

1 Q. But you're telling this jury that you know positively  
2 where you were on May the fifth?

3 A. May the fifth.

4 Q. And you didn't talk to anybody about it until this past  
5 Sunday?

6 A. Right.

7 REDIRECT EXAMINATION

8 BY MR. STIDHAM:

9 Q. Was Jessie Misskelley with you on May the fifth in Dyess,  
10 Arkansas?

11 A. He sure was.

12 Q. Between the hours of seven-thirty and eleven-thirty P.  
13 M.?

14 A. He was.

15 (WITNESS EXCUSED.)

16 DOCTOR RICHARD OFSHE

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. STIDHAM:

21 Q. Please state your name for the Court.

22 A. Richard Ofshe.

23 Q. And what do you do for a living, Mr. Ofshe?

24 A. I'm a professor of sociology at the University of  
25 California at Berkeley.

1 Q. Okay. Can you tell the Court and the jury a little bit  
2 about your education and background?

3 A. I received a Bachelor's Degree in psychology from Queens  
4 College of the City University of New York, and then a  
5 Master's Degree in sociology from the same institution, and  
6 then a Ph.D. in the sociology department of Stanford  
7 University with a speciality in a sub-field called social  
8 psychology.

9 Q. Would you explain to the Court and the jury what social  
10 psychology is?

11 A. Social psychology is a speciality area that is found both  
12 within psychology and within sociology. It has to do  
13 principally and particularly the part that I specialize in --  
14 it has to do with influence, decision making, belief, and  
15 attitude change, techniques of pressure and coercion and I  
16 specialize particularly in extraordinary techniques control  
17 and influences.

18 Q. Do you have any experience or training in the area of  
19 influence and more specifically in the area of influence with  
20 regard to police interrogation?

21 A. All my work for the last thirty years or more has been on  
22 the subject of influence starting out doing work in  
23 traditional problems -- excuse me -- traditional problems in  
24 social psychology having to do with decision making, group  
25 influence, interpersonal influence.

1       Then starting about the early part of the nineteen  
2 seventies I became interested in complex real world systems of  
3 influence. That is to say not laboratory research, but rather  
4 studying on-going very complicated influence environments and  
5 particularly those kinds of environments that have massive  
6 effects on individuals.

7       So initially I did a lot of work for about ten or twelve  
8 years studying what are called cult groups. That is to say  
9 groups that are very strongly organized, that exert enormous  
10 pressure on individuals and that can lead individuals to  
11 change the way in which they see the world and be willing to  
12 take part in activities that they otherwise would ordinarily  
13 not take part in.

14       During -- and I specialized in studying cult groups that  
15 generate violence. During that period of time I did a great  
16 deal of work often involving the analysis of groups that led  
17 their followers to commit murders. I did a lot of work for  
18 prosecutorial agencies, analyzing and prosecuting such crimes.

19       Then my interest in influence continued and I began to  
20 become interested in the study of police interrogation. Ah,  
21 police interrogation is the root of -- out of which various  
22 studied round the world procedures of influence groups --  
23 particularly techniques that have to do with coercing  
24 confessions from individuals and generally manipulating them  
25 in extraordinary ways.

1           And that work began in the late nineteen eighties and  
2 since then I've done a great deal of work and written about  
3 police interrogation tactics, in particular police  
4 interrogations that can and does lead to coerced and/or false  
5 confessions.

6 Q.   Has any of your work been published, Doctor Ofshe?

7 A.   Yes. I've published four or five books, and thirty or  
8 more articles in scientific journals, and presented papers at  
9 dozens of conferences over the years. The work on all of  
10 these subjects have been published.

11 Q.   Are you familiar with a Doctor Gudjonsson?

12 A.   Yes, I am.

13 Q.   And how are you familiar with his work?

14 A.   He's one of the other people who is a specialist in  
15 techniques of interrogation and influencing police  
16 interrogations.

17           MR. DAVIS: Your Honor, at this time if I may  
18 interrupt, as I understood it he is qualifying him as --  
19 or in the process of qualifying him as an expert.  
20 They're moving on to another area and I'd ask that I'd  
21 have an opportunity to voir dire the witness regarding  
22 his special qualifications.

23           THE COURT: Well---

24           MR. STIDHAM: Your Honor, I asked him about what has  
25 been published.

1 THE COURT: You're asking about somebody else's  
2 work.

3 MR. STIDHAM: Your Honor, I was---

4 THE COURT: Right now if you're qualifying him, then  
5 -- then go through his qualification, his vitae, and then  
6 pass him, and then if they've got any questions, then I'm  
7 going to allow them to voir dire.

8 MR. STIDHAM: I think my next question will clear  
9 this up, your Honor.

10 THE COURT: Alright.

11 BY MR. STIDHAM:

12 Q. Are you mentioned in Doctor Gudjonsson's book, "The  
13 Psychology of Interrogations, Confessions, and Testimony"?

14 A. My work is discussed in that book, yes.

15 Q. Did you contribute to the book in any form or fashion?

16 A. Well, he asked me to review certain chapters of the book  
17 and I reviewed them, and made comments, and then he thanked me  
18 in the introduction for doing that, and then he also discusses  
19 my work in the substance of the book.

20 Q. I also understand, Doctor Ofshe, that you've won a  
21 Pulitzer Prize?

22 A. I shared in the nineteen seventy-nine Pulitzer Prize for  
23 public service, yes.

24 Q. And what was that for -- I mean, what was the subject of  
25 your---

1 A. That was for work I did with the publisher of a small  
2 weekly newspaper in West Marin County, California. We did an  
3 expose of a group called Synanon which started out as a drug  
4 rehabilitation organization and turned into a violent cult  
5 group that was assaulting and attempting to murder people in  
6 the immediate area. It became quite a major subject and that  
7 year we were lucky enough to be awarded a Pulitzer Prize.

8 Q. Are you a member of any professional associations?

9 A. Yes. I'm a member of the American Psychological  
10 Association, the American Sociological Association, the  
11 American Psychological Society, the Sociologic Practice  
12 Association, and the Pacific Sociologic Association.

13 Q. Have you ever served as a consultant to any law  
14 enforcement agencies?

15 A. Oh, yes, I have. Starting in nineteen seventy-nine I  
16 served as consultant to Marin County Sheriff's Department and  
17 then subsequent to that the office of the Attorney General of  
18 the State of California, the office of the Attorney General of  
19 the State of Arizona, the United States Department of Justice  
20 -- both the tax division and the criminal division -- the  
21 Prosecuting Attorney of Jefferson County, West Virginia, the  
22 Los Angeles District Attorney's office, the Internal -- that's  
23 not a law enforcement agency, I guess. The United States  
24 Attorney's office in West Virginia, the Thurston County,  
25 Washington, prosecutor's office, currently the State's

1 Attorney's office in Fort Lauderdale, Florida, and again for  
2 the United States Attorney's office in West Virginia.

3 Q. Have you ever testified on behalf of the prosecution in a  
4 criminal case?

5 A. I don't believe -- I'll have to look at the list of cases  
6 in which I've testified.

7 Q. Well, I'll go on to the next question.

8 Do you lecture to groups regarding the influence of  
9 police tactics in false confessions?

10 A. Yes, I do. I'm -- in fact I've been asked to -- in May  
11 of this year to -- at the request of the Supreme Court of the  
12 State of Florida -- been asked to address for a half day a  
13 judicial conference in Florida on the subject of false  
14 confessions.

15 Q. Have you been involved in both civil and criminal cases  
16 dealing with false confessions and confessions in general?

17 A. Yes, I have.

18 Q. How many -- excuse me -- how many cases dealing with  
19 confessions have you been involved in?

20 A. Confessions specifically thirteen -- I've testified  
21 thirteen separate times. I've been involved in many more  
22 cases. Much of the work that I do is consulting work that  
23 doesn't necessarily culminate in testimony. That's why I  
24 wasn't certain whether I had actually testified in this  
25 criminal matter. I'm scheduled to the week after next, but I

1 can't at this moment think of another example where I already  
2 have.

3 Q. Okay. Have you testified in court with regard to any  
4 confessions taken on the defense side?

5 A. Yes. Most -- most of the confession cases in which I've  
6 testified have been cases involving coerced or coerced false  
7 confessions and, therefore, my testimony has been principally  
8 for the defense in those cases.

9 Q. How many times have you been qualified as an expert in  
10 the area of influence and police interrogation?

11 A. Twenty-five times.

12 Q. Twenty-five times? In both state and federal courts?

13 A. Yes, sir.

14 MR. DAVIS: Your Honor, if I might -- the question  
15 was: Qualified as an expert in the area of influence and  
16 police interrogations -- can we break that down? I  
17 didn't hear anything in the background as far as police  
18 interrogation.

19 THE COURT: Can you break it down?

20 BY MR. STIDHAM:

21 Q. Have you been qualified as a expert by any court in the  
22 area of police interrogation tactics and influence on  
23 individuals during police interrogations tactics?

24 A. Yes. On influence in police interrogation in particular  
25 I've qualified and testified thirteen times. On influence in



1 general I've been qualified and testified an additional twelve  
2 times making a total of twenty-five.

3 Q. Okay. Have these been in both state and federal courts?

4 A. Yes, they have.

5 Q. Have you ever testified in the State of Arkansas?

6 A. Yes, I have.

7 Q. And where was that at?

8 A. In Fort Smith in federal court in a case brought by a  
9 young man and his family against a person named Tony Alamo who  
10 ran a cult group located in Fort Smith, and the case had to do  
11 with the beating of this child.

12 MR. STIDHAM: Your Honor, at this time we would ask  
13 that the witness be qualified as an expert in the area of  
14 police interrogation tactics and influence of people  
15 involved in police interrogations.

16 MR. DAVIS: Whether or not he's qualified as a  
17 expert is what we would like to address in voir dire.

18 THE COURT: Alright.

19 VOIR DIRE

20 BY MR. DAVIS:

21 Q. Doctor Ofshe, you are a social science professor at the  
22 University of California at Berkeley. Is that correct?

23 A. I'm a professor in the sociology department.

24 Q. Okay. And what -- so you teach sociology. Is that  
25 right?

1 A. I teach specifically courses in social psychology and  
2 courses on extreme techniques of influence including police  
3 interrogation.

4 Q. You are not a licensed psychologist, correct?

5 A. Ah, that's correct.

6 Q. Okay. You can't practice psychology in California or any  
7 other state, can you?

8 A. Ah -- no, I don't practice clinical psychology which is  
9 -- what is generally licensed.

10 Q. Okay. And would it be a fair statement to say that  
11 psychology is different from social -- sociology in that  
12 sociology deals with group activities?

13 A. No, that's a very general and unhelpful definition.  
14 Social psychology which is an area that I work in is an area  
15 that's represented in both disciplines and I'm a member of the  
16 professional association of both disciplines. Both  
17 disciplines maintain sub-sections called social psychology and  
18 social psychology deals with a very special set of topics that  
19 has to do with influence on individuals, decision making,  
20 attitude change, interpersonal and group pressure.

21 Q. Are you a licensed social psychologist?

22 A. It's not necessary to be licensed to be a social  
23 psychologist because I don't treat anyone.

24 Q. Is there such a thing as a licensed social psychologist?

25 A. No.

1 Q. Okay. In other words---

2 A. Because it does not engage in the treatment of people  
3 it's generally not licensed.

4 Q. Okay. So there are sociologists and there are people  
5 that hold themselves out to be social psychologists, correct?

6 A. People who are members of the requisite professional  
7 associations and members of the sub-sections that are  
8 specialities in social psychology and I'm a member of both and  
9 in each case as a social psychologist.

10 Q. How many states and how many courts have refused to  
11 accept you as an expert in this work?

12 A. No state has ever refused to accept me as an expert.

13 Q. How many courts?

14 A. There's one case in which a line of testimony to which my  
15 testimony would have been foundational was rejected. It has  
16 to do with whether or not a certain theory---

17 Q. Where was that?

18 A. That was in California.

19 Q. Okay.

20 A. That had to do with whether or not a certain line of  
21 testimony was appropriate for the insanity defense and in that  
22 case the judge barred that line of testimony.

23 Q. As far as -- what is it that you studied in relationship  
24 to this case?

25 A. In this case in particular I have studied the following

1 materials: The police reports and notes of Detectives  
2 Gitchell, Ridge, and Durham, the transcript of the first tape  
3 recorded interrogation of Jessie Misskelley, the transcript of  
4 the second tape recorded interrogation of Jessie Misskelley.  
5 I've listened to the tape recordings of both interrogations.  
6 I studied the transcript and the video recording of an  
7 interview of Buddy Lucas. I've studied the treatment records  
8 of Jessie Misskelley at East Arkansas Mental Health Center.  
9 The transcript of a hearing in which Detective Ridge sought  
10 his search warrants from Judge Rainey. I attended a hearing  
11 in this case on January the thirteenth, nineteen ninety-four  
12 at which I heard and saw the testimony of Detectives Allen,  
13 Durham Ridge, and Gitchell with respect to what occurred  
14 during the interrogation. And I subsequently reviewed the  
15 transcripts of that hearing and then I interviewed Jessie  
16 Misskelley on December the fifteenth, nineteen ninety-three,  
17 and have subsequently carefully reviewed, and studied, and  
18 analyzed the transcript of that interview.

19 Q. How long was that interview?

20 A. Three hours, more or less. It may have a bit more. It  
21 may have been a bit less. I don't have the -- I don't have  
22 that -- it might be helpful. It worked out to an eighty-seven  
23 page transcript.

24 Q. You talked with Jessie Misskelley for three hours. Is  
25 that right?

1 A. No. I talked with Jessie Misskelley for the length of  
2 time it took to produce this transcript here.

3 Q. And you reviewed testimony of the police officers?

4 A. I reviewed their reports. I reviewed the actual  
5 transcript of the one part of the interrogation that -- or the  
6 two parts of the interrogation that were tape recorded. I  
7 studied and analyzed their notes, studied and analyzed their  
8 testimony.

9 Q. And what scientific basis is it that you intend to give  
10 an opinion on?

11 A. Well, the first thing that's necessary is to try to get a  
12 clear picture of the history of the interrogation of exactly  
13 what happened step-by-step. Subsequently, that---

14 Q. --If you could---

15 A. Yes.

16 Q. What scientific basis and what scientific tests are you  
17 basing your opinion on that you -- that the defense is  
18 proposing that you testify to?

19 A. It is based on the literature on the subject of  
20 influence, and particularly what is known about techniques of  
21 influence, the conditions that lead up to coerced confessions.  
22 The analysis that I will do on this involves specifying the  
23 pattern, what happened during the interrogation---

24 Q. --What scientific basis is it based on? Not what your  
25 procedure is, but what scientific basis is your opinion

1 grounded in?

2 A. The opinion is grounded in the research on what is known  
3 about the conditions that lead up to coerced confessions.

4 There are patterns of conduct that are known to lead to  
5 coerced confessions. There are consequences that follow from  
6 those patterns that are generally used to identify a coerced  
7 confession. There are criteria that are used to judge whether  
8 or not a confession is coerced or is not coerced, and whether  
9 it is a confession that appears to be the product of influence  
10 or appears to be the product of memory.

11 Q. Again -- is that -- is that based on empirical studies?

12 A. Oh, yes.

13 Q. And those empirical studies would have to determine which  
14 confessions were coerced and which were not coerced in order  
15 for those studies to have any validity, correct?

