

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

STATE OF ARKANSAS

PLAINTIFF

VS.

NO. CR-93-47

JESSIE LLOYD MISSELLEY, JR.

DEFENDANT

PRETRIAL AND TRIAL PROCEEDINGS

CORNING, ARKANSAS

VOLUME 8

APPEARANCES

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BEFORE THE HONORABLE:

DAVID BURNETT, CIRCUIT JUDGE

BARBARA J. FISHER  
OFFICIAL COURT REPORTER  
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1 MR. FOGLEMAN: Your Honor, I don't think it'll take  
2 very long. I -- I think four or five witnesses.

3 THE COURT: Real short questions?

4 MR. FOGLEMAN: Yes.

5 THE COURT: And you say you can finish by noon?

6 MR. STIDHAM: We anticipate that being the  
7 approximate time, yes.

8 THE COURT: Are you anticipating lengthy cross  
9 examination on any of your witnesses?

10 MR. STIDHAM: Not any more than usual, your Honor.

11 THE COURT: That doesn't tell me a whole lot.

12 MR. STIDHAM: You might want to ask him that.

13 THE COURT: Well, alright, ladies and gentlemen,  
14 with the usual admonition not to discuss the case, you  
15 may stand in recess until nine-thirty in the morning.

16 (ADJOURNMENT.)

17 CORNING, ARKANSAS, FEBRUARY 2, 1994, AT 9:30 A. M.

18 THE COURT: Alright, call your next witness.

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

21 THE COURT: Alright.

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

24 MR. STIDHAM: Your Honor, I know we talked about  
25 this yesterday and we did make a record at the hearing in

1 Marion -- I believe it's in the transcript about our  
2 proffer -- regarding Mr. Holmes that we would like to  
3 again for the record, state---

4 THE COURT: Alright, well, whatever is in the record  
5 you've already proffered and I don't frankly don't  
6 remember what it was that I didn't let him testify to and  
7 at this point, but whatever -- whatever the record  
8 reflects it will reflect.

9 MR. CROW: We proffered the testimony from Marion,  
10 your Honor.

11 THE COURT: Yeah, but he did testify to.

12 MR. STIDHAM: We would make an offer of proof.

13 THE COURT: So -- so I' not -- I can't remember  
14 specifically what details were---

15 MR. STIDHAM: Yes, sir, it was in regard to the  
16 results of the polygraph.

17 THE COURT: Oh, yeah, okay. Well, you've already  
18 made a record on that.

19 MR. STIDHAM: I just wanted to make sure.

20 THE COURT: I do remember that.

21 MR. FOGLEMAN: Your Honor, just for the record, the  
22 State -- he was the last witness -- was he the last  
23 witness that testified?

24 THE COURT: Yeah, I believe he was.

25 MR. FOGLEMAN: Well, we would move to strike his

1 testimony. He was put on as a police interrogation  
2 expert and the theories of coerced confessions. He said  
3 the police did everything he would have done.

4 THE COURT: Well, I think you can point that out in  
5 argument. I'm going to let it stand. You all can argue  
6 that.

7 (RETURN TO OPEN COURT.)

8 THE COURT: Alright, call your next witness.

9 MR. STIDHAM: Call Doctor William Wilkins.

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

12 MR. DAVIS: Your Honor, we previously objected to  
13 the other defense team being allowed to be inside the  
14 rail up here during the course of the testimony, but we  
15 certainly object to Mr. Lax and Mrs. -- the lady in black  
16 being there with him sitting up here. They have  
17 absolutely no business being inside the rail.

18 MR. CROW: We have no objection of you telling them  
19 to move, your Honor.

20 THE COURT: Alright, well, have Val tell them to sit  
21 out in the audience.

22 (RETURN TO OPEN COURT.)

23 THE COURT: I've previously sworn the witness.

24 MR. STIDHAM: I believe that's correct.

25 THE COURT: Alright.

1 DOCTOR WILLIAM WILKINS

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

4 DIRECT EXAMINATION

5 BY MR. CROW:

6 Q. Would you state your name, sir?

7 A. William E. Wilkins.

8 Q. What is your occupation?

9 A. I'm a psychologist.

10 Q. Where -- where is your practice primarily located?

11 A. In Jonesboro, Arkansas.

12 Q. What is your educational background?

13 A. I have a Bachelor's Degree in psychology from the  
14 University of New York, a Master's Degree in research methods  
15 from Bucknell University, and a Ph.D. in psychology from  
16 Cornell University.

17 Q. Did you do any internships?

18 A. I did one in psychology in nineteen seventy-seven to  
19 nineteen seventy-nine, and another one in neuropsychology in  
20 nineteen eighty-six.

21 Q. Can you give me a little bit of history of your  
22 professional practice?

23 A. At the present time I've been in private practice in  
24 Jonesboro since nineteen eighty-nine, prior to that time I was  
25 director of clinical services at George Jackson Mental Health

1 Center.

2 Q. If I could interrupt you for a second there. While you  
3 were at George W. Jackson did you do any forensic testing for  
4 the State of Arkansas?

