advise the people that you're teaching that you don't just
6 look for book smarts, but you look for street wise -- street
7 smarts, also?

8 A. Yes.

9 Q. And they're---

10 THE COURT: Mr. Davis, just a minute. I'm going to
11 allow him to ask that question. If you want to reserve
12 your cross examination at this point and you want to go
13 back and ask him that question, I'm going to allow it.

14 MR. STIDHAM: Yes, sir, I would like to go back and
15 ask him. Thank you.

16 THE COURT: Do you want to wait and let him do that
17 and then continue your cross?

18 MR. DAVIS: Yes. I think that would be best, your
19 Honor.

20 THE COURT: Okay.

21 Are you saying that you have developed that profile
22 through the years of your training---

23 THE WITNESS: Empirically. Empirically based on the
24 false confessions that I myself have taken.

25 MR. DAVIS: Your Honor, if that---

1 THE COURT: Well, I'm going to let you give a
2 generic, if there is one, statement of the profiles that
3 you could expect, and if that's what your question is
4 related to---

5 MR. STIDHAM: Exactly.

6 THE COURT: But I -- that does not relate to a
7 specific case, gentlemen. It's a generic profile of what
8 one would look for -- if he knows.

9 MR. STIDHAM: Thank you, your Honor.

10 MR. DAVIS: Judge, our objection would be that as I
11 understand it his profile would be based on specific -- a
12 minimal number or a -- however many specific cases he's
13 had.

14 THE COURT: I think that---

15 MR. DAVIS: And that will be---

16 THE COURT: Well, I've allowed him to testify as an
17 expert in interrogations and interrogation techniques,
18 and it's been fairly well established that he teaches
19 police officers, so if -- if in the course of that if he
20 describes for them a particular set of personality traits
21 to look for, then I'm going to allow him to describe what
22 they are.

23 MR. STIDHAM: Thank you, your Honor.

24 REDIRECT EXAMINATION

25 BY MR. STIDHAM:

1 Q. Can you describe those for us, Mr. Holmes?

2 A. A low I. Q., highly suggestible in personality structure,
3 intimidated when in the presence of dominant personalities,
4 always attempting to solve the immediate stress factor, get
5 the interrogators off my back and just let me go home, naively
6 assumes that they can all straighten it out later on, wherein
7 they become an agent of their own victimization. They give
8 the police or the prosecutor a sword and then the sword is
9 stuck in them with their own confession, but they assume that
10 they can go out and tell their parents or an attorney that, "I
11 just made it up", and the whole thing will be straightened
12 out.

13 It's extremely difficult for the average person to
14 believe that someone would confess to a crime they didn't do.

15 MR. DAVIS: Your Honor, I'm going to have to object.

16 Mr. Holmes is going beyond the question, and he's just
17 talking---

18 THE COURT: I'm going to sustain the objection at
19 this point.

20 BY MR. STIDHAM:

21 Q. Mr. Holmes, you stated that the first factor that you
22 discussed earlier was that in a valid confession the confessor
23 tells you something you don't already know.

24 A. Right.

25 MR. DAVIS: Your Honor, he's now -- I think going

1 outside his limited area or scope.

2 THE COURT: Well, I'll let him open it back up. Go
3 ahead.

4 BY MR. STIDHAM:

5 Q. Do you need for me to repeat the question, Mr. Holmes?

6 A. Yes, please.

7 Q. Okay. You said that the first factor that interrogators
8 look for in determining whether or not they're getting a false
9 confession is that the confessor tells you something that you
10 don't already know. In other words, he---

11 A. He's just throwing back at you what he's already heard
12 from you.

13 Q. Is that the red flag?

14 A. Yes.

15 MR. STIDHAM: Pass the witness.

16 RE-CROSS EXAMINATION

17 BY MR. DAVIS:

18 Q. When you say that he's throwing back something that's he
19 already heard from you, you're presuming that he acquired that
20 information from one of the interrogating officers, correct?

21 A. Yes.

22 Q. Okay, and in this case you don't have any earthly idea if
23 that's the situation, do you?

24 A. No.

25 Q. And if in fact that information was not received from the

1 interrogating officers, you would agree that the one
2 individual being named that was castrated and the injuries to
3 the ears would be factors that would be corroborative of a
4 true confession?