16 A. Well, there are studies of confessions---

17 Q. Would you answer my question, please, sir? You would --  
18 you would have to determine -- someone would have to determine  
19 was a confession coerced or was it voluntary before those  
20 studies would have any validity?

21 A. The studies of confessions are often broken down into---

22 MR. DAVIS: Your Honor, could you ask him---

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

25 THE WITNESS: Okay.

1 THE COURT: If you can, answer yes or no. If you  
2 can't, just say, "It's not capable of being answered yes  
3 or no."

4 THE WITNESS: It's not capable of being answered yes  
5 or no. I could probably answer your question if you'll  
6 allow me to explain why it's not capable.

7 THE COURT: Well, I don't want to allow a long  
8 narrative discourse. If you can answer the question  
9 concisely then proceed.

10 BY THE WITNESS:

11 A. The validity -- the truth or falsity of a confession is  
12 certainly important and sometimes it's possible to know  
13 whether a confession was in fact true or false. There have  
14 been studies -- a lot of studies are done on what are called  
15 disputed confessions as opposed to undisputed confessions, and  
16 the undisputed confessions are more important because it is  
17 known whether or not the confession was true or false.

18 Q. Well, if your studies are based -- is there empirical  
19 data that you're basing your opinion on?

20 A. Yes.

21 Q. Okay. Those studies would have to say -- you would have  
22 to presume that a confession was coerced for those studies to  
23 have any validity, correct?

24 A. No. Sometimes one knows that a confession is false and  
25 therefore coerced because of -- of independent factors, such

1 as knowing -- eventually identifying who the real killer might  
2 be.

3 Q. But in those studies for those to have any value at all  
4 scientifically, somebody has to make a determination that the  
5 confessions were coerced or not, correct?

6 A. Not necessarily because we know the conditions that lead  
7 up to confessions that are undisputed where individuals give  
8 true confessions and do not recant them, and we know under  
9 other circumstances when people give false confessions which  
10 are subsequently proven to be false because the perpetrator is  
11 in fact caught.

12 Q. Well, let me ask you this: How would you characterize  
13 the situation where you said it was a false confession and a  
14 court determined that it was not a false confession, where  
15 would you categorize that?

16 A. I don't know that I've ever said that something was a  
17 false confession. I know I've testified as to whether  
18 something was coerced or not.

19 Q. So you -- as far as this talk previously about false  
20 confessions you don't deal in that area?

21 A. No. I -- the question suggested to me, you're asking me  
22 about a time when I testified in a court that a confession was  
23 false, and it was judged the other way and I don't believe  
24 that that's ever occurred.

25 Q. Have you not testified as to inaccurate contents of



1 confessions in a court and the jury disregarded that and ruled  
2 another way?

3 A. I testified I believe in one case in which I testified  
4 that in my opinion a particular confession was coerced and the  
5 confession was not suppressed and I've testified in other  
6 cases where it is my opinion that a confession was in fact  
7 coerced and the court found that way.

8 Q. Okay. Well---

9 MR. CROW: May we approach the bench, please?

10 THE COURT: Alright.

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

13 MR. CROW: Your Honor, is he qualifying this witness  
14 or is he cross examining him?

15 MR. DAVIS: Your Honor---

16 THE COURT: Well, I'm going to be honest, gentlemen,  
17 I'm real interested in knowing what a sociologist is  
18 going to testify to that would aid and benefit the jury  
19 and what is the scientific basis of that testimony. It  
20 seems to me that you've called this witness to give an  
21 opinion that the confession was coerced---

22 MR. STIDHAM: That is---

23 THE COURT: ---and that it was involuntary.

24 MR. STIDHAM: That's exactly right, your Honor.

25 THE COURT: And I think that -- that's a question

1 for the jury to decide and I'm not sure I'm going to  
2 allow him to testify in that narrow framework. I can see  
3 him having value testifying that these are common  
4 techniques employed by the police overrides one's free  
5 will. I found such and such of these conditions  
6 prevailing here and things of that nature, or maybe group  
7 dynamics of a cult.

8 MR. CROW: Your Honor---

9 THE COURT: But I'm not sure I'm prepared to allow  
10 him to testify that in his opinion it's coerced and  
11 therefore invalid.

12 MR. CROW: Your Honor---

13 THE COURT: I mean, what the hell do we need a jury  
14 for?

15 MR. STIDHAM: He's not going to testify whether or  
16 not the confession is false or true or whether the  
17 defendant is guilty or innocent. He's going to testify  
18 to the voluntary nature of the confession -- statement to  
19 the police -- whether or not it was coerced. That's an  
20 issue that the jury has to decide and that's what an  
21 expert witness is for, to help the jury decide these  
22 issues.

23 MR. DAVIS: No. No, Judge, that's where -- that's  
24 the real crux of the matter -- whether the confession was  
25 coerced or not, doesn't make -- whether it was the truth.

1 It's whether it was the truth and they're trying to get  
2 through the back door what they can't get through the  
3 front door.

4 MR. CROW: Disagree, your Honor. I---

5 MR. STIDHAM: Your Honor, that's not the correct  
6 statement of the law.

7 MR. CROW: The law recognizes---

8 THE COURT: No. The -- the -- the -- I mean, of  
9 course, I've ruled that it was voluntary. The jury, I  
10 guess, could go back and decide that it wasn't. If  
11 that's the issue you're talking about---

12 MR. CROW: That is what Arkansas law---

13 THE COURT: ---but the question of whether or not  
14 psychological ploys or tools were used to get a guilty  
15 person to give a true statement, now that's another  
16 issue.

17 MR. STIDHAM: Your Honor, that's not what he's going  
18 to testify to.

19 THE COURT: I don't know what you've got him here  
20 for. What is he going to testify to? I want to know.

21 MR. STIDHAM: Your Honor, he has an opinion as to  
22 whether or not the statements made by Mr. Misskelley to  
23 the West Memphis Police Department were voluntary.

24 THE COURT: Is that the way you're going to couch  
25 the question to him and is that the way he's going to

1 give his opinion. In my opinion they were involuntary.

2 MR. STIDHAM: Yes, your Honor.

3 THE COURT: That the police used subtle techniques  
4 to cause an innocent man to confess -- to confess.

5 MR. CROW: He's not going to say whether he's  
6 innocent or not, your Honor.

7 MR. STIDHAM: Your Honor, that's for the jury to  
8 decide.

9 MR. DAVIS: Judge, what we've got -- they're trying  
10 to get through the back door what they can't get through  
11 the front. It's the same way.

12 MR. STIDHAM: Your Honor---

13 THE COURT: Well, unfortunately they might be able  
14 to do that under the status of our law.

15 MR. DAVIS: Your Honor, the concern that I have here  
16 is that for there to be any empirical data and for him to  
17 actually claim to have any scientific basis, somebody  
18 somewhere has to categorize these cases as false  
19 confession cases or coercion cases. And what I'm saying  
20 is that this man along with his cohorts in the field have  
21 -- they label things to -- to back up or substantiate  
22 their particular theories, and -- and---

23 THE COURT: Well, I think all of those go to the  
24 weight of his -- weight of his testimony.

25 MR. STIDHAM: That's what -- that's what experts do.

1 If they want to bring an expert to counter them, they  
2 can.

3 THE COURT: I think you can call your man to say in  
4 his opinion that there was nothing that they did out of  
5 the ordinary and that the statement was freely and  
6 voluntarily made.

7 MR. STIDHAM: That's the correct statement of the  
8 law, your Honor.

9 THE COURT: Well, we might as well get on with it.  
10 I'm going to let him testify but I'm not about to let him  
11 testify that in his opinion Misskelley is innocent---

12 MR. CROW: No, your Honor.

13 THE COURT: ---that his confession was a lie and  
14 false. I'm not going to allow him to do that.

15 MR. STIDHAM: He has an opinion as to what---

16 THE COURT: Don't even try to ask him whether or not  
17 he has an opinion whether the confession was true or  
18 false, because I'm ruling that he cannot do that.

19 MR. DAVIS: I want him cautioned before we proceed  
20 any further so that he doesn't blurt that out.

21 MR. CROW: Your Honor, can you give us two minutes?

22 THE COURT: Okay.

23 Well, do you understand what I'm saying? I'm saying  
24 that there are areas where he has expertise that might be  
25 of some benefit and that is in the areas of group

1 dynamics, in the area of -- of possible coercive or -- or  
2 techniques that can be employed to make someone testify  
3 -- or -- or give a statement. Now, whether or not that  
4 statement is true or false is another matter.

5 MR. CROW: That's not what he's testifying about,  
6 your Honor.

7 THE COURT: And I'm not going to allow him to  
8 testify that, In my opinion these officers illegally  
9 exacted or coerced a confession from him either. I'm not  
10 going to allow him to testify to that.

11 MR. STIDHAM: That's the Court's job, your Honor.  
12 That's the jury job.

13 THE COURT: Well, that's exactly right. So what is  
14 he going to testify to?

15 MR. STIDHAM: He's going to testify as to -- he has  
16 an opinion that this -- the statements made by the  
17 defendant were involuntary and a result of psychological  
18 coercive tactics employed by the West Memphis Police  
19 Department.

20 THE COURT: Were involuntary in what sense?

21 MR. STIDHAM: That's what he'll testify to.

22 THE COURT: Well, I want to know. What -- in what  
23 sense?

24 MR. DAVIS: Could we move in chambers?

25 (RECESS.)

1 (RETURN TO OPEN COURT.)

2 THE COURT: Alright, ladies and gentlemen, you can  
3 have about a fifteen minute recess with the usual  
4 admonition not to discuss the case.

5 (RECESS.)

6 THE COURT: Alright, court will be in session.

7 Alright, ladies and gentlemen, you have heard a  
8 number of persons testify that have been presented and  
9 characterized as expert witnesses and perhaps will hear  
10 some more, and in that regard I'm going to give you an  
11 instruction of law that you should consider and it will  
12 again be read to you at the time all of the instructions  
13 are given.

14 An expert witness is a person who has special  
15 knowledge, skill, experience, training, or education on  
16 the subject to which his testimony relates. An expert  
17 witness may give his opinion on questions and  
18 controversies. You may consider his opinion in the light  
19 of his qualifications and credibility, the reasons given  
20 for his opinion, and the facts and other matters upon  
21 which his opinion is based. You are not bound to accept  
22 an expert opinion as conclusive, but you should give it  
23 whatever weight you think it should have. You may  
24 disregard any opinion testimony if you find it to be  
25 unreasonable.

1           Alright, gentlemen, let's proceed.

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

3           THE COURT: Sure.

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

6           MR. STIDHAM: I assume that the witness has now been  
7 qualified and I can go on with my questioning?

8           THE COURT: Again, I never make that statement. I  
9 just tell you to proceed.

10          MR. STIDHAM: Thank you.

11                       (RETURN TO OPEN COURT.)

12          THE COURT: Do you have any additional voir dire?

13          MR. DAVIS: No, sir, your Honor, not at this time.  
14 We'll reserve it for cross examination.

15          THE COURT: Alright. Alright, you may proceed.

16          MR. STIDHAM: Thank you, your Honor.

17                       CONTINUED DIRECT EXAMINATION

18 BY MR. STIDHAM:

19 Q.   How many confessions has you analyzed, Doctor?

20 A.   I've been requested to analyze a total of forty-eight  
21 separate interrogations leading to confessions.

22 Q.   Okay. Have you ever taken a coerced confession or a  
23 false confession from someone?

24 A.   Yes, I have.

25 Q.   Can you give us an example of that?



1 A. In one particular case I was called in by the prosecution  
2 with the putting together the investigation of what was  
3 believed to be a multiple murder and sex abuse crime case. In  
4 the course of my work on that case -- again at the request of  
5 the prosecution -- I had access to an individual who was  
6 confessing to all manner of heinous crimes.

7 In the course of my interviewing of him I began to become  
8 suspicious as to the validity of the confessions that he had  
9 been giving now for five months on a series of subjects. At  
10 that point after hearing from him what happened during the  
11 interrogation and certain other things about his reactions to  
12 the interrogation, I determined that there was a possibility  
13 that he had been falsely confessing and I determined to run an  
14 experiment.

15 I then invented a crime on the spot and told him that one  
16 of his sons and one of his daughters had said that he had done  
17 something in particular to them, and asked him if he could  
18 remember it. Initially he said, "No." He then started using  
19 the techniques that he had been using to try to remember these  
20 events and I simply allowed him to do that -- in fact, sent  
21 him away and asked him to continue doing this alone and within  
22 twenty-four hours using the techniques that he had learned in  
23 the course of his five month long interrogations, he produced  
24 for me the next day a three page written detailed confession  
25 including dialogue that supposedly happened during the crime

1 -- to a crime that never happened that I invented and that the  
2 daughter who was supposedly involved in it confirmed never  
3 happened.

4 I then concluded that this was a highly suggestible  
5 individual because I had now succeeded with very minimal  
6 effort in eliciting a false confession from him.

7 Q. Have you been ever -- excuse me -- have you been able to  
8 break down your work into percentages with regards to  
9 analyzing these confessions and the work you've done with  
10 confessions?

11 A. Yes, I have. Of the forty-eight separate interrogations  
12 I have been asked to analyze, fifty-five percent of the time  
13 my conclusion has been that the statement that was made was  
14 voluntary or it was impossible for me to make a determination  
15 and forty-five percent of the time that the particular  
16 statement that was elicited was either what's called a coerced  
17 compliant confession or what's called a coerced internalized  
18 confession -- these are two different types of confessions  
19 generally two different types of false confessions.

20 Q. Could you tell the jury the difference between these  
21 types of confessions?

22 A. In the literature on interrogation and confession it was  
23 recognized that there are two kinds of involuntary and false  
24 confessions. One kind is called coerced compliant. This is a  
25 -- an inaccurate -- that is to say false statement -- that

1 comes about because an individual can no longer stand the  
2 strain of the interrogation and knowingly gives a statement  
3 that they know to be untrue.

4 The other kind is much more complicated. It's called a  
5 coerced internalized confession and this kind of statement  
6 arises when an individual actually becomes convinced that he  
7 or she has committed a crime that they had nothing to do with.

8 The second kind of confession comes about out of the use  
9 of very special or very extraordinary influence techniques  
10 that operate in a particular way. It can occur by accident in  
11 the course of an ordinary police interrogation, but if it  
12 occurs certain things have to be present in the interrogation  
13 and they have to happen in a certain sequence in order to  
14 persuade someone that they've committed a crime of which they  
15 are innocent.

16 The far more common kind of coerced statement is the  
17 coerced compliant statement when the individual simply gives  
18 up and agrees to say whatever they need to say because they  
19 can no longer stand the strain of what's going on.

20 Q. Doctor, is it possible for police interrogation tactics  
21 to produce a false confession?

22 A. Yes. I don't know of any -- any researcher, any scholar  
23 in this area -- who works in this area who does not  
24 acknowledge that false confessions come about in the course of  
25 police interrogation, and in fact, a few years ago there was a

1 landmark study of miscarriages of justice in capital cases in  
2 American history. A study done by Professors Bideau  
3 (phonetic) of the University of Michigan and Ratalid  
4 (phonetic) of the University of Florida published in the  
5 Stanford Law Review.