5 A. Yes, I did.

6 Q. Did you do any -- what kind of case was that involved in?

7 A. I remember one. It was a -- a competency of three young  
8 adolescents who had been accused of murder.

9 Q. Was that in Greene County?

10 A. No, that was in Craighead County.

11 Q. Craighead County? That was a murder case?

12 A. Yes.

13 Q. Go ahead. I didn't mean to interrupt you.

14 A. I'm sorry. Prior to my being at -- at George W. Jackson  
15 -- while I was at George W. Jackson I -- I basically did a  
16 small -- I did a small practice -- practice. Mostly I was  
17 involved in supervisor of -- of the staff of approximately  
18 thirty -- uh -- uh -- psychological -- uh -- examiners,  
19 interns, so my primary job at that point was supervising -- uh  
20 -- uh -- psychological examiners and interns, but I -- I saw a  
21 few people, but not very many.

22 Prior to that time I was director of mental health  
23 services for the Lyon County Mental Health Service in Lyon  
24 County, Nevada. Again, a -- some administrative work, but in  
25 the large measure a wide range of patients ranging to child

1 abuse cases to schizophrenics to chronic long term and so on.

2 Prior to that time I was head of psychological services  
3 for the Nevada Youth Training Center. That is the in quote  
4 "reform school for boys" for the State of Arkansas. I'm  
5 sorry, for the State of Nevada. In that position I did  
6 therapy with the -- with the young men. I put together  
7 psychological profiles for the purpose of parole and  
8 probation. I was a permanent member of the parole board. I  
9 did review of penal planning and those sorts of things.

10 Prior to that time I was director of mental health  
11 services for the Phoenix Area Indian Health Service stationed  
12 in Owyhee, Nevada. That was a program to establish and  
13 develop mental health services for several tribes in the  
14 eastern half of Nevada and parts -- parts of Idaho and parts  
15 of Utah.

16 Prior to that time I was coordinator of the Ashley County  
17 Mental Health Center in Crossett, Arkansas. There I  
18 coordinated and supervised a multi-disciplinary staff --  
19 social workers, psychologists, substance abuse counselors, and  
20 medical personnel, and involved in a wide variety of  
21 administrative as well as day-to-day processes.

22 Prior to that time I was associated with Psychological  
23 Associates in Neosho, Missouri, doing a full case load of  
24 private practice.

25 Prior to that time I was an associate professor at the

1 University of Houston in Clear Lake Texas -- Clear Lake City,  
2 Texas, I'm sorry. There I was responsible for teaching a wide  
3 variety of courses in -- um -- um -- human development,  
4 psychology, ethics, child development, abnormal psychology. I  
5 also chaired the department for two -- for two years of  
6 approximately thirty people. I also supervised doctoral  
7 dissertations and master's -- master's dissertations.

8 Prior to that time I was assistant professor at State  
9 University of New York at Rockport. At one time chairing one  
10 of the subdivisions of approximately fifteen people. I taught  
11 graduate and undergraduate level courses in measurement  
12 theory, human development, and those sorts of things.

13 Prior to that time I was principal investigator for a  
14 large U. S. funded grant on self-fulfilling prophecies.

15 Prior to that time I was a coordinator of evaluation and  
16 development for the U. S. Office of Education project center  
17 in Lafayette, Pennsylvania.

18 Q. In the course of your practice over the last two years,  
19 have you attended any continuing education programs?

20 A. Yes, I have.

21 Q. Okay. Have some of those programs been in forensic  
22 psychology?

23 A. Yes, they have.

24 Q. Do you know how many of those it would have been?

25 A. In -- are you talking about continuing education?



1 Q. Yes. Just a rough guess.

2 A. Uh -- probably -- probably -- I don't know how many --  
3 thirty -- forty -- fifty.

4 Q. Have you previously been qualified to testify as an  
5 expert in courts of law?

6 A. Yes, I have.

7 Q. As a psychologist?

8 A. Yes, I have.

9 Q. Including a forensic psychologist?

10 A. Yes, I have.

11 Q. Do you know the number of times you've been called on?

12 A. Oh, I would guess probably somewhere between seventy-five  
13 and a hundred in -- in Arizona, Nevada, Idaho, Missouri,  
14 Texas, Arkansas.

15 Q. Have you -- in the course of your practice while in  
16 Jonesboro have you testified for the prosecutor, Mr. Davis?

17 A. Yes, I have.

18 Q. And what kinds of cases was that?

19 A. One where in filing FINS Petitions.

20 Q. Was that with a juvenile?

21 A. Yes, it was.

22 Q. What was -- what would your duties be?

23 A. If -- if a -- if a -- if a juvenile probation office or  
24 -- the parents or some other agency or some other persons were  
25 concerned with a -- an adolescent or a child needing -- uh --

1 uh -- psychiatric services or -- or in need of being  
2 supervision outside of the range of the parents, the process  
3 is that there is a court process for that where the -- where  
4 the prosecuting attorney's office I gathered by law -- or I'm  
5 not sure how -- anyway they're the ones who present the -- the  
6 argument for the FINS petition.