5 A. Well, I would have looked at this kid with a fish eye the
6 same way these investigators did, and I probably would have
7 felt the same way they did, but the minute he came out with
8 that wrong time of death, and not knowing what the proper
9 ligature is, that's when I would have backed off. Then I
10 would have known, "Hey, there's something wrong here."

11 And that's the only disagreement I have with these
12 officers. I'm not in here to castigate them in their tactics,
13 because I've probably done things twice as bad as they have in
14 my career. All I'm saying is when they didn't resolve those
15 things, that's when they aborted professionalism, and they
16 should have -- and I have a sense in listening to the tape
17 that they had a sense that there was something wrong, and
18 that's the reason they didn't ask more probing questions.

19 MR. DAVIS: Your Honor, your Honor, he's not giving
20 a response to the question and now we're getting away far
21 afield in the area that he doesn't have the expertise to
22 testify.

23 THE COURT: Alright, I'm -- please answer yes or no
24 and then I'm going to allow you to explain your answer.

25 THE WITNESS: Okay.

1 BY MR. DAVIS:

2 Q. Now, I just want to be sure that we're clear on this.
3 Assuming that the officers did not impart knowledge to this
4 defendant about the child being castrated -- let's assume that
5 as a hypothetical -- then when this defendant tells us the
6 child and is able to pinpoint the child that was castrated,
7 and that information is not general public knowledge, then
8 that's one of those factors you would look for to corroborate
9 the truthfulness of a confession, correct?

10 A. Yes.

11 Q. And the same with the injury to the ears?

12 A. Yes.

13 Q. So the only way that you discard that and begin to think
14 that's not important is if you presume that the officers
15 imparted that knowledge to the defendant.

16 A. That and it's overwhelmed by the importance of the time
17 factor and the rope versus the shoelaces.

18 Q. So you're saying that even if this defendant is able to
19 accurately describe the injuries to one of the three youths,
20 and describe the specific and the unusual type injuries that
21 we have here, absent police providing that information, that
22 still isn't all that significant factor to you?

23 A. Well, it is significant if it's not contaminated by
24 anything that they said or did. That's the only qualifier I
25 would put on it.

1 Q. Now, there's certainly nothing unusual about a defendant
2 recanting a confession, is there?

3 A. No.

4 Q. In fact wouldn't you agree that in ninety-nine percent of
5 the cases where a defendant has confessed to a crime and they
6 then recant and in ninety-nine percent of those cases the
7 defendant's guilty?

8 A. Yes.

9 Q. And in fact you teach in your seminars, don't you, that
10 you don't expect defendants to keep reiterating their
11 confessions?

12 A. True.

13 Q. In other words, once somebody tells their involvement in
14 a crime, then you don't expect them to come back and tell
15 other people, correct?

16 A. Correct.

17 Q. And in fact, it would be the rare exception if they did
18 that, correct?

19 A. Correct.

20 Q. So in this case, this defendant recanting his
21 confession---

22 MR. CROW: I'm going to object, your Honor. May we
23 approach the bench?

24 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT
25 OF THE HEARING OF THE JURY.)

1 MR. CROW: I don't care what the percentages are as
2 to what other people are toward guilt or innocence.
3 That's showing other people's inno -- guilt or innocence
4 is to infer that this client, that this defendant is
5 guilty. I strenuously object.

6 MR. DAVIS: He's indicated his opinion.

7 MR. CROW: Yes, your Honor. They can't -- the guilt
8 or not, other individuals cannot be shown as guilt on Mr.
9 Misskelley. Just like -- just like the prior bad acts
10 and it cannot show the guilt or innocence of Mr.
11 Misskelley.

12 I think it's along the exact same thing, your Honor.

13 THE COURT: Well, I mean I don't think he's capable
14 of testifying whether or not the statement was true or
15 false or---

16 MR. CROW: Right, your Honor.

17 THE COURT: ---or whether or not Mr. Misskelley is
18 guilty or innocent, if that's what you're saying.

19 MR. CROW: Yes, your Honor, but I don't like him
20 testifying -- his eliciting responses of percentages
21 whether other people are or not. That's not the issue in
22 this court, your Honor.