6 In this study they identified three hundred and fifty  
7 examples of miscarriages -- false convictions in capital cases  
8 in American history. And using the standards that they  
9 developed to judge whether or not a particular conviction was  
10 a miscarriage of justice -- in other words an improper  
11 conviction -- they identified three hundred and fifty examples  
12 in which by their criteria, which often had to do with the  
13 real killer being found, the person ultimately being pardoned  
14 -- standards of that sort -- they identified three hundred and  
15 fifty examples where the jury had found someone guilty who was  
16 in fact innocent.

17 In that study nineteen percent of the miscarriages were  
18 caused by false confessions given by---

19 MR. DAVIS: Your Honor---

20 BY THE WITNESS:

21 A. ---the suspects..

22 MR. DAVIS: ---I have an objection to make and I  
23 think it would be more appropriate if I made it at the  
24 bench rather than---

25 THE COURT: Alright.

1 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT  
2 OF THE HEARING OF THE JURY.)

3 MR. DAVIS: The Court laid down certain ground rules  
4 and now we're talking about percentages in terms of false  
5 -- false confessions. We aren't talking about opinion.

6 THE COURT: I'm interpreting this as an -- as an  
7 attempt to -- to use coercive techniques on the jury to  
8 suggest to them that this is a false confession and that  
9 there is danger on their considering the confession and  
10 that it suggests to them that they have to be very  
11 careful not to make a three hundred and fifty error --  
12 whatever the percentages were.

13 Gentlemen, that's -- that's a -- I'm---

14 MR. FOCLEMAN: I thought this would -- what they did  
15 is exactly what the Court had told them not to do.

16 MR. STIDHAM: No, your Honor, I asked the witness if  
17 there were empirical scientific studies and he was simply  
18 relating those to the jury.

19 THE COURT: Well, I don't care. You're still making  
20 inferences that by these statements that this particular  
21 statement was false and untrue.

22 MR. CROW: Your Honor, if I can interject.  
23 Yesterday I objected to questions that -- where Mr.  
24 Holmes stated that ninety-nine percent were real, or  
25 something like that. That's empirical data that's -- now

1 the shoe is on the other foot.

2 THE COURT: Well, no, in that particular case I  
3 think you offered it or it came up through your all's  
4 testimony and he brought it out---

5 MR. CROW: No.

6 THE COURT: ---is the way I recall it.

7 MR. CROW: I don't think that's correct, your Honor.

8 THE COURT: Well, I may be wrong on that. This is  
9 totally different. This has done just exactly what I  
10 indicated I wasn't going to allow.

11 MR. DAVIS: Judge, and that's what's going to happen  
12 because of this witness as you surmised. He's very  
13 astute. He's very smart, and he's going -- he's going to  
14 slip around the ground rules and we're sitting here  
15 talking to a jury in terms of percentages of cases in  
16 which there's been a false confession.

17 THE COURT: I'm going to sustain the objection.

18 (RETURN TO OPEN COURT.)

19 THE COURT: Objection sustained.

20 MR. DAVIS: Your Honor, could we ask the jury to  
21 disregard this last -- to be admonished to disregard---

22 MR. STIDHAM: Your Honor, I would object to an  
23 instruction of that nature. The witness is merely  
24 relating scientific studies and empirical studies with  
25 regard to that issue.

1 MR. DAVIS: In an area---

2 MR. STIDHAM: I would be happy to move on and ask  
3 him about how he analyzes the---

4 MR. DAVIS: The concern we have, Judge, is we  
5 understood he was relating things that are outside the  
6 area of his expertise.

7 MR. STIDHAM: That's not at all the case, your  
8 Honor.

9 THE COURT: Go ahead. Move on to something else and  
10 I'll see.

11 BY MR. STIDHAM:

12 Q. Doctor Ofshe, are certain individuals more susceptible to  
13 coercive police tactics than others?

14 A. Generally, it's been found that individuals who are  
15 lacking in self-confidence, low self-esteem are more  
16 persuadable and also more likely to respond to coercive  
17 tactics. Individuals who are mentally handicapped are also at  
18 risk to responding to coercive and overly persuasive tactics.

19 Q. Can you tell the jury what it is that you do when you  
20 analyze a confession?

21 A. Ah, that -- that starts with determining whether or not  
22 the interrogation has been tape recorded. If the  
23 interrogation has been tape recorded in its entirety, then the  
24 analysis of the influence process during the interrogation is  
25 time consuming and -- is time consuming, but is fairly

1 straightforward. When police agencies have not tape recorded  
2 the interrogation, the problem becomes much more complicated  
3 because it becomes necessary to try to reconstruct the events  
4 of the interrogation from the available information. So that  
5 in a case such as this case in which part of the interrogation  
6 was recorded and most of it was not, it becomes necessary to  
7 first try to identify what actually happened in the  
8 interrogation and the order in which things happened to then  
9 relate that to the statements that are undisputed. That is to  
10 say that parts of the interrogation which are recorded so that  
11 one can hook up the analysis or hook up the history of the  
12 interrogation as it occurred in the unrecorded part but as  
13 reported on by the police officers involved as well as the  
14 suspect, in order to try to rebuild and get a picture of how  
15 the interrogation progressed from start to step-by-step-by-  
16 step, and the changes that occurred over the course of the  
17 interrogation.

18 Now, in this particular case this culminates in the two  
19 recorded statements which give us a great deal of information  
20 about what happened during the interrogation and illustrate  
21 certain things about the tactics that were used and the  
22 suggestibility of the suspect in terms of how he responded to  
23 particular tactics that are -- that are simply captured in the  
24 recorded part of the interrogation.

25 Then because it is -- has been reported on in the



1 literature as to the kinds of ideas that develop in people's  
2 minds in response to extremely pressured interrogations, I  
3 usually---

4 MR. DAVIS: Your Honor, at this time, if I may --  
5 first enter an objection. He keeps referring to "as  
6 reported in the literature". Can he be more specific  
7 about what he's referring to? I don't know if these are  
8 books he's written or if it's something from other  
9 sources.

10 MR. STIDHAM: Judge, that's exactly what I was  
11 trying to elicit from the witness before when he  
12 objected.

13 MR. DAVIS: Your Honor---

14 MR. STIDHAM: The scientific studies in this area  
15 that's what he was trying to testify about when the  
16 prosecutor objected.

17 MR. DAVIS: Your Honor, the -- if I may explain.  
18 The reason I objected was because he was going into  
19 scientific literature which as I understood it the Court  
20 has ruled was beyond his area of expertise and that's  
21 exactly why I wanted him to -- to be more specific  
22 because he keeps referring to the literature and if I  
23 don't know what it is, I don't know whether that  
24 literature is valid literature. I don't know if it's  
25 something he has expertise in, or I don't know if it's a

1 comic book.

2 THE COURT: Okay, I think my ruling was that it  
3 invaded the province of the jury and that it was an  
4 ultimate question for the jury that exceeded the scope of  
5 his capabilities. That was my ruling. But that was to a  
6 narrow portion of it.

7 I think what you're raising now -- if you're asking  
8 about the underlying data or information or scientific  
9 research that he -- he's utilizing, I think you're  
10 entitled to know that.

11 MR. STIDHAM: I'd be happy to---

12 THE COURT: However, I think you're entitled to  
13 bring that out on cross examination. So I'm going to let  
14 you develop it on cross examination.

15 You might have him refer to any treatise or any  
16 scientific journal or -- that he's referring to and when  
17 he says "literature", and then you can develop it  
18 further.

19 MR. DAVIS: Judge, one other thing. He -- he  
20 indicated -- as I understood it -- that his analysis  
21 would be based on a reconstruction of the period prior to  
22 the taped confession, and it's my understanding that that  
23 reconstruction would require him to presume facts not in  
24 evidence and to base that upon speculation and upon  
25 statements -- out of court statements made by other

1 individuals and we would strenuously object to him being  
2 able to give an opinion or to "reconstruct" something  
3 based on such speculative premises.

4 MR. STIDHAM: Your Honor, there's nothing  
5 speculative about it. In fact the rule is very clear  
6 that he can base his opinion on such things. We  
7 discussed that earlier.

8 THE COURT: I'm not sure I'm going to allow him to  
9 reconstruct, if that's what you're referring to. I'm  
10 going to allow him to testify based upon his learning,  
11 education, publications, and so forth in the field of  
12 social -- what was the field, Doctor?

13 THE WITNESS: Social psychology.

14 THE COURT: Social psychology. Okay, and I'm not  
15 real sure what that is, but I am real sure about what I  
16 told you I wasn't going to let in because that's for the  
17 jury to decide, and I'm not going to substitute this  
18 witness's opinion for theirs.

19 Alright, so let's proceed. You all know where we  
20 stand.

21 BY MR. STIDHAM:

22 Q. Let's back up to the scientific studies in this area,  
23 Doctor Ofshe, that you're familiar with with regard to  
24 influence in police interrogation tactics.

25 You mentioned the Stanford Law Review article. Are there

1 any other treatises or studies you can refer to?

2 A. Yes. The book you held up before is perhaps the  
3 authoritative work in the area at this point by Professor  
4 Gudjonsson and he cites numerous studies by himself by  
5 hundreds of other people that all contributes to the analysis  
6 of police interrogation.

7 Q. Are these theories and empirical studies commonly  
8 accepted by professionals in your field?

9 A. Yes.

10 THE COURT: Are they in universal acceptance?

11 THE WITNESS: The empirical studies are research  
12 based studies that people don't dispute the honesty of  
13 the researchers. They provide data. I think the data is  
14 accepted. The theories are not particularly esoteric, so  
15 that these are very data based studies. They have to do  
16 with studying the conditions, for example, under which  
17 individuals make the decision to confess when in fact  
18 they committed a crime. In other words, when  
19 interrogation is effective and when it elicits certain  
20 sorts of decisions, and they have to do with conditions  
21 that lead to statements that are coerced statements and  
22 in particularly---

23 MR. FOGLEMAN: Your Honor, I would like to object to  
24 this speech that he's making. It's not responsive to  
25 what the Court's question was which is whether this is

1 universally accepted and he never said yes or no, he  
2 just---

3 THE COURT: Well, I think I understand what he's  
4 saying, but I guess you're right. He didn't---

5 MR. FOGLEMAN: I didn't -- I didn't get -- I didn't  
6 catch him saying that, yes, it was universally accepted.  
7 I think he's being evasive.

8 THE COURT: Well, that might have been a real  
9 general question, too.

10 Can you answer yes or no and then continue with your  
11 explanation?

12 THE WITNESS: Yes, your Honor, they're universally  
13 accepted in the sense that they are data based and no one  
14 disputes the honesty of the researchers who report the  
15 data. The data is accepted. I then tried to go on to  
16 explain that the theories are not particularly esoteric  
17 arise from the data. So this is a very empirically  
18 grounded line of work.

19 THE COURT: Is there contrary work?

20 THE WITNESS: Pardon?

21 THE COURT: Are there contrary theories and contrary  
22 empirical data?

23 THE WITNESS: The -- the disputes would be about  
24 explaining why something happens rather than whether or  
25 not it happens. So that there might be different

1 theories about the impact. For example, how much is  
2 attributable to personality or how much is attributable  
3 to something else. But there are hair-splitting disputes  
4 if everyone agrees to the basic -- that the basic  
5 phenomena exists.

6 THE COURT: Alright. Go ahead.

7 BY MR. STIDHAM:

8 Q. Doctor, I believe you stated earlier what you had to look  
9 at in this case with regard to Jessie Misskelley?

10 A. Yes, I did.

11 Q. You read the transcripts of his statement to the police  
12 -- both statements?

13 A. Yes, I did.

14 Q. You've listened to the tapes?

15 A. Yes.

16 Q. You've also heard the officers testify at a previous  
17 hearing?

18 A. Yes, I did.

19 Q. Have you formed an opinion with regard to the specific  
20 issue of the voluntary nature of the defendant's statements to  
21 the police?

22 A. Yes, I have.

23 Q. And what is that opinion?

24 THE COURT: Wait just a minute. Approach the bench.

25 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT

1 OF THE HEARING OF THE JURY.)

2 THE COURT: I'm not sure that's an appropriate  
3 question.

4 MR. CROW: I thought that's---

5 MR. STIDHAM: I thought that's what we---

6 THE COURT: No. I mean, are we going to start  
7 calling sociologists and psychologists to second guess a  
8 court?

9 MR. CROW: How about, your Honor---

10 THE COURT: Are we going -- are we going -- I mean,  
11 that -- I've already ruled it was voluntary. Now, am I  
12 going to let a witness get up here and contradict my  
13 ruling?

14 MR. STIDHAM: Kagebein versus State, your Honor.

15 THE COURT: That's not what Kagebein holds---

16 MR. STIDHAM: Your Honor---

17 THE COURT: And that is a jury issue granted.

18 MR. STIDHAM: Yes, sir.

19 MR. DAVIS: And the question is, obviously the  
20 Court's given an expert opinion regarding that and we  
21 can't bring that out to the jury.

22 THE COURT: No.

23 MR. DAVIS: And it's based on the same thing. It's  
24 based on your review of those facts and evidence and we  
25 can't bring that out.

1 MR. CROW: Your Honor, if I -- would the question be  
2 allowed, have you reached an opinion as to whether the  
3 statement was coerced.

4 MR. DAVIS: That's the same---

5 MR. CROW: That's one of the two things we were  
6 talking about awhile ago. I'm just trying to figure out  
7 what's going to work here, your Honor.

8 THE COURT: Well, my notion of his testimony is that  
9 he can -- he can testify as to recognizable areas of --  
10 of -- of influence, of suggestion, but to give an opinion  
11 that would totally supplant the jury's function in making  
12 that decision, I'm not going to allow it.

13 MR. STIDHAM: Judge, didn't we talk about this issue  
14 a minute ago when you said you would allow him to testify  
15 as to whether or not the statements were voluntary?

16 THE COURT: No. If I said that I didn't mean it  
17 because -- I don't think I did.

18 MR. CROW: Your Honor, it would appear to me -- I  
19 just want to make sure I understand what the Court  
20 appears to be saying -- is that he can lay out what he  
21 bases his opinion on, but not give his opinion. I  
22 mean---

23 MR. DAVIS: Your Honor, we were clear on this.

24 THE COURT: Well, I think that's what he can do. I  
25 think he can talk about the general principles that are



1 applied, the general notion or concepts in that area in  
2 that field, but I -- I -- to allow him to testify that,  
3 in my opinion the confession was involuntary does two  
4 things.

5 It -- one, it -- it goes to the issue that the jury  
6 will have to decide. Two, it directly refutes the ruling  
7 the Court's already made.

8 MR. STIDHAM: Your Honor, an expert in a medical  
9 malpractice case testifies as to whether or not there was  
10 negligence on the part of the treating physician.

11 THE COURT: That's a little bit different.

12 MR. STIDHAM: Well, I don't see any difference at  
13 all, your Honor.

14 MR. DAVIS: It is very analogous to a child abuse  
15 situation where a doctor can testify, I found these  
16 factors and these factors, they sometimes exist when this  
17 happens, but they can't say, in my opinion sexual abuse  
18 occurred.

19 THE COURT: It's just like the Johnson case on the  
20 rape of that child. I'm going to allow him to testify  
21 right up to the point of where he's giving an opinion or  
22 inference that it was involuntary -- that it was coerced.

23 MR. STIDHAM: Can he use the word coercive?

24 THE COURT: It's the same thing.

25 MR. STIDHAM: Your Honor, the jury is here to decide

1 the voluntariness---

2 THE COURT: That's exactly right and he's not, and  
3 that's my ruling.

4 MR. STIDHAM: This expert is here to offer an  
5 opinion with regard to that issue. It will assist the  
6 trier of fact in determining that issue. It's for the  
7 jury.