7 I've also been appointed guardian -- guardian ad litem by  
8 the court for interviews for abused children.

9 Q. Okay. How many forensic evaluations have you performed?

10 A. In the past -- uh -- fifteen years, probably four  
11 thousand. I also did some for the U. S. Department for the --  
12 for the Secret Service as part of the assassination attempt on  
13 President Reagan.

14 Q. That was when you were in Nevada?

15 A. Yes.

16 Q. Okay. Here in Arkansas have you worked with police  
17 departments to help certify their officers.

18 A. Yes. In the State of Arkansas as in most states -- uh --  
19 police officers are required to have a psychological  
20 evaluation before they can be certified police officers. I do  
21 a number of those for a number of towns in the area.

22 Q. Have you been published?

23 A. Yes, I have.

24 Q. And are you currently licensed?

25 A. Yes, I am.

1 Q. Where are you licensed?

2 A. I'm currently licensed in Arkansas. I retired my  
3 licenses in Arizona and Missouri because I didn't want to pay  
4 the dues there.

5 Q. Okay. Now, are you currently having some kind of  
6 difficulties or dispute with your licensing board?

7 A. Yes, I am.

8 Q. Do you want to tell us a little bit about that?

9 A. The process began in nineteen ninety-one. At that time I  
10 had taken a critically ill patient to the hospital in Memphis  
11 -- Charter Lakeside Hospital. While the patient was there --  
12 uh -- she called me and her husband, also, contacted me later  
13 on. Their adolescent son was having some psychological  
14 difficulties. The concern of the parents was and those --  
15 those are in legal depositions -- the parents' comments.  
16 They're -- they're -- they're well founded.

17 Her concern was with that a psychologist by the name of  
18 Doctor Anise Causey was telling the patient she could not go  
19 home until she had agreed to bring her son over there and they  
20 would grab him and put him on the unit. When I was informed  
21 of this I became quite concerned that they were looking at --  
22 at the potential at a -- a -- a lengthy potential for holding  
23 people against their will. I contacted Doctor Causey about  
24 those issues---

25 MR. DAVIS: Your Honor, if I may interrupt. We

1 could go into a litany about this, but as I understand  
2 it, the first thing he has to do with this witness is  
3 qualify him as an expert, and as far as what this has to  
4 do with specifics of this event and his explanation has  
5 to do at this point with this case with his  
6 qualifications as an expert, I don't know. And that may  
7 come up and he may need to explain later but at this  
8 stage of the game it's not relevant.

9 THE COURT: I'm going to sustain the objection.  
10 That's not to say that at some point in this process that  
11 he will not be permitted to make his explanation.

12 MR. CROW: Alright, your Honor.

13 THE COURT: That was a double negative. What I'm  
14 trying to say is that if it's appropriate he'll be  
15 allowed to make any explanation necessary. Okay.

16 BY MR. CROW:

17 Q. Through the course of some hearings did you enter into  
18 some kind of stipulation?

19 A. Yes, I did.

20 Q. Okay. Did you agree to not practice in the area of  
21 neuropsychology?

22 A. Yes, I did.

23 Q. Did you agree to obtain a supervisor---

24 A. Yes, I did.

25 Q. ---for a period of six months?

1 A. Yes.

2 Q. And did you have any -- was there anyone taking your  
3 place when you practice forensic psychology?

4 A. No, there were not. And, in fact, I -- the supervision  
5 has not because I'm still waiting after two and a half years  
6 to get the board to decide if I -- what I need to be  
7 supervised for and by whom.

8 Q. Currently there isn't -- currently there isn't a  
9 supervisor appointed?

10 A. No. I have chosen two and it is up to the board now to  
11 decide what they're going to do with that. So -- and like I  
12 said, it's been two and a half years, so I don't know what  
13 they're going to do with it.

14 Q. Does anything in that situation affect your ability to do  
15 the type of evaluations you did on the defendant?

16 A. No.

17 MR. CROW: Your Honor, we would submit him as an  
18 expert.

19 MR. DAVIS: Your Honor, we would like to voir dire  
20 the witness.

21 THE COURT: Alright.

22 VOIR DIRE

23 BY MR. DAVIS:

24 Q. Doctor, what is the board that you have to get approval  
25 from in order to practice the profession of psychology in

1 Arkansas?

2 A. It's called the Board of Examiners of Psychology -- or  
3 for Psychology. I don't know which one it is. It's a  
4 governing board.

5 Q. And in fact that board brought disciplinary action  
6 against you, did they not?

7 A. Yes, they did.

8 Q. Okay, and as a result of that disciplinary action that  
9 was brought against you, you are under probationary status.  
10 Is that not correct?