23 THE COURT: Well, but the issue here is, is this guy
24 is an expert in interrogation and interrogation
25 techniques and the issue that you've raised is a false

1 confession---

2 MR. CROW: Yes, your Honor, I understand that.

3 THE COURT: ---or an untrue confession. I'm not
4 sure you really raised that, but at least a coerced
5 confession.

6 MR. CROW: It is outside the scope of direct.

7 THE COURT: I don't think so. I think -- don't go
8 too far in that area, but I'm going to allow you to
9 pursue it.

10 MR. CROW: That makes him -- I don't know if I've
11 got the right rule or not but, is it four oh four?

12 THE COURT: Four oh four -- four four B, that's
13 in---

14 MR. CROW: Maybe I mis -- let me get the Rule Book.

15 THE COURT: Well, I've got it right here.

16 MR. CROW: Maybe I have the wrong rule, your Honor.

17 THE COURT: I think it's four oh five.

18 MR. CROW: It may be, your Honor. No, that's not
19 it.

20 THE COURT: It's four oh four.

21 MR. CROW: It's just like evidence of other crimes
22 whether it be of this defendant or another defendant,
23 your Honor, are not admissible to prove guilt or
24 innocence. They're only admissible to prove what's in
25 the rule. And the guilt or innocence of other

1 individuals in Mr. Holmes' career. He's -- the way he's
2 proffering the question---

3 THE COURT: But this isn't character evidence.

4 MR. CROW: Yes, I understand that, but the way he
5 proffering the question, your Honor, is not only ninety-
6 nine percent of the people who confess their guilt -- you
7 know -- and that---

8 MR. DAVIS: This guy is an expert in the field.

9 MR. STIDHAM: Just because other people are doesn't
10 mean that this defendant is---

11 MR. FOGLEMAN: He's trying to testify---

12 THE COURT: I'm going to allow you to pursue that
13 line of questioning, but I don't want you to attempt to
14 elicit from him whether or not the statement was true or
15 false, or whether or not the defendant is guilty or
16 innocent. And I'll sustain an objection on those points.

17 MR. CROW: Note our objections, your Honor.

18 MR. FOGLEMAN: Thank you, Judge.

19 MR. STIDHAM: Thank you, your Honor.

20 THE COURT: You're welcome.

21 (RETURN TO OPEN COURT.)

22 MR. DAVIS: Judge, I forgot what question was
23 asked. Was there even a response to it?

24 BY THE WITNESS:

25 A. Well, you asked me if it was unusual for people to recant

1 and we both agreed no, it's not.

2 Q. And in fact, would you agree, Mr. Holmes, that there is a
3 very brief time frame in the lives of most people who have
4 committed a serious crime in which they will confess?

5 A. It only comes at one critical point. It's like two
6 people come together, the chemistry is right, and he just
7 decides, "I'm going to tell this guy the truth." And he may
8 never get that feeling again.

9 Q. And, in fact, after that brief moment occurs, that person
10 may recant and deny his involvement. Is that correct?

11 A. Well, they begin to realize the consequences of what
12 they've done, yes.

13 Q. Now, sometimes you get confessions that don't quite jive
14 with the facts as you know them to be, correct?

15 A. There's always things that are unresolved, always
16 dangling things that you don't seem to be able to put all the
17 pieces of the puzzle together, but not of this magnitude.

18 Q. In your lectures to law enforcement officers you
19 specifically address that area regarding matters that are
20 unresolved or that are inconsistent concerning statements by
21 witnesses, do you not?

22 A. That's the nature of our existence. There's always
23 something you can't resolve. There's always the inexplicable.

24 Q. And isn't it true that in instances where a defendant
25 make incriminating admissions regarding his involvement that

1 it's your opinion that ninety-nine percent of the time those
2 people are guilty?

3 MR. CROW: Your Honor, I want to raise my same
4 objection. That is a totally improper question.

5 MR. DAVIS: Your Honor, I'm asking him his opinion
6 regarding that.

7 MR. STIDHAM: Your Honor, he should ask him his
8 opinion regarding the defendant.

9 MR. DAVIS: No -- that's---

10 MR. FOGLEMAN: The Court's already ruled that's
11 improper.

12 THE COURT: Go ahead. I'm going to allow it.
13 Overruled.

14 BY THE WITNESS:

15 A. I agree.

16 Q. So you would agree that if people make incriminating
17 admissions regarding their involvement, then ninety-nine
18 percent of the time they're guilty.

19 A. They're telling the truth.

20 Q. And sometimes they just give you tidbits of information.
21 Is that correct?

22 A. Well, everybody wants to put their best foot forward, and
23 they don't want to make themselves look bad, and they don't
24 want to always go into the gory details of what they did.