8 THE COURT: I'm not going to allow him to testify on  
9 that opinion. You can make an offer of proof if you  
10 want.

11 MR. STIDHAM: Your Honor, please -- please tell me  
12 what it was that I could ask him a few minutes ago that I  
13 don't understand I can ask him now.

14 THE COURT: I just told you.

15 MR. STIDHAM: I can ask him what?

16 THE COURT: You can ask him to talk about the facts  
17 and circumstances, the conditions that he observed and  
18 that he saw these factors for what the police did, that  
19 they -- that they're suggestive techniques. Those are  
20 the kinds of things I'm going to allow him to testify to.  
21 But I'm not going to allow him to give that ultimate  
22 opinion, and I know what the rules say, and I'm saying  
23 that our Court will adopt the modification that the  
24 federal court made, and that you're trying to get this  
25 witness to supplant the jury and to become the jury on

1           that issue. I'm not going to allow it.

2           MR. DAVIS: Judge, another thing for the record, his  
3           opinion on that is based in large part on what the  
4           defendant told him.

5           THE COURT: I understand that. That's another basis  
6           for it.

7           MR. STIDHAM: Your Honor, will you note our  
8           objection and allow us to---

9           THE COURT: Sure.

10          MR. STIDHAM: ---make an offer of proof?

11          THE COURT: Yes. You're making a record now.

12          MR. CROW: In that case if this is our offer, it  
13          needs to be shown on the record that his opinion would be  
14          that it was -- however the question was worded either  
15          involuntary confession or coerced confession -- that is  
16          how he would testify.

17          MR. STIDHAM: I want to make sure I'm crystal clear.  
18          I want to follow the Court's order to a tee. Can I ask  
19          this witness whether or not any of the tactics employed  
20          by the police in this interrogation were coercive or  
21          psychologically overbearing?

22          MR. DAVIS: Based on what he heard in their  
23          testimony.

24          THE COURT: Yes, I'll let you ask those questions.  
25          But the difference is you're asking him whether or not

1 this was involuntary and allow him to say, In my opinion  
2 it was involuntary -- well, what does involuntary mean?  
3 Does that mean the State -- or the officers did something  
4 impermissible, illegal -- there are a number of things in  
5 the psychological area and the sociological area that the  
6 police could do that are perfectly permissible.

7 Psychological techniques are not necessarily improper or  
8 wrong. From a psychologist's standpoint, he might say,  
9 Well, by using these subtle techniques they caused him to  
10 -- to confess. That doesn't mean that they're  
11 involuntary. It means that they're good techniques. So  
12 it means a lot of different things, and I'm not---

13 MR. STIDHAM: Am I allowed to ask the question---

14 MR. FOGLEMAN: Your Honor, for the record, what this  
15 person is saying from a standpoint of a psychologist it  
16 might be involuntary in the sense that the person didn't  
17 want to say it, but it doesn't mean in a legal sense that  
18 it's involuntary, and for that reason we would also---

19 THE COURT: Well, that's what I was trying to  
20 enunciate just a minute ago.

21 MR. STIDHAM: Your Honor, after I ask that question  
22 we would like to make an offer of proof.

23 THE COURT: I told you I would let you ask that last  
24 question.

25 MR. DAVIS: Judge, that is premised on what he's

1 read in their transcript of that -- read or heard him  
2 testify to.

3 THE COURT: Yes, that's correct.

4 MR. STIDHAM: That's what I just asked him, Judge.

5 THE COURT: Alright. I'll allow that.

6 (RETURN TO OPEN COURT.)

7 BY MR. STIDHAM:

8 Q. Doctor Ofshe, I need to rephrase the question for you.

9 Do you have an opinion as to whether or not some of the  
10 interrogation tactics employed by the police against Mr.  
11 Misskelley were coercive in nature or overborne his will?

12 A. Yes, I do.

13 Q. Could you tell the jury what that opinion is?

14 MR. DAVIS: Your Honor, I -- wait -- wait -- wait.  
15 We -- I hate to object and I apologize for this, but the  
16 Court just told Mr. Stidham---

17 MR. STIDHAM: That I could ask that question.

18 THE COURT: Well---

19 MR. DAVIS: He knows---

20 THE COURT: ---I think the question grew, but---

21 MR. DAVIS: It sure did. Your Honor, we would  
22 object to that question and we would object to that  
23 response. He knew what the question was and he went  
24 ahead and extended it further beyond what the Court has  
25 instructed.

1 MR. STIDHAM: I -- I asked your Honor if I could ask  
2 that question and I understood that your Honor said I  
3 could ask that question.

4 THE COURT: Well, you lengthened it to some extent,  
5 but I'm not going to comment any further on that. I  
6 don't need to.

7 Alright, ladies and gentlemen, you're going to be  
8 instructed to disregard the last question and the last  
9 answer.

10 And, gentlemen, my ruling is is that this witness  
11 will not be allowed to testify as to the ultimate jury  
12 issue. That's solely and only the province of the jury.  
13 He may testify as to scientific tools, methods, notions  
14 that he may possess and it will be limited to that. I  
15 think we've outlined that enough up here that I don't  
16 need to go on any further.

17 MR. STIDHAM: Your Honor, can I write the question  
18 down and ask your Honor to approve it before I ask it?

19 THE COURT: Write it down and see if they agree to  
20 it and then give it to me, then we'll get on with it.

21 MR. STIDHAM: May I have a moment, your Honor?

22 THE COURT: Yes.

23 MR. STIDHAM: I can write better sitting down.

24 Your Honor, may I approach the bench?

25 THE COURT: Sure.

1 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT  
2 OF THE HEARING OF THE JURY.)

3 MR. STIDHAM: I hope you can read my writing.  
4 (HANDING TO THE COURT.)

5 THE COURT: (EXAMINING.) I'll struggle through. I  
6 think I'll go along with that.

7 MR. STIDHAM: Thank you.

8 THE COURT: Have you got any objection to that?

9 MR. FOGLEMAN: Your Honor, that's exactly what you  
10 told him not to.

11 THE COURT: Well, not really. Let me -- just a  
12 minute. Let me see what I can come up with.

13 Let's take a ten minute recess, ladies and  
14 gentlemen, with the admonition not to discuss the case.

15 (RECESS.)

16 (THE FOLLOWING HEARING WAS HELD OUT OF THE PRESENCE  
17 OF THE JURY.)

18 THE COURT: Let the record reflect this is out of  
19 the hearing of the jury and it's for a proffer of proof.

20 MR. DAVIS: While we're here, can we see that  
21 seventy-eight page confess -- or statement that he has  
22 that's never been provided to us through discovery?

23 THE COURT: Well, I think you're entitled to it, yes  
24 -- if it's going to be used.

25 MR. STIDHAM: Your Honor, we would object to that.

1 It's not going to be used. The Court ruled that it  
2 wouldn't be used.

3 THE COURT: It will be used if he's going to use it.  
4 If he's going to refer to it and relate to it.

5 MR. DAVIS: Well -- well---

6 MR. STIDHAM: It won't be for the jury to see and  
7 have reference to.

8 THE COURT: Well, I don't know.

9 MR. FOGLEMAN: It's part of the basis of the  
10 defense.

11 MR. STIDHAM: This is a proffer, your Honor, an  
12 offer of proof.

13 MR. CROW: The Court---

14 MR. STIDHAM: But the jury's not going to see it.

15 MR. CROW: I believe the Court ruled that he would  
16 -- basically his opinion is based on the undisputed  
17 things these officers said. So if anything---

18 MR. FOGLEMAN: Well, if that's the case, if it's  
19 only on the undisputed things, he's not going to have  
20 anything coercive there to do. Isn't that right, Mr.  
21 Ofshe?

22 THE WITNESS: No, I think you ruled -- as I remember  
23 -- you ruled that this is part of the basis for my  
24 opinion -- the interview I did with Jessie.

25 THE COURT: Yes, that's what I---



1 MR. FOGLEMAN: Mr. Ofshe, could I ask a question?  
2 Isn't it true that if you exclude what the defendant  
3 told you that you don't find anything coercive, do you?

4 THE WITNESS: Not true.

5 THE COURT: Okay. Let's -- let's do this in some  
6 order.

7 Go ahead if you want to make a proffer of proof and  
8 let's be sure that I know what I'm excluding and what --  
9 that I know what you're attempting to put in and then  
10 maybe it'll change my opinion. I don't know.

11 PROFFER OF PROOF

12 BY MR. STIDHAM:

13 Q. Doctor, have you formed any opinions with regard to this  
14 case?

15 A. Yes, I have.

16 Q. Could you tell the Court your opinion?

17 A. That the statement made by Jessie Misskelley was a  
18 product of the influence tactics brought to bear on him, and  
19 that it overbore his initial stated intention to maintain that  
20 he had nothing to do with this crime and was not there, and  
21 that it was a process of influence brought to bear represented  
22 by the interrogation tactics that progressively changed his  
23 statements about that subject.

24 Q. Okay. Were there any other tactics in particular that --  
25 that you thought were important?

1 A. The interrogation forms a process in which one step  
2 builds on the preceding step. And so, for example, the  
3 interrogation changes dramatically prior to and then after the  
4 polygraph -- I assume it's all right at this point for me to  
5 discuss the polygraph.

6 THE COURT: Yes, since we're outside the presence of  
7 the jury.

8 BY THE WITNESS:

9 A. The poly -- the polygraph as used in this  
10 interrogation---

11 Q. First of all, Doctor, are you familiar with Mr. Holmes'  
12 report on the polygraph?

13 A. Yes, I am.

14 Q. Okay.

15 A. The polygraph as used in this interrogation has two  
16 effects. One based on the opinion formed by the polygrapher  
17 -- which as I'm aware Mr. Holmes says was an inappropriate  
18 opinion -- that Mr. Misskelley was "lying his ass off." That  
19 that created the circumstances under which the interrogators  
20 could shift to a -- an accusatory interrogation, one in which  
21 maximum pressure is brought to bear on the suspect and they  
22 then did precisely that.

23 The second effect of the polygraph is that Mr. Misskelley  
24 was told that there existed this machine -- scientific machine  
25 that was recording that he had done something that he knew he

1 had not done. While Mr. Misskelley reported to me that he did  
2 not believe the polygraph the fact that -- the fact that he  
3 was told that contributed to his sense of helplessness that he  
4 had which developed over the course of the interrogation.

5 In conjunction with the other tactics and the other  
6 procedures of the interrogation the polygraph played an  
7 important role in swaying the influence process that was the  
8 entire interrogation and culminated with the two recorded  
9 statements.

10 Q. What effect did the diagram -- the circle diagram, the  
11 photographs of the body and the playing of the tapes have in  
12 your analysis?

13 A. Those particular techniques as testified to by the police  
14 officers and as I would understand them to fit in police  
15 interrogations so far as I -- I understand police  
16 interrogations and have studied them -- the technique of using  
17 the circle is an important technique because in this  
18 particular interrogation and consistent with what the officers  
19 say, that the technique was not being used to try to suggest  
20 that Jessie Misskelley that he was a suspect who was believed  
21 to be culpable but rather than he possessed information that  
22 was vital to the case and that the offer that was communicated  
23 through that was an offer to join the police.

24 Mr. Misskelley in my interview with him when I asked him  
25 about the impact of the circle technique, did not fully

1 comprehend what would follow if you could not get out of the  
2 circle. He simply did not understand what the consequences  
3 would be. The extent to which he could understand that was  
4 characterized by him in the interview I did. He knew that it  
5 was bad. He knew that it was a place where he did not want to  
6 be. And he knew that if he simply conformed -- and that is to  
7 say to agree with the police -- that they would take him out  
8 from the center of the circle and they could join him.

9 Over the course of the interrogation as the interrogation  
10 became accusatory and the offer for safe harbor was made using  
11 the circle technique as what then happened after the circle  
12 technique was used and based on my analysis of the sequence of  
13 the interrogation, based on the notes -- the contemporaneous  
14 notes of the interrogation by Detective Ridge together with  
15 the testimony of the police officers -- it's my opinion that  
16 that circle technique probably occurred early in the  
17 interrogation. It was then followed by an hour and a half of  
18 intense pressure brought to bear on Mr. Misskelley in which he  
19 was told repeatedly when he said -- first he would often say  
20 that he wanted to go home and he was told he could not go  
21 home, that's what Mr. Misskelley reports, which for my  
22 purposes contributed to the sense of helplessness that there  
23 was no way to escape these pressures.

24 Over the course of this hour and a half we have Detective  
25 Ridge's notes which indicate that Mr. Misskelley was now

1 beginning to talk about the existence of a satanic cult, was  
2 giving the detective the kinds of statements that would  
3 implicate Damion and Jason which it is my opinion that the  
4 purpose of the entire interrogation and particularly the use  
5 of the circle technique. The contemporaneously notes  
6 illustrate the statement that Mr. Misskelley was successively  
7 giving that were statements that were damning to Damien and  
8 Jason. This according to Mr. Misskelley was coupled with  
9 repeatedly being asked questions about the facts of the crime  
10 and every time he would guess something and it would be an  
11 incorrect guess even what was known about the facts of the  
12 crime, Detective Ridge would be sitting there shaking his head  
13 no indicating that this was the wrong answer.

14 This was repeated on several subjects and Mr. Misskelley  
15 was continually pressured in this way. Mr. Misskelley  
16 describes that what he learned to do was to feed back to the  
17 interrogators what they were telling him happened and he  
18 sought to avoid making mistakes because when he made mistakes  
19 they would make him go back through the entire story and they  
20 would not believe him when he repeatedly told them that he was  
21 working with Rickey Deese that day and he knew nothing about  
22 the crime.

23 Those repeated refusals to believe his statements about  
24 where he was contributed again to his sense of helplessness.

25 Then the picture technique and the tape recording was

1 used. According to the testimony of Detective Gitchell and  
2 Detective Ridge the purpose of using -- at least Detective  
3 Gitchell on this point -- the purpose of using the picture was  
4 to get a response from Mr. Misskelley. The object in the  
5 course of an interrogation would have been -- and this is  
6 still at this point -- for someone whose principal interest to  
7 the interrogators to obtain statements against another, the --  
8 the technique is showing a group of photographs of a murdered  
9 boy was designed to put additional pressure on Mr. Misskelley  
10 and it succeeded and there are descriptions in the testimony  
11 of Detective Gitchell and Detective Ridge and the description  
12 that I obtained from Mr. Misskelley about his reactions to the  
13 use of the picture. All of those descriptions include Mr.  
14 Misskelley's becoming transfixed, terribly upset by the  
15 picture, staring at it, not responding to other questions, Mr.  
16 Misskelley adds that it was a horrible picture and he began to  
17 cry. He became increasingly upset in immediate response to  
18 the use of the picture. That was followed by the audio tape  
19 of a little boy's voice saying the words that the little boy  
20 said.

21 Subsequent to that, Mr. Misskelley stated that -- in  
22 effect he stated -- and the very words are quoted by Detective  
23 Gitchell and similar words are used by Detective Ridge -- "I  
24 want out." I have the exact quote and what I just quoted is  
25 not exact either, but the statement that was made, was the

1 statement "I want out." A reference to the offer contained in  
2 the circle that, I'll do what you want in order to escape this  
3 continuing relentless pressure of the interrogation.