11 A. I'm not sure of that.

12 Q. Okay. Well, they have placed restrictions on your  
13 ability to operate as a psychologist, correct?

14 A. Yes. Yes.

15 Q. In fact they've basically limited your practice to the  
16 most basic evaluations. Is that correct?

17 A. No, it is not correct.

18 Q. Okay. Well, you can't deal at all with child sexual  
19 abuse cases, can you?

20 A. No.

21 Q. And that is a result of that disciplinary action brought  
22 against you?

23 A. Yes. Yes.

24 Q. Okay, and because of that disciplinary action they've  
25 restricted you in that area?

1 A. Yes.

2 Q. Okay. And, also, you can't do neuropsychology. Is that  
3 correct?

4 A. Right.

5 Q. And what is the field of neuropsychology?

6 A. The field of neuropsychology is through psychological  
7 assessment procedures to assess brain damage as a result of  
8 head trauma, auto accidents, whatever.

9 Q. And so if in evaluations you make comment regarding any  
10 sort of indication regarding brain damage or any results from  
11 any neuroevaluations, then that would be beyond the area of  
12 scope that you're allowed to practice in. Is that correct?

13 A. Yes.

14 Q. Okay, and you mentioned that you had done some  
15 examination and testimony in FINS cases?

16 A. Yes.

17 Q. Those are brought by the Department of Human Services,  
18 right?

19 A. I -- they're brought by -- I guess so. I don't know the  
20 details.

21 Q. Okay. And in those cases the Department of Human  
22 Services retains whoever it is that's going to examine the  
23 children, correct?

24 A. I don't know how it happens.

25 Q. And in fact in your hearings before the board you

1 indicated that you only do forensic evaluations for the  
2 defense, correct?

3 A. I mean -- well, that -- that's the vast majority of what  
4 I do, yes.

5 Q. Well, the truth of the matter is that the forensic  
6 evaluations you've done in the past four or five years have  
7 all been for the defense, correct?

8 A. Yes.

9 Q. Okay, and you in fact told that board when they were  
10 questioning you about it, "I don't work for the prosecution.  
11 I work for the defense."

12 A. I may well have. I don't remember.

13 Q. Have you had any training -- in-state training in the  
14 State of Arkansas in the area of forensic evaluation?

15 A. What do you mean by "in-state"? You mean, where the  
16 training was done in -- where the training was in the state?

17 Q. Yes, sir.

18 A. No, I have not. I think I have. Let me look and see.  
19 (EXAMINING.) I've done some.

20 Q. In the state?

21 A. Yes, in the state.

22 Q. Training in-state. When was that?

23 A. Uh -- uh -- one in -- uh -- uh -- nineteen eighty-seven.  
24 Uh -- one in nineteen eighty-eight. One in nineteen eighty-  
25 eight. One in nineteen eighty-nine. One in nineteen-ninety.



1 One in nineteen ninety-one. One in nineteen ninety-one. One  
2 in nineteen ninety-one. I'm sorry. I'm sorry.

3 Q. Now are those -- wait a minute. Are those training  
4 sessions that -- that you taught or that---

5 A. Yes.

6 Q. ---okay. But I mean training sessions that you've been  
7 to.

8 A. No.

9 Q. Okay. And there's a big difference between being trained  
10 and presenting yourself as the one who's doing the training,  
11 correct?

12 A. Yes.

13 Q. Okay, and in fact when you were before the board at your  
14 last disciplinary action the chairperson of that board, Ms.  
15 Griffin, asked you, "Have you undergone any training for  
16 forensic evaluations conducted by the state?" And could you  
17 read your response to that? (HANDING TO WITNESS.)

18 A. (EXAMINING.) "No, I have not."

19 Q. What else did you say?

20 A. "I don't do them for the prosecution. I only do them for  
21 the defense. I thought I should find out about it again. I  
22 called the board about seven times the past three years trying  
23 to find out how to take the course. I just found out last  
24 week. I called over there and they gave it. They may give it  
25 again in June and they may give it again in January."

1 Q. Okay, so what you told the chairperson was that you had  
2 been trying for three years to find out or get scheduled for  
3 the course---

4 A. Yes.

5 Q. ---on forensic psychology---

6 A. Yes.

7 Q. ---correct? And as of the date that this statement was  
8 taken, you hadn't been able to figure out how to get in the  
9 course?

10 A. No.

11 Q. And in fact you told them you hadn't had any training in  
12 the State of Arkansas, correct?

13 A. I -- if that's in there, then I said that.

14 Q. Now, as part of this order of probation, was it also  
15 ordered that you receive a psychological evaluation yourself?

16 A. Yes, it was.

17 Q. Okay, and who performed that psychological evaluation?

18 A. A Doctor Michael Hazelwood.

19 Q. And---

20 MR. STIDHAM: Your Honor, may counsel approach the  
21 bench?

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

24 MR. STIDHAM: Your Honor, may I move some of the  
25 stuff out of the way?

1 THE COURT: Yes.

2 MR. STIDHAM: Your Honor, we vehemently object to  
3 the prosecution cross examining this witness on a basis  
4 of a mental evaluation on him. I don't remember what the  
5 date of it is, but it's obviously improper to impeach him  
6 on that. Also, we submit that it's improper to impeach  
7 him with any extrinsic evidence. They're trying to  
8 allege that he is not qualified because of prior bad acts  
9 or prior bad conduct. I don't think that's allowed under  
10 the rule.