25 Sure, you don't always get a complete vivid description of why

1 they did it, a motive behind it, and et cetera. That's rare
2 that you get a full disclosure. There is always things that
3 are unresolved, but there are no major discrepancies as in my
4 opinion, what you have in this case.

5 Q. And wouldn't you agree that it's contrary to human nature
6 to even give a statement admitting or indicating your
7 involvement in something as heinous as the murder of three
8 eight-year-old boys?

9 A. It's against the nature of most people, yes.

10 Q. And that's why when somebody makes an admission regarding
11 their involvement in such a crime, you place a great deal of
12 weight on that. Isn't that true?

13 A. Yes, I would agree with that.

14 Q. Now, Mr. Holmes, when you testified at a previous matter
15 involving this case, do you recall what you told us the most
16 important thing there was in determining the accuracy of a
17 confession?

18 A. Well, are you talking about looking for something to
19 corroborate it physically, or the emotional factor that's
20 evident?

21 Q. Do you recall stating that the most important thing of
22 all is if they sound and look like they're telling the truth,
23 then you can tell?

24 A. Yes.

25 Q. And wouldn't you agree, Mr. Holmes, that in order to make

1 that determination and the person in the best position to make
2 that determination is the one who is there doing the
3 interview?

4 A. No, not in this case because in a case of this
5 importance, national significance, they had a vested interest
6 in it.

7 Q. So a person in a better position to make a determination
8 in this case is someone who's never talked to the defendant,
9 wasn't there during the confession, only listened to the tape
10 in the last week or so, that person is in a much better
11 position, is that what you're telling us?

12 A. Well, I respect their opinion, but I also respect my own.

13 Q. And your opinion would be different or -- let me rephrase
14 that, your Honor.

15 You presume -- what gives you concern is because you
16 presume the officers provided information regarding the
17 castration of the one victim, and other physical findings to
18 the defendant during the course of the interrogation, correct?

19 A. No, what I'm concerned about is the defendant didn't
20 provide enough information to offer a valid confession in my
21 opinion. That's what I'm concerned about.

22 Q. But you presumed that the defendant was provided with
23 that information in order to have concerns about this
24 particular interrogation, correct?

25 A. You can guess at a lot of things. Fortune tellers do it

1 all the time. If you're going to utter a bunch of statements
2 you're going to be on the money with one or two of them just
3 by chance alone. I'm not saying that that's the case in this
4 situation, but that happens, you know.

5 But what I'm concerned about are the things that are not
6 reconciled.

7 Q. So really what your job and -- are you hired by the
8 defense in this case?

9 A. I don't really know. They told me they didn't have any
10 money and that they felt that there was something wrong and I
11 said, "Well, send it down and let me take a look at it." And
12 I looked at it.

13 Q. Are you submitting a bill on this case?

14 A. I haven't done it yet.

15 Q. Are you intending to submit a bill?

16 A. Well, I'll ask for my plane fare.

17 Q. And in this particular case you have presumed that the
18 officers tainted the defendant's mind prior to or during the
19 confession. Is that true?

20 A. I'm not attempting to impugn the professionalism or the
21 integrity of these officers---

22 MR. DAVIS: Your Honor, if he could answer my
23 question. I asked him a question.

24 THE COURT: Answer yes or no and then you can
25 explain.

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1 BY THE WITNESS:

2 A. Alright, let me have the question again, Counselor.

3 Q. Okay. Are you presuming that the officers tainted the
4 mind of the defendant with facts and information about the
5 crime?

6 A. Yes.

7 Q. And is your job here and what you're hired to do in this
8 case basically is second guess what the officers did?

9 A. No.

10 Q. You indicated that you -- it would be a guess regarding
11 whether or not -- let me rephrase that.

12 You indicated a minute ago that it could have been a
13 lucky guess on the part of the defendant when he guessed --
14 when he said that Chris Byers was the boy that was castrated
15 and described the injuries.

16 A. It's only one out of three.

17 Q. And also describing that type of injury to that
18 particular individual?

19 A. Well, I don't know the antecedent conditions to that, so
20 I really can't speculate on that.

21 Q. Well, the truth -- the truth of the matter, Mr. Holmes,
22 is you aren't acutely familiar with the facts and
23 circumstances surrounding this case. Isn't that true?