4 Subsequent to that and immediately following that  
5 according to Detective Gitchell he got the tape recorder and  
6 would get the first recorded statement. The person -- it's  
7 possible now to analyze the influence process contained in the  
8 first recorded statement. We now have the first undisputed  
9 record in the case and in that part of the interrogation it's  
10 possible to demonstrate how relentless, the leading,  
11 suggestions, and an unwillingness to accept anything other  
12 than what the police knew the facts of the crime to be. This  
13 was continually suggested to Mr. Misskelley and we can chart  
14 his moving step-by-step-by-step from an inaccurate statement  
15 to a statement that was put in his mouth by the police and the  
16 tape recorded part of it illustrates that. And I'm prepared  
17 to go through that step-by-step to illustrate how that  
18 happened.

19 Even then there were still gross inaccuracies in the  
20 statement. The next thing that happened is that Mr.  
21 Misskelley is left alone and Detective Gitchell meets with  
22 Prosecutor Fogleman and some of the specific gross  
23 inaccuracies in the -- the recorded statement are now  
24 discussed and according to Detective Gitchell's statement,  
25 Prosecutor Fogleman sends him back in to work on these

1 particular statements.

2 And then we can look at the second statement and show how  
3 precisely that happened and how again Jessie Misskelley is  
4 conforming to the demand placed on him and is changing his  
5 statement from direct response to suggestions and direct  
6 instructions by Detective Gitchell. There are illustrations  
7 of interrogation tactics in the second part of the statement  
8 that illustrate what I'm talking about and also illustrates  
9 Mr. Misskelley's strategies of simply parroting back to the  
10 police what they told him in order not to displease them and  
11 not to be subject to additional questions.

12 That's the outline of my testimony and analysis of the  
13 process of influence in this interrogation.

14 Q. And you are prepared to go through step-by-step and cite  
15 page numbers of the statement to demonstrate this?

16 A. Page numbers of every statement, on every point,  
17 statements made by the police officers, statements made by Mr.  
18 Misskelley. These are the facts that I deal with.

19 Q. Have you also formed an opinion as to the classification  
20 of his confession?

21 A. I would classify this confession as a coerced compliant  
22 confession and for a number of other reasons having to do with  
23 other specific statements in the confession statement and  
24 gross inaccuracies in the scenario that Mr. Misskelley  
25 produces, I would reach the opinion that this interrogation



1 was far more -- these statements are far more likely to be the  
2 product of influence than they are based on any memory that  
3 Mr. Misskelley has of the crime.

4 THE COURT: You want to ask him more?

5 MR. STIDHAM: Yes, your Honor, I---

6 THE COURT: Go ahead.

7 BY MR. STIDHAM:

8 Q. Are there any other opinions you have, Doctor, with  
9 regard to the interrogation itself?

10 A. I don't believe so. I have a lot of specific  
11 illustrations that I've been talking about.

12 Q. I understand that you also have some experience and  
13 training with regard to cult---

14 A. Yes, I do.

15 Q. ---and you won a Pulitzer Prize with regard to working in  
16 cults?

17 A. Yes, I did. I shared one, yes.

18 Q. And is it true that you have worked internationally with  
19 regards to satanic cult homicides or -- or let me rephrase  
20 that -- to allegations of satanic ritualistic abuse or  
21 homicides?

22 A. I've consulted internationally, if Canada counts, ah,  
23 specifically on an occult inspired murder which was a real  
24 occult inspired murder.

25 I've consulted on other cases in which there had been

1 allegations of the existence of a baby murdering satanic cult  
2 of the sort that is based on all the available evidence, based  
3 on the studies done by the F. B. I., appear to be totally  
4 without foundation insofar as there have now been over three  
5 hundred separate investigations of allegations of child  
6 murdering, child sexual abusing, secret satanic cults. None  
7 of these allegations have resulted in any evidence that  
8 suggests that these groups exist. This is a conclusion by  
9 Kenneth Lanning of the F. B. I.

10 On the other hand, there are in my experience what I  
11 would call youth culture groups that get interested in the  
12 occult and these are the groups that are responsible for  
13 graffiti, responsible for the undisputed animal mutilations  
14 that sometimes occur.

15 The dividing line is between the murderous baby killing  
16 satanic cults and the youth culture groups and the occasional  
17 occult inspired criminal groups that in fact do exist. So  
18 there's both a reality to it and then there's a mythical level  
19 to it.

20 Q. Have you -- do you have an opinion of whether or not the  
21 homicides in question Mr. Misskelley is charged with or have  
22 anything to do with satanic rituals or anything of the occult?

23 A. As far as I am able to tell from what I know of the  
24 evidence, there is no evidence that suggests that there is an  
25 occult element to this and as far as the satanic panic tips

1 that are given to the police, my understanding is that none of  
2 them have panned out. None of them has produced corroboration  
3 and that they have been investigated and this is what one  
4 would expect if this is an example of a satanic hysteria that  
5 it's picked up by the police. This sort of thing happens,  
6 when it happens, when there is a particularly heinous crime  
7 for which there is no obvious explanation. This is when these  
8 sorts of allegations are likely to surface.

9 Q. What are you basing your opinion on in this case -- that  
10 opinion with regards to this not being a cult killing?

11 A. What I know about the follow-up, the leads that suggested  
12 that there existed some cult, that Jessie Misskelley or anyone  
13 else was a member of. For example, during his interrogation,  
14 Mr. Misskelley provided a list of people who were supposedly  
15 members of the cult, and according to the testimony of  
16 Detective Ridge who followed that up was knowledgeable at the  
17 time of the deaths, none of those people confirmed the  
18 existence of a cult.

19 Apparently there is one individual who claims to have  
20 attended a cult meeting. Apparently her testimony also -- or  
21 her report is equally unconfirmed. As far as I can tell there  
22 is an absence of hard information suggesting that such a  
23 satanic cult exists in this area and in addition, I know of  
24 nothing about the crime scene that suggests that this is an  
25 occult ritual killing.

1 Q. Thank you, Doctor.

2 THE COURT: Do you want to add anything?

3 MR. DAVIS: Judge, my concern at this point and I  
4 got lost in that monologue there---

5 THE COURT: Don't feel too bad.

6 MR. DAVIS: ---okay. I got lost back there about  
7 the time he got to the first taped confession, but at  
8 least prior to that time what I heard was Mr. Ofshe  
9 talking about what Jessie told him in a statement. And,  
10 Judge, there are two things about that.

11 Number one, what he has done is taken these -- a  
12 statement that we've never seen, we weren't privy to, and  
13 he is now going to paraphrase that statement -- or so-  
14 called statement -- to the jury coming from a so-called  
15 expert in some official capacity to be the basis for why  
16 he finds police coercion.

17 Now, number one, we -- we objected to him coming in  
18 as an expert in the first place, but assuming he is an  
19 expert, if he can limit his -- his testimony to what he  
20 heard the officers say in their testimony, of what he  
21 read in a transcript about what the officers said, but  
22 when he starts saying, "Jessie told me at this point the  
23 officer really bore down on him and they spent another  
24 hour and a half with him. This made him increase his  
25 feelings of helplessness."

1           Now, your Honor, we can't cross examine Jessie if  
2           his voice is coming through the body of Doctor Ofshe, and  
3           that's what they're basically trying to do and that's  
4           clearly inappropriate. He -- there is no possible way  
5           that a person in his position can rely on a statement he  
6           took from a person and then paraphrase it and translate  
7           it to a jury. That's hearsay. It doesn't matter whether  
8           it comes from him or whether it comes from someone else.  
9           That's hearsay testimony.

10           He can say what he observed. He can testify how  
11           that affects his opinion. He can list the facts that  
12           indicate coercion. If he goes beyond that, your Honor,  
13           the State feels that he's clearly gotten into a province  
14           that's -- that's the sole province of the jury -- in the  
15           area that's the sole province of the jury.

16           THE COURT: Alright, I've heard the proffer of proof  
17           and it can be submitted as a proffer of proof, and it  
18           would be my finding that the information elicited and the  
19           testimony proffered not only embraces the ultimate issue  
20           or facts for the jury to consider, that it in effect  
21           tells the jury what their finding should be.

22           And I'm -- I'm going to apply the rule in Gramling  
23           versus Jennings, 274 Ark. 346. I'm going to apply the  
24           additional phrasing adopted by Congress in nineteen  
25           eighty-four to Rule Eight Oh Four that says explicitly,

1 "No expert witness testifying with respect to the mental  
2 state or condition of a defendant in a criminal case may  
3 state an opinion or inference as to whether the defendant  
4 did or did not have the mental state or condition  
5 constituting an element of the crime charged or a defense  
6 thereof."

7 And I think that applies here and I think the term  
8 -- just reading Rule Seven Oh Four alone, it says,  
9 "Testimony in the form of an opinion or inference  
10 otherwise admissible is not objectionable because it  
11 embraces an ultimate issue to be decided by the trier of  
12 the fact."

13 The question is: What does embrace mean and our  
14 court tried to define it in two or three cases. One of  
15 them was that Gramling case. Another one is Aetna  
16 Casualty -- that was a civil case.

17 I just think under the facts and circumstance of  
18 this case, to allow him to testify in the fashion  
19 tendered would be eliminating the jury and accepting an  
20 expert's opinion. So the opinion of the jury is what's  
21 significant to me.

22 There are some things that he testified to such as  
23 the occult activity that he might properly testify to.  
24 There are other things that I would allow him to testify  
25 to that would be in the general nature of his expert

1 knowledge, but to give that final and conclusive opinion  
2 in -- in the fashion that it's elicited -- says, Jury,  
3 you must find this way - and I'm not going to allow it.

4 MR. STIDHAM: Your Honor, I understand the Court's  
5 ruling.

6 THE COURT: I -- I -- everything -- everything  
7 you've just said, however, I submit would be an  
8 appropriate argument that you may make to the jury at the  
9 proper time, and that an expert in his capacity normally  
10 is employed to consult with and discuss trial strategies  
11 and techniques with counsel. And if I allowed him to  
12 testify based upon a -- you say a seventy-five page  
13 statement taken from the defendant would be doing just  
14 exactly what the prosecutor says -- allowing him to  
15 testify as a surrogate.

16 MR. STIDHAM: That's why we did it as a proffer,  
17 your Honor.

18 THE COURT: Yes. Well, I'm not going to allow that.

19 MR. STIDHAM: Your Honor, I understand your ruling  
20 and we would just ask the Court to note our objections  
21 pursuant to Rule Seven Oh Four with regard to our  
22 interpretation as we discussed earlier with regard to  
23 Rule Seven Oh Four.

24 THE COURT: We just made a record.

25 MR. STIDHAM: Thank you, your Honor.

1 MR. CROW: Thank you, your Honor.

2 MR. FOGLEMAN: Your Honor, we would like to make as  
3 a part of the record State versus Luff, 621, N.E.2d 493,  
4 which is an Ohio case in which the defendant (sic) was  
5 found not qualified to testify and also United States  
6 versus Fishman it's---

7 THE REPORTER: You said, "defendant." Did you mean  
8 witness?

9 MR. FOGLEMAN: He was found not qualified to testify  
10 as a witness, right. And also State versus Fishman,  
11 which is in the Northern District of California 743  
12 F.Supp. 713.

13 THE COURT: Okay.

14 MR. STIDHAM: Your Honor, likewise, we would like to  
15 offer two examples of when Doctor Ofshe was allowed to  
16 testify as an expert in this exact area and we would like  
17 to submit those exhibits.

18 THE COURT: Alright, they may be received.

19 (DEFENDANT'S EXHIBITS NUMBER EIGHT AND NUMBER NINE  
20 ARE RECEIVED AS A PROFFER.)

21 (STATE'S EXHIBITS NUMBER ONE HUNDRED SIX AND NUMBER  
22 ONE HUNDRED SEVEN ARE RECEIVED AS A PROFFER.)

23 MR. STIDHAM: I'm going to make some copies and  
24 have---

25 THE COURT: Sure, you can do that later if you want



1 to.

2 MR. STIDHAM: Thank you, your Honor.

3 THE COURT: Where do we stand now?

4 MR. STIDHAM: Your Honor, I think that we're at the  
5 point where I can -- we can ask the jury to come back in  
6 and I can read the question that -- that the Court  
7 permitted. At least that's my understanding of where  
8 we're at.

9 MR. FOGLEMAN: Your Honor, my only concern is  
10 whether or not this gentleman is going to base his  
11 opinion on -- on what this defendant told him because  
12 from what he testified to in the proffer he adopted the  
13 defendant's version versus the officers' version.

14 THE COURT: I think that's what he said.

15 MR. FOGLEMAN: Alright, and I think that that's an  
16 improper basis of his opinion and if he's going to  
17 purport to testify now about coercive tactics and adopt  
18 what this defendant's told him and say things that aren't  
19 in accordance with the evidence, I think the jury is  
20 going to be---

21 THE COURT: I don't think that's the way I worded  
22 it. I -- I allowed him to ask a question using the two  
23 statements, the files and testimony that he reviewed and  
24 whether or not he had an opinion as to whether or not the  
25 tactics employed were suggestive or that would lead

1 Misskelley to make a statement.

2 MR. STIDHAM: And the basis of his opinion is the  
3 statements and tapes that he's heard of the defendant's  
4 statements to the police.

5 THE COURT: I'm going to allow him to do that. And,  
6 of course, everything he just said you may use in an  
7 argument to your jury if you want to.

8 MR. STIDHAM: Thank you.

9 MR. CROW: Thank you, your Honor.

10 MR. DAVIS: But the question would be restricted and  
11 would not include whatever statements -- his opinion  
12 would have to be based on everything except those  
13 statements he received from the defendant.

14 THE COURT: I think he said he could do that.

15 MR. DAVIS: I want to be sure of that because then  
16 in cross examination when I ask what specific police  
17 misconduct or police coercive tactics are you talking  
18 about, I don't want him to go back and say, Well, Jessie  
19 told me -- or -- or even through the back door because,  
20 your Honor, at least the last few hours I've come to  
21 respect the witness. I know he can certainly catch you  
22 when you make questions that give---

23 THE COURT: Tricky, isn't he.

24 MR. DAVIS: ---give him an opportunity to answer,  
25 and---

1 THE COURT: He's an expert, you know.

2 MR. DAVIS: If he doesn't understand very clearly  
3 that he is not to refer to that statement as a basis of  
4 his opinion, then I think we're going to end up getting  
5 it in one form or another.

6 MR. STIDHAM: Do you understand, Doctor Ofshe, that  
7 you're not to refer to the defendant's statement.

8 THE WITNESS: I understand.

9 (RETURN TO OPEN COURT.)

10 MR. STIDHAM: May I proceed, your Honor?

11 THE COURT: Yes.

12 BY MR. STIDHAM:

13 Q. Doctor Ofshe, do you have an opinion based on the  
14 transcription of the statements made by this defendant to the  
15 West Memphis Police Department and listening to those tapes of  
16 the statements made to the West Memphis Police Department by  
17 the defendant or the testimony of the officers that you've  
18 heard as to whether any of the interrogation tactics used by  
19 the police against the defendant, Jessie Misskelley, were  
20 suggestive or led Misskelley to make that statement?

21 A. Yes. I would add to that that I would also rely on the  
22 notes that were produced by the officers and also certain  
23 other facts I've been informed have been testified to by  
24 various witnesses in this courtroom.