11 THE COURT: No, I'm not going to allow that -- prior  
12 bad acts -- prior conduct. He opened it up himself. In  
13 fact you were about to go into areas on your introductory  
14 comments that the Court said I wasn't going to allow.

15 MR. CROW: I wasn't. No, your Honor, I wasn't.

16 THE COURT: However, I -- I also viewed Channel  
17 Eight t. v. last night where your witness was on t. v.  
18 telling the world about the things that I had restricted.

19 MR. STIDHAM: Not about the evaluation, your Honor.

20 THE COURT: Well, he talked all about this child and  
21 about the child being exposed and all that. I -- I  
22 overruled that type of testimony. What I am going to  
23 allow the State to do -- I don't want you to go into any  
24 specific findings of this man. I am going to allow you  
25 to go into any area that would test or challenge his

1 competency to act as a forensic psychologist, and it will  
2 be limited to -- to those areas -- competency -- not --  
3 not -- not -- specific findings in the letter that refer  
4 to some specific conduct of the witness.

5 MR. STIDHAM: Your Honor, I'm going to have to---

6 THE COURT: --If that -- if that makes sense.

7 MR. DAVIS: I think I'm going to stay within the  
8 bounds.

9 THE COURT: Okay.

10 MR. STIDHAM: Your Honor, if he doesn't, I'll have  
11 to move for a mistrial.

12 THE COURT: Well, you can move for a mistrial any  
13 time you want. I mean, I've made my ruling and that's  
14 all I can do. I'm trying to limit it as best as  
15 possible---

16 MR. STIDHAM: I don't mean that as any disrespect to  
17 the Court.

18 THE COURT: ---I understand that. I'm trying to  
19 limit the cross examination within the bounds of decency  
20 and fair play. On the other hand, they have a right to  
21 cross examine a witness that you put up as an expert as  
22 to his professional competency and that's what I'm going  
23 to allow. Okay.

24 MR. CROW: Thank you, your Honor.

25 (RETURN TO OPEN COURT.)

1 BY MR. DAVIS:

2 Q. Doctor Wilkins, before I get into the psychological  
3 evaluation that was performed on you as a result of this  
4 probationary order, the -- it was also ordered that you be  
5 supervised, correct?

6 A. Yes.

7 Q. And you aren't supervised, are you?

8 A. No.

9 Q. And you weren't supervised when you did the evaluations  
10 in this case, correct?

11 A. As of this point, the board has not appointed a  
12 supervisor nor have they told me what I was supposed to be  
13 supervised for. As soon as they do so, I will be glad to do  
14 so.

15 Q. Now, would you answer my question: Were you---

16 A. No, I was not.

17 Q. ---you weren't supervised at the---

18 A. No.

19 Q. ---time you did this evaluation?

20 A. No.

21 Q. And that's part of what the board that govern  
22 psychologists in the State of Arkansas required that you be  
23 supervised in the practice of psychology, correct?

24 A. At some point, yes.

25 Q. Now, this evaluation by Doctor Hazelwood---

- 1 A. Yes.
- 2 Q. ---you're familiar with that?
- 3 A. I saw it the first time about six months ago.
- 4 Q. Okay. It's some eleven page report---
- 5 A. Yes.
- 6 Q. ---regarding his findings?
- 7 A. Yes.
- 8 Q. Okay, and he did perform a psychological evaluation on  
9 you?
- 10 A. No.
- 11 Q. Okay, what did he perform on you?
- 12 A. I don't know what it was. It was not a psychological  
13 evaluation.
- 14 Q. Okay. Well, did you meet with him?
- 15 A. Yes, I did.
- 16 Q. Okay, how long?
- 17 A. Approximately five hours.
- 18 Q. Okay, and as a result he -- he's made an eleven page  
19 report, correct?
- 20 A. Yes.
- 21 Q. Okay, is the Wechsler Memory Scale -- is that something  
22 that you use just in neuropsychology?
- 23 A. No, it's not.
- 24 Q. Okay, you use that in forensic psychology, don't you?
- 25 A. Sometimes.

1 Q. Okay, and in fact you used it in this case, didn't you?

2 A. Yes, I did.

3 Q. Okay.

4 A. I -- yes, I did.

5 Q. And the---

6 A. I used parts of it.

7 Q. Okay, the MMPI -- is that something you just use in  
8 neuropsychology?

9 A. No, it's not.

10 Q. Okay, you used that to back forensic evaluations, don't  
11 you?

12 A. Yes.

13 Q. Okay. And you used that in this case?

14 A. Yes.

15 Q. Okay, and you recall the concerns that were expressed by  
16 Doctor Hazelwood -- are you familiar with page eleven---

17 A. Yes.

18 Q. ---of his letter? (HANDING TO WITNESS.)

19 A. Yes.

20 Q. Okay. And did he not in there outline and express  
21 concern by your lack of knowledge of the MMPI and the sub-test  
22 contained therein?

23 A. Yes.

24 Q. Okay. In fact, what does he say about that? Would you  
25 read that for us, please?

1 A. (EXAMINING.) Which place? You have nine places marked.

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

4 THE COURT: Alright.

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

7 MR. STIDHAM: Your Honor, again, he's doing exactly  
8 what you told him not to do, and that is impeach him with  
9 this document. We would ask for a mistrial.