24 A. I'm acutely aware of some troubling things in the
25 confession that I read.

1 Q. Okay, now, would you answer my question?

2 A. Yes.

3 Q. You -- you aren't familiar with the facts and
4 circumstances surrounding this case?

5 A. Not all of them, no.

6 Q. Okay. And that is vitally important in being able to
7 ascertain whether the facts given by a defendant are accurate
8 or not, correct?

9 A. I've read thousands of confessions and this is just one
10 more confession that I've read in thirty-nine years.

11 Q. I appreciate you providing that information to us. Now,
12 if you would, would you answer my question? Now, that
13 information, the details of this case, if you're going to be
14 able to determine whether this confession -- how accurate it
15 was or to judge it, or to weigh it -- it's important to have a
16 good grasp of the facts and circumstances surrounding this
17 case, correct?

18 A. Correct.

19 Q. And you admit that you don't have that acute awareness
20 regarding the facts and circumstances of this particular case.

21 A. No, I don't admit that at all.

22 MR. STIDHAM: Your Honor, again, I would object. We
23 asked that the witness be allowed to hear the officers'
24 testimony and the prosecution objected to that.

25 BY MR. DAVIS:

1 Q. What have you reviewed in the way of records? Have you
2 got those with you? The records that you reviewed in
3 preparation---

4 A. I've -- I've reviewed enough to prompt me to come up here
5 and testify.

6 Q. Have you got with you those documents and records that
7 you reviewed prior to coming here and testifying?

8 A. I've got the copies of the two confessions that were
9 taken from him, yes.

10 Q. Okay, and what other documents did you review?

11 A. Well, I listened to the tape.

12 Q. Okay, and what did you do besides listen to the tape and
13 review the two confessions?

14 A. Well, you know what else I did.

15 Q. Did you also review any of the investigative reports?

16 A. No.

17 Q. Did you review any of the statements of other witnesses?

18 A. Yes, I'm aware that the defense has a lot of alibi
19 witnesses. I'm aware that there were other suspects in this
20 crime. I'm aware of a lot of things.

21 Q. Did you review those statements?

22 A. No.

23 Q. I assume since you say you're aware of them you were fed
24 that information by the defendant's attorneys?

25 A. Yes.

1 Q. Okay. And as far as information from the medical
2 examiner's office, have you ever reviewed any of that
3 information?

4 A. Uh -- I read the psychological profile of the defendant.
5 I don't think I read the autopsy, no.

6 Q. Okay, and you haven't been provided a transcript of that
7 -- of the medical examiner's testimony here at trial?

8 A. No.

9 Q. So as far as his physical findings you have no real
10 working knowledge of what he found in his autopsy report?

11 A. No.

12 Q. Okay, and therefore no way of determining whether the
13 statements or confessions jive with what his findings were in
14 that autopsy report?

15 A. (NODS HEAD.)

16 MR. DAVIS: One second, your Honor.

17 THE COURT: Was that -- you didn't answer. You just
18 nodded your head.

19 THE WITNESS: Well, it was kind of an elongated
20 question. I was trying to figure out at what point I
21 should respond now.

22 THE COURT: Alright.

23 THE WITNESS: If he wants to reiterate the
24 confession---

25 MR. DAVIS: I'll pass the witness, your Honor.

1 MR. STIDHAM: May I have just a moment, your Honor?
2 We pass the witness, your Honor, we have no further
3 questions.

4 MR. DAVIS: Judge, I did think of---

5 THE COURT: Well, go ahead.

6 MR. DAVIS: No further questions, your Honor.

7 THE COURT: Are you all both sure you got all you
8 want out of him, because after I let him go, I assume
9 he's leaving.

10 Alright, sir, you're free to go. Thank you very
11 much.

12 Call your next witness.

13 MR. STIDHAM: Your Honor, we would request a recess
14 until in the morning. We've called our last witness.
15 We've exhausted the witnesses we had ready.

16 THE COURT: Alright. Can you gentlemen give me some
17 idea of how many witnesses you've got left and how many
18 potential rebuttal witnesses you'll have?

19 MR. STIDHAM: Your Honor, I would anticipate we'll
20 be rested by lunch time tomorrow.

21 THE COURT: Well, how many witnesses do you think
22 you're going to have tomorrow?

23 MR. STIDHAM: Four, approximately four.

24 THE COURT: You anticipate the need for any rebuttal
25 witnesses at this time and what length would it take?