25 Q. So if I understand your testimony it is your opinion that

1 those tactics did---

2 MR. FOGLEMAN: Your Honor---

3 THE COURT: If he's talking about testimony, that's  
4 fine.

5 MR. FOGLEMAN: Was he here to hear this testimony in  
6 the courtroom?

7 THE COURT: Well, if it was made known to him, he  
8 doesn't have to be here.

9 MR. FOGLEMAN: But how do we know it was made known  
10 to him accurately, your Honor? If somebody told him that  
11 so and so testified---

12 MR. STIDHAM: Judge, I asked the Court Reporter to  
13 give me a transcript and that's what he looked at.

14 THE COURT: Alright.

15 MR. FOGLEMAN: Well, if that's the case, that's  
16 alright.

17 THE COURT: Alright. Is that the case?

18 MR. FOGLEMAN: Is that the case?

19 THE WITNESS: I have not seen a transcript of this  
20 hearing. I've seen a transcript of a prior hearing and  
21 was informed as to certain specific testimony given and  
22 presented by the medical examiner and I'll identify the  
23 particular facts that I'm using if that would be helpful.

24 BY MR. STIDHAM:

25 Q. Well, if I understand your testimony, it is that the

1 tactics used by the police were suggestive and led the  
2 defendant to make a statement?

3 A. Yes, and that the statement -- the contents of the  
4 statement was shaped by these techniques.

5 CROSS EXAMINATION

6 BY MR. DAVIS:

7 Q. Now, Mr. Ofshe, earlier in your testimony you referred  
8 about -- you were telling us about this scenario where you  
9 have claimed to have obtain a false confession in a case you  
10 worked on?

11 A. That's correct.

12 Q. Is that the case out in Washington State?

13 A. That's right.

14 Q. Okay, and in that case the scenario you presented to the  
15 defendant in that case that you said you created and he -- he  
16 agreed with, that scenario was similar to the allegations in  
17 the actual case, correct?

18 A. No. The scenario was specifically designed to be  
19 different from any of the allegations in the case. I invented  
20 it to make it in the same area, otherwise it would be  
21 meaningless, but I made it specifically different from any  
22 allegations in the case and then I verified with one of the  
23 people who was supposedly involved in it that in fact it never  
24 happened just to double check that in fact it did not happen.

25 Q. Well, isn't it true that in both instances the

1 allegations involved child sexual abuse?

2 A. This was a case about child sexual abuse and when I told  
3 him the specifics as to a particular event which I made up --  
4 I made up peculiar circumstances for that event and he then  
5 produced a very detailed confession specific to that event  
6 including dialogue and then I verified from one of the victims  
7 that no such event had ever occurred.

8 Q. And isn't it true that in that particular scenario that  
9 both daughters of that defendant had testified he had sexually  
10 abused them?

11 A. I don't believe they ever testified to that. I believe  
12 they made allegations as to that effect. I don't think their  
13 formal testimony was ever taken. They also made allegations  
14 to the fact that their bodies were covered with scars which  
15 were then subject to examination and -- a court ordered  
16 medical examination and there were no scars on their bodies.  
17 So they made a lot of allegations, none of which proved  
18 empirically correct.

19 Q. Those were two adult daughters, correct?

20 A. That's correct.

21 Q. Okay, and also the wife also made allegations that he  
22 sexually abused the daughters, correct?

23 A. The wife was being threatened with having her---

24 MR. DAVIS: Your Honor, could you ask him -- if he  
25 has an explanation we can hear that, but would he answer

1 the question on the front end before we go through the  
2 five minute---

3 THE COURT: --Try to answer yes or no and then --  
4 then if you need to explain, I'm going to let you.

5 THE WITNESS: Thank you, your Honor.

6 BY THE WITNESS:

7 A. Yes. The wife during the period when she was being  
8 pressured by the police and threatened with having her one  
9 remaining child taken away from her if she did not come up  
10 with accusations against her husband, proceeded to come up  
11 with such accusations and some of those accusations included  
12 being present at a satanic cult ceremony where blood flowed  
13 out of a book and flowed uphill over her arms -- over her  
14 body.

15 I was asked to evaluate her by the prosecution to help  
16 them make a determination as to whether or not to charge her  
17 or whether or -- or -- whether or not to charge her and it was  
18 my recommendation not to charge her.

19 Q. And in fact her husband had pled guilty to these sexual  
20 abuse charges, correct?

21 A. No. In fact her husband pled guilty to six counts of  
22 third degree -- entered pleas to six counts of third degree  
23 rape when he was told that if he did not enter that plea---

24 MR. DAVIS: Your Honor, would he be responsive to  
25 the question?

1 BY MR. DAVIS:

2 Q. Did he enter a plea of guilty to charges of rape or  
3 sexual abuse?

4 A. He entered -- yes -- he entered a plea to six counts of  
5 third degree rape.

6 Q. Did he maintain his guilt for a period of five months  
7 prior to entering that plea of guilty?

8 A. Oh, yes.

9 Q. Okay, and isn't it true, Doctor, that he did not decide  
10 that he was not guilty until he talked with you?

11 A. After he talked---

12 MR. DAVIS: Your Honor, could he be asked to respond  
13 yes or no?

14 THE COURT: Yes or no and then---

15 BY THE WITNESS:

16 A. Yes, that's technically correct. However, the discussion  
17 that I had with him which was tape recorded was not a  
18 discussion that precipitated his changing his mind. He  
19 changed his mind subsequent to that after he independently  
20 began to look at the things that he had confabulated and after  
21 the pressures that he had been under during this five month  
22 period were withdrawn, after which he had been gotten to enter  
23 a guilty plea. So his decision -- his realization that he in  
24 fact committed none of these things -- was done independent of  
25 any conversation I had with him.



1 Q. And despite your opinion that his confession was coerced  
2 or involuntary in that case, the jury and the court found  
3 otherwise, correct -- or the court did?

4 A. The court found based on statements made prior to the  
5 statements that I analyzed -- found that it was sufficient to  
6 accept -- or not to accept his request to withdraw his guilty  
7 plea and go to trial.

8 Q. So in that scenario with the husband saying for five  
9 months he's guilty, with the wife saying that he's guilty, and  
10 the two daughters giving statements as to his guilt, you met  
11 with him and convinced him that he was not guilty, correct?

12 A. Incorrect.

13 Q. Well, after you met with him is when he decided that he  
14 was not guilty, correct?

15 A. A month after he met with me after going through his own  
16 analysis of what happened -- after he was no longer being  
17 constantly coached by the interrogators, by the psychologists,  
18 and by his minister, he realized that the beliefs that he had  
19 formed made no sense whatsoever and he realized that he -- he  
20 had come to believe something that was not true.

21 What he came to believe was that he was the leader of a  
22 satanic cult that had been in operation for seventeen years,  
23 that had killed hundreds of children for which there was no  
24 evidence. That's what he came to realize made no sense.

25 Q. And you testified in his behalf in a hearing designed to

1 get that guilty plea set aside, correct?

2 A. I test -- that's correct, and the result of that was that  
3 the judge chose to maintain the guilty plea based on  
4 statements that he had made prior to the matter that I  
5 testified about, and that was the justification for not  
6 allowing him a trial.

7 Q. What exactly -- based on the testimony that you heard  
8 from the officers at the prior hearings and based upon your  
9 examination of those taped statements -- what coercive tactics  
10 do you allege that the police made in this case -- or did?

11 A. In order to answer your question, first I need to break  
12 the interrogation down into its component part so that I can  
13 cut out parts of it and focus on a particular part.

14 Q. Well, one thing I want you to assure me, Doctor, is that  
15 you're referring to either testimony you've heard, or to the  
16 taped statements of the---

17 A. That's correct, and the notes.

18 First---

19 Q. When you say "the notes", what notes are you talking  
20 about?

21 A. The detectives' handwritten notes and typed notes and  
22 also I may refer to a fact I've been informed that was  
23 testified in this courtroom and I'll specify exactly what that  
24 was when I do.

25 Q. Let me -- let me back up just a minute. Did you find any

1 evidence in any of those things you referred to as to physical  
2 coercion?

3 A. No, I did not.

4 Q. Did you find anything in any of that evidence to indicate  
5 that any of the officers yelled or used a loud voice or were  
6 degrading to the defendant in those tapes or in that testimony  
7 that you reviewed?

8 A. No, the officers testified they did not do that.

9 Q. Okay, and in those tapes that you observed, you didn't  
10 hear anything of that nature, did you?

11 A. No, I did not.

12 Q. Okay, and there is nothing in the notes prior that would  
13 indicate there was any undue influence, pressure, or loud  
14 voices and demands made on the defendant, was there?

15 A. Not in the limited set of materials you're allowing me to  
16 testify on.

17 Q. So as far as those type of tactics you would have to  
18 agree that what you reviewed is devoid of any evidence of  
19 that, correct?

20 A. I would have to agree that based on the set of materials  
21 on which I am now testifying, I can find no example of that.

22 Q. And those things that you refer to that you're testifying  
23 to are based on your review of testimony and your observance  
24 of that confession? You've read it and listened to it,  
25 correct?

1 A. That's correct.

2 Q. And is what you term or what you find in there coercive  
3 that the officers asked at times leading questions -- is that  
4 one of the things?

5 A. The questions were more than leading. The questions were  
6 very directly specifying what the answers should be.

7 Q. Did you find anything in your review of the officers'  
8 testimony, in your review of the statement of the defendant or  
9 either of the statements of the defendant to indicate that the  
10 officers gave him the information about which boy was  
11 castrated?

12 A. In their statements? No.

13 Q. And in their notes?

14 A. In their notes? No.

15 Q. In the taped confession?

16 A. Other than I seem to recall that he was being shown a  
17 picture of one of the boys and that happened to be the boy  
18 that was castrated and I believe that, if memory serves, that  
19 he then identified that boy as the one that was castrated, but  
20 I believe -- and perhaps I'm wrong -- but I believe that he  
21 was being shown a picture of that boy at the time.

22 Q. Do you know where that is in the transcript?

23 A. No, that's not something I'm sure of at this point.

24 Q. And if that turns out to be inconsistent with what the  
25 testimony at trial has been, then you certainly wouldn't

1 disagree with that?

2 A. My memory may be defective on that.

3 Q. And those facts that -- in fact -- let -- let me ask you  
4 this: In fact after this defendant makes the statement and  
5 identifies the one that's castrated, the next question is,  
6 "Are you absolutely certain that's the one?" Isn't that the  
7 next question in the interview?

8 A. Can you direct me to that?

9 Q. Yes, sir. It's in the first statement. It's on page  
10 seven. Let me see which statement you have. (EXAMINING.)  
11 Okay, it's that transcript on page seven.

12 A. (EXAMINING.)

13 Q. Down at the bottom of the page. Where the officer asked,  
14 "Which boy was that?"

15 And the defendant said, "That one right there."

16 And Officer Gitchell said, "You're talking about the  
17 Byers boy again?"

18 And the defendant said, "Yes."

19 Then what was the next question that Officer Ridge asked?

20 A. (EXAMINING.) "Are you sure that he was the one that was  
21 cut?"

22 Q. Okay. Now, Mr. Ofshe, if the police are coercing him  
23 when he has just given them the accurate information and has  
24 just told them the Byers boy is the one who was castrated, are  
25 you saying that it's coercive for Officer Ridge to then ask,

1 "Are you sure that he was the one that got cut?"

2 A. Well, judging from this statement apparently there was a  
3 photograph of the Byers boy because he was able to say, "That  
4 one right there."

5 Q. So you're presuming those facts?

6 A. I think -- it says, "Which boy was that?" And then Mr.  
7 Misskelley responds, "That one right there." I read that as  
8 indicating he is identifying some representation of that boy  
9 right there.

10 Q. Okay, and do you know how many photographs were there?

11 A. No, I don't, and I don't know how those photographs were  
12 being manipulated at the time.

13 Q. But---

14 A. I'm just pointing out that that's a possibility.

15 Q. You don't know anything as far as from the testimony or  
16 from the taped confessions and anything to indicate that those  
17 photos were manipulated, do you?

18 A. No, I don't.

19 Q. Okay, so you would have to presume that fact if you were  
20 not to take some -- place some significance on that particular  
21 statement, correct?

22 A. It's a possibility. If the record is not clear as to one  
23 way or the other as to whether or not this is being  
24 suggestive. This is an area that in my mind is unclear.

25 Q. Well, explain to me how it's suggestive or if -- if the

1 police are trying to coerce someone into giving them an  
2 incorrect or a specific scenario, why would they go back and  
3 ask them, "Are you sure that he was the one that was out?"  
4 Why wouldn't they leave it alone when they had the answer they  
5 wanted?

6 A. Because when they got the answer that they wanted, then  
7 they emphasize it in order to stabilize that so that when you  
8 get somebody where you want them, you emphasize that's what  
9 you're trying to do.

10 Now, I can show you other examples of very direct leading  
11 suggestions that shows that in the course of this  
12 interrogation these officers were capable of doing that and I  
13 know there was a picture there and it may have happened that  
14 they indicated which picture should be selected.

15 Q. Well, gee, Doctor, to say it may have happened you would  
16 have to assume and presume certain inappropriate police  
17 conduct, wouldn't you?

18 A. I would have to assume there are other inappropriate  
19 police conduct which I can specify might also have expressed  
20 itself here and I might point out that you brought up this  
21 point, I didn't. This is not one of my examples. This is  
22 something that I would judge to be unclear.

23 Q. And that's why the answer to that -- is that not clear to  
24 you that when the officers have the answer that's consistent  
25 with the evidence and they keep on going and they say, "Are

1 you certain that's the one?" Doesn't that indicate to you  
2 that those officers are trying to get an accurate statement  
3 rather than coerce him into saying something?

4 A. Well, if we -- we're looking at an interrogation that was  
5 free of the kind of gross leading and suggestion that  
6 characterizes this interrogation---

7 Q. Is -- wait, let me -- let me stop you. The question,  
8 "Are you certain that is the one?" -- are you characterizing  
9 that as a gross leading statement?

10 A. I'm suggesting that if---

11 Q. Could you answer that question for me, please?

12 MR. STIDHAM: Your Honor, he's trying to answer the  
13 question and the prosecutor won't let him.

14 THE COURT: Answer the question.

15 BY THE WITNESS:

16 A. Under some circumstances that could be and that would be  
17 under some circumstances a gross leading suggestion if it were  
18 done in a particular way.

19 Q. Do you have any actual facts or knowledge from that  
20 transcript and those tapes and you're hearing the officer  
21 testify that there was anything that would contribute with  
22 that statement to make it a gross leading statement?

23 A. As I said, this is your example I think it's unclear  
24 because I don't -- I don't believe the record is clear in my  
25 mind as to the circumstances under which this occurred and I'm



1 simply pointing out that there are other examples of gross  
2 leading, highly suggestive, if not demanding statements on  
3 other points that illustrate that as an operating procedure  
4 this is present in this interrogation and, therefore, there is  
5 a possibility -- and I don't know the particular circumstances  
6 of this particular presentation of the photograph. You  
7 brought it up, I didn't.