10 THE COURT: I didn't say he couldn't impeach him  
11 with this document. I said he could go into the areas  
12 that dealt on professional competency and -- and so far  
13 as I can tell, that's what he's doing. Now, specific  
14 incidents of bad conduct on the part of this person, I  
15 have said that you could not go into those. In fact, Mr.  
16 Crowe's opened it up until the State objected. But I am  
17 going to allow---

18 MR. CROW: I wasn't going---

19 THE COURT: ---him to cross examine him with regard  
20 to his professional competency.

21 MR. STIDHAM: Thank you, your Honor.

22 THE COURT: I feel real comfortable on this. He  
23 signed a consent order permitting this.

24 (RETURN TO OPEN COURT.)

25 THE COURT: Alright, go ahead.



1 MR. STIDHAM: Thank you, your Honor.

2 MR. DAVIS: Thank you, your Honor.

3 BY MR. DAVIS:

4 Q. Doctor, while -- just to clarify, this examination or  
5 psychological evaluation of you -- or -- pardon me --  
6 examination was conducted pursuant to that order entered by  
7 your governing board, correct?

8 A. Yes.

9 Q. And that order was entered with your consent, correct?

10 A. Yes.

11 Q. In fact you signed and agreed to all of this?

12 A. Yes.

13 Q. Okay, and Doctor Hazelwood indicated in his letter that  
14 he found some fundamental deficits in your knowledge in  
15 certain areas, correct?

16 A. That's what's in there, yes.

17 Q. Okay, and he put for example, "Inability to provide the  
18 sub-test of the Wechsler Memory Scale, a test he reportedly  
19 utilizes." Is that correct?

20 A. It is correct that he said that?

21 Q. Yes, sir.

22 A. Yes, it's correct he said that. It's in there.

23 Q. Okay. Okay, and he also indicated that you've misnamed  
24 -- one of the areas of concern was that you misnamed MMPI  
25 clinical scales, the inability to spontaneously recite the

1 clinical scales of the MMPI, correct?

2 A. If he says that.

3 Q. And you've reviewed this letter, correct?

4 A. Yes, I have, and that part is not true, but that's  
5 alright.

6 Q. And all -- in addition to that he says, "There was  
7 demonstrated failure to follow standardized procedures in the  
8 administration of the Finger Oscillation Test."

9 A. Yes.

10 Q. "And failure to conduct comprehensive examinations of  
11 clients", correct?

12 A. I don't remember that one, but if it's in there and he  
13 says that, it's fine.

14 Q. And did he also say -- and I -- "That there was a failure  
15 to appreciate the limitations of your professional  
16 competence"?

17 A. I think he said that.

18 Q. Now, you used in your evaluation in this case -- you used  
19 the Wechsler and MMPI, correct?

20 A. Yes, I did.

21 Q. Now, of the tests you used on Mr. Misskelley, how many of  
22 those tests were objective in nature?

23 A. Uh -- I'd have to look and see. I don't remember without  
24 looking.

25 Q. Let me ask you this: Is the House/Tree/Person -- is that

1 -- is that a subjective or objective?

2 A. It's a projective technique -- subjective.

3 Q. Subjective. And when you say subjective, that means that  
4 the tester's viewpoint and orientation is included in the  
5 tester's opinion---

6 A. No, I -- I mean by that that there is a -- there is a  
7 manual that describes what certain issues -- what certain  
8 signs -- what certain things mean.

9 Q. Are you -- are you saying that in subjective tests that  
10 the viewpoints and the frame of mind and the perspective of  
11 the person giving the examination does not enter into the  
12 results drawn from that examination?

13 A. It's not supposed to.

14 Q. But in any subjective test that happens?

15 A. Probably does.

16 Q. And how many of these tests that were provided on him  
17 were subjective?

18 A. I don't know without looking.

19 Q. And the House/Tree/Person is, right?

20 A. Yes.

21 Q. Bicycle Test?

22 A. Uh -- no -- maybe half, okay. It has -- it -- it again  
23 has a scoring manual.

24 Q. The Clock Test?

25 A. Again, it has a scoring manual that goes with it.

1 Q. I mean it's still subjective in how you evaluate it,  
2 correct?

3 A. There can be a subjective element to it.

4 Q. And you would agree that in any subjective test your  
5 perception, your viewpoints, your mental make-up contributes  
6 to the results you derive or determine from this -- from that  
7 test?

8 A. Yes.

9 Q. When you do an evaluation for forensic -- a forensic  
10 evaluation for a criminal defendant, what is it you're trying  
11 to determine?

12 A. In the very simplest form of forensic psychology you deal  
13 with competency to stand trial.

14 Q. So once you get beyond the issues of competency to stand  
15 trial you're getting into a more complex area of forensic  
16 evaluation?

17 A. Yes.

18 Q. And has there been questions by the board as to whether  
19 or not you are qualified to practice in a complex area of  
20 forensic pathology -- I mean, forensic psychology?

21 A. No.

22 Q. And you have -- have you filed a letter of intent with  
23 the board regarding that particular area of practice?

24 A. Yes.

25 Q. When was that?

1 A. Last week some time.

2 Q. When?

3 A. Last week some time. You are -- you are permitted to --  
4 to update your letter of intent.

5 Q. So as of last week you filed a letter of intent regarding  
6 that area of practice?

7 A. Yes. When I first came here in eighty-seven, there was  
8 no area in that area in the State of Arkansas, so -- so it was  
9 not included on my original statement of intent.

10 Q. In order to practice in an area you are supposed to file  
11 a letter of intent, right?

12 A. When there's an area, yes.

13 Q. Okay. I think that you put yourself out to be a forensic  
14 psychologist, that's an area, correct?

15 A. Yes.

16 Q. Okay, and it wasn't until last week that you even filed  
17 your letter of intent with the Board of Psychology?

18 A. Yes.

19 MR. DAVIS: No further questions, your Honor -- yes,  
20 one more last question.

21 BY MR. DAVIS:

22 Q. When you filed your letter of intent -- say if I'm -- if  
23 I'm going to practice psychology and I want to practice  
24 forensic psychology, I don't just send a letter to the board  
25 and that qualifies me, does it?

1 A. No. Just like for example in my original intent I filed  
2 one that I was going to practice neuropsychology and they  
3 certified that when I first came here and decided later on  
4 they were not going to do that -- on what grounds I'm not sure  
5 of.

6 Q. But there is a certification process. When you---

7 A. There -- there are -- there are no criteria anywhere in  
8 the State of Arkansas by the board or anywhere else which  
9 determines the criteria or qualifications of the practice of  
10 any part of psychology -- none.

11 Q. Then why did you file a letter of intent?

12 A. Because of -- enough other -- you mean recently or in the  
13 past?

14 Q. Last week.

15 A. Last week because in some other cases I'm dealing with it  
16 became an issue.

17 Q. Whether you're qualified to practice in that area?

18 A. No. No, whether or not I had taken the one day state  
19 course or not.

20 Q. You haven't taken that one day state course?

21 A. No, have not.

22 Q. And up until last week you hadn't even filed a letter of  
23 intent?

24 A. No.

25 Q. And yet you've been practicing it for -- you've been

1 holding yourself to practice for how long?

2 A. Five years -- well, ten years -- twelve years.

3 MR. DAVIS: No further questions on voir dire, your  
4 Honor. We'll have some later.

5 CONTINUED DIRECT EXAMINATION

6 BY MR. CROW:

7 Q. Doctor Wilkins, did the -- did your board receive a copy  
8 of that evaluation that Mr. Davis was talking about?

9 A. Yes, they did.

10 Q. Do you know when?

11 A. They received it -- I think it was done in June of  
12 nineteen ninety-two. Is that the date on it?

13 Q. Sometime in nineteen ninety-two?

14 A. Yes, at a date set -- I did not see it again. I never  
15 did see it until about a year and half later. Uh -- despite  
16 repeated attempts by me and my attorneys to getting copies of  
17 it, we were never able to get copies of it and my thought  
18 about it is since the board let me practice for -- for well  
19 over two years after that was completed it must not have been  
20 terribly concerned about what was in there.

21 Q. Are you still as of today able to practice forensic  
22 psychology?

23 A. Yes, I am.

24 Q. Have you contacted the board about it?

25 A. Yes, I have.

1 Q. And while you can't tell what they say, is it your  
2 impression that you are still able to practice?

3 A. At this time---

4 MR. DAVIS: Your Honor---

5 MR. CROW: Wait a minute.

6 MR. DAVIS: ---whether they're asking what they say  
7 or whether he can ask him what his impression is, that's  
8 a hearsay response.

9 MR. CROW: Your Honor---

10 MR. DAVIS: We'll stipulate that he's obviously  
11 still practicing. We just question whether he's  
12 qualified.

13 MR. STIDHAM: Your Honor, may counsel approach the  
14 bench?

15 THE COURT: Yes.

16 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT  
17 OF THE HEARING OF THE JURY.)

18 MR. STIDHAM: Your Honor, I think we need to go to  
19 chambers and have a discussion.

20 THE COURT: About what?

21 MR. STIDHAM: The State is trying to say he's not  
22 qualified. I've got -- we've got a forensic evaluation  
23 in the court file---

24 THE COURT: I want to know in those other cases he  
25 made reference to because he had failed to take the one



1 day test, has he ever been denied the right to testify in  
2 court as a forensic psychologist.

3 MR. STIDHAM: The Attorney General says he's  
4 qualified.

5 THE COURT: Has he ever been denied that as a result  
6 of that?

7 MR. CROW: Not to my knowledge, your Honor.

8 MR. STIDHAM: Your Honor, my concern is we've got a  
9 competency of the defendant issue now.

10 THE COURT: It goes -- listen -- all of those things  
11 go to the weight of his testimony, not -- not -- I mean  
12 the jury can sift through that.