8 Q. Okay. When you say, "It's my example", it's his voice,  
9 isn't it true, Doctor? I mean, you heard the tape.

10 A. It's also -- yes, it is his voice. It is also his voice  
11 that says that he arrives at the scene at nine o'clock in the  
12 morning, which is the very first statement that he makes about  
13 the time that this all began, and that statement is a  
14 statement that because it is not the statement as I analyze  
15 the influence process of this interrogation, because it is not  
16 the statement that fits with the facts. The statement about  
17 the time at which this crime occurred is a statement that  
18 comes up and is manipulated eight different times over the  
19 course of this interrogation and over the course of those  
20 eight manipulations one sees a pattern of unrelenting pressure  
21 on Mr. Misskelley.

22 Q. When you talk in terms of general valid---

23 A. May -- may I finish?

24 Q. Mr. Ofshe, when you talk in terms of generality---

25 MR. STIDHAM: Your Honor, may the witness finish

1           answering the question?

2           MR. DAVIS: Your Honor, he hasn't answered my  
3           question yet.

4           MR. STIDHAM: He hasn't answered the question the  
5           way he wants him to.

6           MR. DAVIS: Well, your Honor, I asked him the  
7           question about part of the statement and he starts off  
8           talking about something that's on page twenty-four.

9           THE COURT: Alright, answer yes or no and then if  
10          you need to explain I'm going to permit it.

11          THE WITNESS: May I have the question again, please?

12 BY MR. DAVIS:

13 Q. I don't know what the terminology is in Berkeley,  
14 California, but is it different when somebody says, "Are you  
15 sure that he was the one that was cut?" Is that a leading  
16 statement in California?

17 A. No, it's not a leading statement in California and may I  
18 explain?

19 Q. Is it a leading statement in Arkansas?

20 A. If it is a state -- I never said it was a leading  
21 statement. I think what I tried to explain and what I would  
22 like to explain is---

23 Q. Well, are you -- are you going to confine your remark to  
24 that statement, Doctor, or are we going to roam around the  
25 entire tape recording?

1 MR. STIDHAM: Your Honor---

2 THE COURT: Yes.

3 MR. STIDHAM: He's asking questions and he didn't  
4 get the right answer he wanted---

5 THE COURT: You're making a statement. Make an  
6 objection if you've got one.

7 MR. STIDHAM: Your Honor, my objection is that the  
8 witness should be allowed to answer the question and  
9 explain his answer.

10 THE COURT: Alright, I'm going to allow him to  
11 answer the question yes or no and then give your  
12 explanation. Were you through?

13 BY THE WITNESS:

14 A. No, that is not a leading statement in California and I  
15 think the point I was trying to make was if following  
16 manipulating a suspect to a statement that the interrogator  
17 likes, the interrogator is likely at that point to try to  
18 reinforce that particular statement and will, therefore,  
19 because it's very likely that if the person has immediately  
20 said, "That's the one," however, that was accomplished.

21 To stabilize that, one would then reinforce it by  
22 allowing the person to restate it, yes, I'm sure, because it's  
23 a very very low likelihood that the person is not going to  
24 immediately continue. That's a good tactic for stabilizing an  
25 answer that you like.

1 THE COURT: Doctor, excuse me, are you assuming that  
2 a single photograph of one individual was exhibited?

3 THE WITNESS: No. I am -- I am assuming that I  
4 don't know how the photographs were placed, that I don't  
5 know what prominence it might have been given, and I  
6 don't know what indication might or might not have been  
7 given, and therefore, I don't know what surrounds that is  
8 not included in this record in this particular choice---

9 THE COURT: --Have you read the officer's  
10 description of the showing or viewing of the photographs  
11 or photograph?

12 THE WITNESS: Yes, I have.

13 THE COURT: Have you seen the photographs or  
14 photograph?

15 THE WITNESS: No, I have not.

16 THE COURT: Show them to him.

17 MR. DAVIS: Your Honor, for the record I believe  
18 it's marked as State's Exhibit Number One Oh Five.

19 (HANDING TO WITNESS.)

20 THE WITNESS: (EXAMINING.)

21 BY MR. DAVIS:

22 Q. Doctor, if that -- if that -- if those three photographs  
23 are laid out on the table and he makes the statement that one  
24 of them was cut on his bottom and is pointing to his private  
25 parts at the time he does that and the officer says, "Which

1 boy was that?", and he points to the picture and says, "That  
2 boy right there," are you saying that that's unduly  
3 suggestive?

4 A. Or if he responds to an officer whose finger is on the  
5 picture and says, "That one there." If that happened, that  
6 would be a way of accomplishing that identification.

7 Q. But we're in a court of law and we deal with evidence and  
8 if there's no testimony or evidence in the record or in  
9 anything you've looked at to indicate that that happened, then  
10 there's nothing suggestive about that question or there's  
11 nothing that indicates that that response was coerced, is  
12 there?

13 A. And all I said was, "That's a possibility. I don't know  
14 all the facts."

15 Q. Okay. But you have to presume facts or assume things in  
16 order for you to reach the conclusion that that indicates  
17 coercion, isn't that correct, Doctor?

18 A. If I were to reach that conclusion about that particular  
19 statement, I would agree with you. If I say, "I don't know"  
20 on that particular statement, then I'm trying to say I don't  
21 know.

22 Q. And, also, on that same page the defendant indicates that  
23 one of the boys was being cut in the face. Isn't that  
24 correct? Page seven.

25 A. Yes.

1 Q. And the question before that was, "Where did he cut him  
2 at?" And Jessie's response was, "He was cutting him in the  
3 face." Is there anything coercive or suggestive about the  
4 question, "Where did he cut him at?"

5 A. No, my judgment is indeterminate because I don't know the  
6 facts surrounding it.

7 Q. So when the defendant identified who it was who was  
8 castrated and he indicated that one of the boys was cut in the  
9 face, you don't know and you can't give an opinion that any of  
10 those questions were coercive in nature, can you?

11 A. And the record -- no, I can't because the record that we  
12 are dealing with is very incomplete because this part of the  
13 record is preceded and everyone agrees by over two hours of  
14 interrogation in which many subjects were discussed and in  
15 which we do not know what was said on the subjects because we  
16 have two hours of interaction about this for which we have no  
17 record.

18 Q. And your speculation on what might have happened during  
19 that time and your guess as to what occurred and what  
20 transpired and what happened after reading this testimony, you  
21 can't speculate any better than any of these people can, can  
22 you?

23 A. Not on this particular point, no. There are other points  
24 about which the record is quite clear, about which I'm happy  
25 to be helpful.

1 Q. How many cases in the past twelve months have you  
2 provided expert testimony on?

3 A. Perhaps five or six.

4 Q. What percentage of your income last year was derived from  
5 the providing of expert testimony?

6 A. I don't know what the percentage was. I can tell you the  
7 number if you'd like.

8 Q. What's that number?

9 A. In my -- I -- I earned Forty Thousand Dollars last year  
10 out of this part of my professional life for which I take half  
11 time leave from the university every year to free up my time  
12 to do it.

13 Q. And is your going rate---

14 A. Half time unpaid leave from the university.

15 Q. Is your going rate approximately Three Hundred Dollars an  
16 hour?

17 A. No, it is not.

18 Q. What is it?

19 A. My rate is a hundred and fifty dollars an hour for  
20 consultation and Three Hundred Dollars an hour for time spent  
21 in court or in depositions.

22 Q. Okay. So---

23 A. Because time sent in court or depositions is very, very  
24 hard work.

25 Q. Okay. I will agree with that, Doctor.

1       So it's Three Hundred Dollars per hour in court and when  
2 you're asked -- when you're initially asked to evaluate a  
3 case, you don't get the Three Hundred Dollars an hour unless  
4 you give an opinion that's consistent with what the person  
5 asking you wants to hear. If they don't call you as a  
6 witness, you don't get your Three Hundred Dollars an hour,  
7 correct?

8       MR. STIDHAM: Judge, that's a ridiculous question.  
9 It has an inference that---

10       THE COURT: --Are you -- again, you're making a  
11 statement. How many times have I got to tell you, Dan.

12       Stand up first of all and say, "I object", okay?

13       MR. STIDHAM: I object, your Honor.

14       THE COURT: Alright. What is your objection?

15       MR. STIDHAM: My objection is it's not a proper way  
16 to impeach the witness. It's very -- it's -- it's  
17 speculation and it's -- the witness has testified, your  
18 Honor, that he is a consultant--

19       THE COURT: Well---

20       MR. STIDHAM: ---to the prosecuting attorney's  
21 office in several areas throughout the United States.

22       MR. DAVIS: Your Honor---

23       THE COURT: Okay. Again, that gets into statement.

24       My -- my ruling on your objection is is it's common  
25 and customary practice to ask an expert what their



1 compensation for their testimony is, and I'm going to  
2 allow it to that extent.

3 MR. STIDHAM: To ask him -- if he doesn't say what  
4 he's supposed to say he's not going to get paid? That's  
5 what the prosecutor asked him.

6 THE COURT: Well, I'll let you rehabilitate him  
7 then, although I think he don't needs much help.

8 MR. STIDHAM: Thank you, your Honor.

9 BY MR. DAVIS:

10 Q. Isn't it true, Mr. Ofshe, that you actually formulated an  
11 opinion before you ever heard or examined any testimony from  
12 the police officers?

13 A. No. I -- I had an idea about what might have happened,  
14 but I needed to hear the testimony from the officers to find  
15 out much more information about what did happen. In fact in  
16 order to try to get that information I tra -- I tried to  
17 travel to Memphis to meet with the officers to interview them  
18 about what happened so that I could have a fuller basis for  
19 it, but that meeting was in part unscheduled because of the  
20 airplane problems and in part apparently because they were  
21 going to refuse to talk to me in any case.

22 And so at the hearing that I attended, I observed the  
23 officers and listened to their testimony and in fact my  
24 opinions changed very substantially because of the testimony  
25 that I heard.

1 Q. Isn't it true that you had advised Mr. Stidham that you  
2 had an opinion as to the coercion that was used in this case  
3 prior to the time you ever heard the police officers testify?

4 A. Uh -- the opinion that I had at that point was based on  
5 the materials available to me which included my having  
6 interviewed Jessie Misskelley.

7 Q. Well, my question I have for you is: Didn't you  
8 formulate an opinion before you ever heard the officers? And  
9 you just indicated, "My opinion was", so you had formulated an  
10 opinion, correct?

11 A. I had formulated a tentative opinion and I was aware that  
12 there was much that I wanted to know about the interrogations  
13 that I could not know from just the records, and so the  
14 hearing that I attended was an opportunity to hear answers to  
15 specific questions that I wanted to know from the officers  
16 which allowed me to refine my opinion about what happened.

17 Q. Was your opinion before that that the officers had not  
18 coerced anyone?

19 A. Well, the opinion that Mr. Misskelley's statement was a  
20 coerced statement can be supported from the records that were  
21 available---

22 MR. DAVIS: --Doctor -- your Honor, would he --  
23 would you ask him to answer the question?

24 THE COURT: Answer yes or no and then if you need to  
25 explain you're going to be permitted to.

1 BY THE WITNESS:

2 A. Could you repeat the question, please?

3 Q. Prior to hearing the police officers testify or either  
4 reviewing their testimony in the form of a transcript, was  
5 your opinion at that point that the police -- that the police  
6 officers didn't coerce anybody?

7 A. No, that was not my opinion.

8 Q. Okay, so your opinion prior to that -- granted tentative  
9 but before you even heard or sat -- saw or read anything about  
10 what the police officers did -- you already formulated an  
11 opinion that this was -- this confession was coercive in  
12 nature, correct?

13 A. That is correct because there is adequate evidence as to  
14 the coercive nature of it contained in the materials that I  
15 already saw, but there were many questions that I had about  
16 the specifics of it that were very unclear until I heard the  
17 officers and what they said caused me to modify substantially  
18 my analysis of what led to the materials that I already had  
19 seen.

20 Q. How many cases in the last twelve months have you  
21 testified to and indicated that there was coercion on the part  
22 of police in obtaining a confession?

23 A. I can recall one that I testified to that most of my work  
24 consists of evaluating the interrogation and feeding back  
25 opinions to attorneys and, more than half the time those

1 opinions do not lead me back into the courtroom because I tell  
2 the attorneys there is nothing for me to testify about because  
3 I don't find in materials that have been provided to me  
4 suggesting that there is coercion.

5 Q. How many times have you testified at the rate of Three  
6 Hundred Dollars an hour that a confession was coerced?

7 A. To the best of my knowledge, never.

8 Q. How many times have you testified for hire and testified  
9 that a confession was coerced or as a result of police  
10 coercion?

11 A. I think that number is -- over the years I've done this  
12 -- I've testified -- I've testified to coercion thirteen  
13 times. Of those thirteen times at least once I was testifying  
14 without fees and in no case was I paid Three Hundred Dollars  
15 an hour because -- while that's my standard fee, to the best  
16 of my recollection all of the other cases involved indigent  
17 defendants and the State rarely pays very much money for one's  
18 time to do this work.

19 So in no case has anyone ever paid me my customary rate  
20 and I do it for whatever rate is appropriate once I reach the  
21 conclusion that this is what the facts tell me and I have done  
22 it for nothing and would do it for nothing again.

23 Q. But the truth of the matter is that the more you do it  
24 and the more high profile cases you do it in, the more  
25 attention you get, correct?

1 A. The more what?

2 Q. Attention.

3 A. I suppose.

4 Q. If it's my understanding, Doctor, you didn't find  
5 anything coercive about the statement that Jessie Misskelley  
6 made about the injuries of Stevie -- or of Christopher Byers.  
7 Is that correct?

8 A. No, that is not correct. I didn't reach any conclusion  
9 about those statements because I don't believe that the record  
10 is sufficient for me to reach a conclusion one way or the  
11 other.

12 Q. And the remainder of it is basically because you found  
13 some questions that you determined to be leading?

14 A. Oh, no, not at all.

15 Q. Is that not what your testimony was earlier?

16 A. I don't believe I said that the remainder of it was  
17 because I merely found the questions to be leading. My  
18 recollection of my testimony was that it was much more than  
19 that which I would be happy to explain to you.

20 MR. DAVIS: Your Honor, wait just a second. Your  
21 Honor, we'll pass the witness.

22 REDIRECT EXAMINATION

23 BY MR. STIDHAM:

24 Q. Doctor Ofshe, you mentioned that sometimes you will  
25 testify for indigent defendants. Is that correct?

1 A. I believe every time I've testified in a confession case  
2 it has been for an indigent defendant.

3 Q. Were you told that this particular defendant over at  
4 counsel table was indigent?

5 A. I believe so.

6 Q. Have you received any money in this case so far?

7 A. I haven't even received my expenses for the three trips  
8 I've made to Arkansas. No, I haven't received any money.

9 Q. Do police officers usually yell at suspects when the tape  
10 recorder is on?

11 MR. DAVIS: Your Honor, I would object to that  
12 question because this individual doesn't have any  
13 expertise in the field of police interrogations as far as  
14 his personal experience of being there to make that  
15 determination.

16 MR. STIDHAM: I'm not sure I understand his  
17 objection.

18 THE COURT: Well, I'm not sure it takes an expert to  
19 answer that question, so I'm going to allow him to answer  
20 it.

21 MR. STIDHAM: Thank you, your Honor.

22 BY THE WITNESS:

23 A. No, when the tape recorder is on, one gets behavioral  
24 statements that are tailored to the fact that the tape  
25 recorder is there and so one would not expect the yelling to

1 happen.

2 In my experience the yelling and the other improper  
3 activities happen when the tape recorder is off.

4 Q. Is there any difference between cops yelling at people in  
5 Los Angeles or Corning, Arkansas, when the tape recorder is on  
6 or off?

7 A. I don't see why.

8 Q. The prosecutor kept wanting you to ask question -- or  
9 asked you questions about the coercive nature of the  
10 statements on -- the questions and answers on page seven that  
11 he pointed out to you on the transcript, and I kind of got the  
12 impression when I was sitting over there in that chair that  
13 you wanted to talk about other examples of leading and  
14 suggestion that was employed by the police. Would you like to  
15 talk about those?

16 A. Yes, I would.

17 THE COURT: How long are we going to be talking  
18 about them?

19 MR. STIDHAM: We're all tired and we know you're  
20 tired and the jury looks tired---

21 MR. FOGLEMAN: Your Honor---

22 MR. STIDHAM: ---so we won't be long.

23 MR. FOGLEMAN: ---we don't mind Mr. Stidham asking  
24 questions but to try to elicit some narrative, we don't  
25 think that's proper.

1 THE COURT: I'll object -- I mean I'll sustain your  
2 objection to the invitation for a narrative. This  
3 witness is capable of answering questions in question  
4 form and answer rather than a narrative and that  
5 objection will be sustained. The Court Reporter is not  
6 going to be able to go much longer.

7 MR. STIDHAM: May I have just a few more minutes,  
8 Judge?

9 THE COURT: Sure.

10 BY MR. STIDHAM:

11 Q. Doctor Ofshe, could you point to a few areas of the  
12 interrogation which you feel are leading and suggestive?

13 MR. STIDHAM: Your Honor, may I use the word  
14 coercive like the prosecutor used?

15 THE COURT: I guess that's the goose and the gander  
16 thing, isn't it? Go ahead.

17 BY MR. STIDHAM:

18 Q. Could you give some examples of the police being coercive  
19 and leading or suggestive during the course of the  
20 interrogation?

21 A. Yes, I can. Perhaps the most powerful example in my  
22 opinion is the example of the eight revisitings of the  
23 question of the time at which the crimes occurred.

24 The first example occurs on page -- in my numbering --  
25 eleven -- which I believe is page three -- and this is the



1 point at which Detective Ridges says, "Alright, when did you  
2 go with them?"

3 Mr. Misskelley says, "That morning."

4 Detective Ridge says, "Nine o'clock in the morning?"

5 Jessie says, "Yes, I did. I went with them and then"---

6 Then they talk about walking. At that point Jessie is  
7 now saying he went there at nine o'clock in the morning. I  
8 believe that there is a mistyping here. I believe it's Jessie  
9 said, "Nine o'clock in the morning." But this transcript does  
10 not say that and I'll point that out. That's my recollection.

11 In any case he agrees or says that it was nine o'clock in  
12 the morning. There is no follow-up at that point. The tape  
13 recorder is on. Nine o'clock in the morning is grossly  
14 inaccurate as everyone knows.

15 Detective Ridge has testified in hearings that that was  
16 the first time that any time for this occurring happened and  
17 in his hearing testimony at page ninety-nine of the  
18 transcript. The next time the subject of the time at which  
19 the events occurred comes up is on page nine of the first  
20 transcribed interrogation and, at this point without reading  
21 it, I'll just point out that Detective Ridge asked Mr.  
22 Misskelley -- he's now revisiting the subject. He asks Mr.  
23 Misskelley, "I'm not saying when they called you. I'm saying  
24 what time was it that you were actually there in the pa--"

25 Mr. Misskelley says, "About noon."

1 Ridge says, "About noon?" -- and it has a question mark.

2 Jessie says, "Yes."

3 Ridge now says something that in my opinion was an  
4 attempt to manipulate Mr. Misskelley's statement about the  
5 time because Detective Ridge now says, "Okay, was it after  
6 school had let out?" This is immediately after Jessie saying,  
7 "It's at noon." He's now suggesting it must be later by  
8 saying, "Is it after school let out?"

9 Jessie says, "I didn't go to school."

10 Ridge now has to clarify and say, "These little boys."

11 Jessie says, "They skipped school."

12 Ridge says, "They skipped school?" -- with a question  
13 mark.

14 Then there was more discussion about their bikes and so  
15 on. Again, there is an error. We know it's impossible for  
16 these boys to have been there at noon.

17 Going on to the third example on page nineteen. Now,  
18 it's Detective Gitchell who revisits the question of time  
19 still because the time is inaccurate and he raises -- "Now,  
20 did you say the boys skipped school that day? These little  
21 boys did?" Said in that way, it's a suggestion that you  
22 change your answer indicating, I'm displeased with this. This  
23 isn't the right answer. Did you really say would be the  
24 emphasis on that.

25 Jessie then answers. He asks -- Gitchell now asks, "What

1 time did you get there?"

2 Jessie again repeats, "I got there about nine."

3 Gitchell says, "In the morning?"

4 Jessie says, "Yes." So Jessie now attempts again to say  
5 he got there at nine in the morning.

6 Now, I am of the belief that there has been testimony  
7 that Jessie was roofing that morning. I believe that that was  
8 testified to. So that would be an example if I'm correct in  
9 that belief that Jessie was somewhere -- says he was somewhere  
10 else and someone confirms that and he is now saying he got  
11 there at nine o'clock in the morning. Clearly a  
12 contradiction.

13 Q. Doctor Ofshe, is there another example in the second  
14 recorded statement?

15 A. Yes. This goes on and is repeated several times. If I  
16 can just illustrate one other point in the first statement.

17 Q. Certainly.

18 A. There is a very important example of the way in which the  
19 detectives refuse to allow Jessie's inaccurate statement to  
20 stand and directly manipulated Jessie's statement through  
21 skillful interrogation tactics.

22 So for example, on page eighteen of the transcript at the  
23 conclusion of a discussion about the supposed cult, Detective  
24 Ridge now changes the subject. There is nothing that precedes  
25 this about the timing, but now for the fourth time revisits

1 the timing and this time Detective Ridge says and I quote,  
2 "Okay. The night you were in the woods, had you all been in  
3 the water?"

4 Jessie replies, "Yeah, we'd been in the water. We were  
5 in it that night playing around in it."

6 This is the first time in the record according to my  
7 analysis of it and according to Detective Ridge's testimony  
8 that it is directly suggested to Jessie that the correct  
9 answer is, "This happened at night."

10 Immediately upon that being suggested Jessie is --  
11 responds by accepting and now he starts to use the word "at  
12 night", where he had never used it before, where he had  
13 consistently said it was during the day. It is in direct  
14 response to Detective Ridge's substitution and introduction  
15 into the interrogation the correct fact that this happened at  
16 night so Jessie now adopts that. That is an influence tactic.  
17 It is a way of getting someone to accept something out of  
18 pressure and out of suggestion.

19 Detective Ridge follows up with his victory on page  
20 thirty -- page twenty-four of the transcript at the bottom  
21 where Detective Ridge now capitalizing in my opinion on his  
22 victory at getting night into the story now seeks to do what I  
23 was describing before -- stabilize that -- by saying the  
24 following -- and again, this is introduced by Ridge and there  
25 is nothing preceding it from which this follows. He is

1 choosing to return to this subject and he says, "Okay, they  
2 killed the boys. You decided to go. You went home. How long  
3 after you got home before you received the phone call --  
4 thirty minutes or an hour?"

5 Now there has been previous testimony about a phone call  
6 to Jessie at home at nine P. M. That's what Detective Ridge  
7 is referring to. But Detective Ridge now links this up with  
8 Jessie going home and gives Jessie the choice of having  
9 arrived home either thirty minutes or an hour before the phone  
10 call occurred, which would mean he's now suggesting to Jessie  
11 and elaborating on the story and getting Jessie to -- as he  
12 next does -- Jessie says, "Uh" -- there's a silence and then  
13 he says, "An hour."

14 So Ridge had given Jessie a choice. You can either say  
15 you got home a half hour before the phone call or you can say  
16 you got home an hour before the phone call. Those are the  
17 only choices he's got. Jessie now chooses an hour.

18 Again, that's a tactic of influence. That is posing the  
19 question in such a way that you only have two choices. Either  
20 one of those choices, I win. Detective Ridge is using that  
21 technique.

22 Then we get to the second interrogation. That's the last  
23 time that the time subject comes up in the first  
24 interrogation. As we know at two forty-four in the afternoon  
25 -- at three-eighteen in the afternoon the first tape was

1 finished. According to Detective Gitchell no one spoke with  
2 Jessie between then and the time that Detective Gitchell --  
3 after meeting with the Prosecutor Fogleman -- went back in to  
4 get the statement that is labeled "Interview of Jessie  
5 Misskelley, Junior, Second Interview Conducted to Clarify  
6 Previous Statement."

7 The last two times you will recall that Jessie said that  
8 anything was brought up about time, Jessie had been  
9 successfully moved to talk about the events happening in the  
10 evening instead of in the morning which is where he started.  
11 So now Gitchell comes in and on page one of the second  
12 transcript begins with, "Jessie, uh -- when you got with the  
13 boys and with Jason Baldwin when you three were in the woods  
14 and them little boys come up, about what time was it when the  
15 boys come up to the woods?"

16 Jessie replied, "I would say it was about five or so --  
17 five or six."

18 So Jessie is now moving in the direction of later but  
19 it's as if there is the original statement that he made about  
20 the morning and he's being slowly moved towards the evening  
21 but clearly in this statement he has not gone far enough  
22 because five or six I gather from what I've been informed  
23 about the testimony is too early for the boys to have shown up  
24 at the woods.

25 Now, we have---

1 MR. FOGLEMAN: Your Honor, I'm going to have to  
2 object to that statement by this witness. There is no  
3 basis for him concluding that five or six is too early  
4 for this defendant and the defendants to show up in the  
5 woods. There is no basis for that.

6 THE COURT: Well, he's been talking for ten minutes.  
7 I guess that's been in response to a question. I don't  
8 know. What is your objection?

9 MR. FOGLEMAN: Your Honor, my objection is is that  
10 he is testifying on things that are not in the record and  
11 have not been testified to.

12 THE COURT: Doctor, I'm -- I'm assuming that all of  
13 your testimony is based upon the testimony you've heard,  
14 the statements you've read and listened to, and the notes  
15 given by the officers.

16 THE WITNESS: Absolutely, your Honor, and  
17 specifically on this point the transcript says when the  
18 little boys come up. It is a specific statement about  
19 when the children arrived.

20 THE COURT: All right. Mr. Stidham.

21 BY MR. STIDHAM:

22 Q. Your last example, Doctor?

23 A. The next after failing to get the time moved to the  
24 proper time, Detective Gitchell uses another interrogation  
25 tactic. He now says -- and I quote from page one of the

1 second transcript -- "Alright, you told me earlier around  
2 seven or eight. Which time is it?"

3 And there are two important things about this. The first  
4 one is it's obvious that Detective Gitchell is doing the same  
5 thing that Detective Ridge has done earlier -- giving Jessie a  
6 choice. Pick one and I win or pick two and I win -- either  
7 seven or eight.

8 Gitchell can live with either answer and he's giving  
9 Jessie only those two choices. But what's even more important  
10 about this is that nowhere in the record, including the record  
11 of what the detectives say, the notes, the specific statements  
12 by Detective Ridge, the transcript of the first interrogation,  
13 is there any indication that Jessie ever said -- as Detective  
14 Gitchell says, "You told me earlier around seven or eight."  
15 There is an absolute absence of anything indicating that.

16 That's extremely important to me because what this  
17 illustrates is the legitimate interrogation tactic of making  
18 up evidence, of overstating, inaccurately stating the  
19 evidence. This is something that happens in police  
20 interrogations all the time. It is not something that it is  
21 my understanding is improper in police interrogations. It is  
22 something I see all the time and it is a tactic for  
23 manipulating the suspect and, in this case, based on my review  
24 of the evidence there is no place at which Jessie told Ridge  
25 -- told Gitchell that they had arrived there at seven or



1 eight. And in fact Detective Ridge in his testimony in the  
2 hearing makes very clear that the very first time any time  
3 came up was when Jessie said, "Nine o'clock in the morning."  
4 And we have a complete record of every utterance from that  
5 point forward. So Detective Ridge who was present with  
6 Detective Gitchell says prior to the beginning of the tape no  
7 time was mentioned and we note every mention of time prior to  
8 that.

9 So it's my opinion that this is a tactic and it's a very  
10 effective tactic because Jessie now simply repeats back to  
11 Detective Gitchell what Gitchell told him. He says, "It was  
12 seven or eight." Jessie doesn't even make a choice. He just  
13 tells Gitchell everything that Gitchell told him. That's an  
14 indication of someone who is willing to comply and does not  
15 want to take any chances of making a mistake and therefore  
16 being punished for it through pressure.

17 Then there's some more discussion of that and -- and it  
18 changes again. But that's one example. There are many other  
19 examples of -- of illustrations of manipulation on important  
20 points throughout this record.

21 Q. Thank you, Doctor.

22 MR. STIDHAM: Pass the witness.

23 RECROSS EXAMINATION

24 BY MR. DAVIS:

25 Q. Doctor, just one question. It's certainly an option for

1    Jessie Misskelley to make the statement, I wasn't there. I  
2    didn't kill anybody. I didn't see anybody killed. I don't  
3    know anything about that. That is certainly an option that he  
4    could have used in talking to the police officers, is it not?

5    A.    Yes, it is and may I explain?

6           MR. DAVIS: Your Honor, I -- I have no further  
7    questions.

8           MR. STIDHAM: Your Honor, I would like to give the  
9    witness the opportunity to explain that since the  
10   prosecutor brought it up.

11          MR. DAVIS: Your Honor, I don't think that question  
12   calls for a response.

13          MR. STIDHAM: Well, then it wasn't a question.

14          MR. DAVIS: Other than -- other than a yes or no  
15   response.

16          MR. STIDHAM: Your Honor, may the witness please  
17   explain his answer?

18          THE COURT: What -- what is the -- what explanation  
19   is necessary to that -- your answer?

20          THE WITNESS: The presumption that that's an option  
21   presumes that the person does not feel pressure and in  
22   fact the scientific literature on the subject of when one  
23   gets a coerced compliant confession is when the  
24   individual feels that they have no choice, cannot escape  
25   the situation---

1 MR. DAVIS: Your Honor---

2 THE WITNESS: ---and can no longer resist and  
3 therefore simply give up resisting and comply.

4 MR. STIDHAM: Nothing further, your Honor.

5 RECROSS EXAMINATION

6 BY MR. DAVIS:

7 Q. Doctor, just one more time. When the person is being  
8 asked questions and they don't know anything about it, and  
9 they don't know any of the details, they can always say, I  
10 don't know. I don't know anything about it. I don't know the  
11 details you're asking me about. They can always say that,  
12 can't they?

13 A. They can and sometimes they get to the point at which  
14 they can no longer do that and so they simply give up.

15 THE COURT: Alright, anything else?

16 MR. STIDHAM: No, your Honor.

17 (WITNESS EXCUSED.)

18 THE COURT: Do you have any other witnesses?

19 MR. STIDHAM: Your Honor---

20 THE COURT: I'm not asking for it right now. I mean  
21 we've---

22 MR. CROW: Your Honor, we -- we are debating  
23 recalling one witness for like one question and we'll---

24 MR. STIDHAM: Your Honor, if I could have a few  
25 minutes with Mr. Crow, I think we can make a decision