13 MR. CROW: Thank you, your Honor.

14 MR. STIDHAM: Your Honor, but I don't think the  
15 Court's seeing my point.

16 THE COURT: What is your point?

17 MR. STIDHAM: My point is at a previous hearing  
18 Doctor Wilkins was qualified as an expert. He testified  
19 about a forensic evaluation he did and he said the  
20 defendant was competent to stand trial and that he was  
21 aware of the difference between right or wrong and was  
22 able to appreciate---

23 THE COURT: Um-hum.

24 MR. STIDHAM: Is the State questioning that now? I  
25 mean, do I need to move for a continuance that -- I don't

1 want to have to retry the case based on the defendant's  
2 competency. They hadn't challenged this until yesterday.

3 THE COURT: I don't think that's even an issue.

4 MR. DAVIS: We never questioned the defendant's  
5 competence to stand trial.

6 MR. STIDHAM: Judge, they're saying he's not  
7 competent to do this.

8 THE COURT: They're saying this man -- they're  
9 challenging his competency as an expert.

10 MR. FOGLEMAN: Not your client's competence.

11 MR. STIDHAM: What about -- how can you do one  
12 without doing the other? That's my concern.

13 MR. FOGLEMAN: That would be like saying if he had  
14 never been given a test he's automatically incompetent to  
15 stand trial. That---

16 THE COURT: --Well, there's a presumption of one's  
17 sanity in the first place and I don't know that that's  
18 even been put in the issue.

19 I'm going to -- what I'm going to do is I'm going to  
20 allow you to proceed---

21 MR. STIDHAM: Thank you, your Honor.

22 THE COURT: ---and then it simply goes to the weight  
23 of his testimony.

24 MR. STIDHAM: Is this witness going to be qualified  
25 as an expert in the area of psychology?

1 THE COURT: I'm not going to make that statement. I  
2 never make that statement. You submit him and I tell you  
3 to proceed.

4 MR. CROW: Thank you, your Honor.

5 THE COURT: If I make the statement then it gives  
6 extra credence to -- to the person's position, so my  
7 policy has always been that you'll never hear me say it.

8 MR. STIDHAM: May I inquire of the Court, does the  
9 Court have any concerns about the defendant's fitness to  
10 proceed?

11 THE COURT: Quite frankly, I've got some serious  
12 reservations based upon what I've seen and heard, but  
13 that doesn't mean I'm not going to let him testify  
14 because apparently the State has certified him and he's  
15 given him---

16 MR. CROW: He's talking about the defendant.

17 THE COURT: The defendant?

18 MR. STIDHAM: Yes, your Honor.

19 THE COURT: Oh, the defendant, no, not at all. None  
20 whatsoever.

21 MR. STIDHAM: Two different issues. Is the State  
22 raising that issue?

23 THE COURT: Not that I know of.

24 MR. STIDHAM: Are you satisfied that he's competent?

25 MR. DAVIS: As I understood the competency -- as I

1 understood it, he said the very basic evaluation was that  
2 -- forensic evaluation to determine competency -- that  
3 once you got beyond that you're in a more complex area  
4 and a more extended area and I question whether he's  
5 competent in that area of forensic -- forensic---

6 THE COURT: Now wait a minute. You're questioning  
7 the witness, not the defendant.

8 MR. DAVIS: Yes.

9 MR. STIDHAM: Your Honor, but my -- I don't think --  
10 I don't think could we go in chambers, Judge -- I think  
11 this is very important.

12 THE COURT: I'm not going to waste any more time  
13 going back in chambers. What is -- what is your -- what  
14 is your issue? What are you trying---

15 MR. STIDHAM: I'm questioning -- Judge, it's not the  
16 witness -- the defendant.

17 THE COURT: Well, I -- nobody's raised that as far  
18 as I know.

19 MR. STIDHAM: That's what I'm doing right now.

20 THE COURT: Are you trying to tell me you don't  
21 think your witness is -- the defendant is competent to  
22 stand trial? Is that what you're saying?

23 MR. STIDHAM: No, I'm asking you: Does the Court  
24 have any question about that -- does the State have  
25 any---

1 THE COURT: None at all as to the competency of the  
2 defendant. None. Zero.

3 MR. STIDHAM: Is the Court satisfied with that?

4 THE COURT: Sure.

5 MR. STIDHAM: Is the State satisfied that the  
6 defendant is competent to proceed?

7 MR. FOGLEMAN: Oh, yes. We've never questioned  
8 that.

9 MR. STIDHAM: I just want to make sure that -- you  
10 know -- those issues were kind of beginning to  
11 intertwine.

12 THE COURT: Well, you're talking about two totally  
13 different things.

14 MR. STIDHAM: But they were starting to intertwine,  
15 your Honor. I wanted to make sure.

16 THE COURT: Okay, that's a matter of perception, I  
17 guess.

18 MR. STIDHAM: Thank you, your Honor.

19 MR. FOGLEMAN: Thank you, your Honor.

20 (RETURN TO OPEN COURT.)

21 **BY THE WITNESS:**

22 A. Let me also add that I have had several psychological  
23 evaluations prior to that one by Doctor Hazelwood for various  
24 appointment positions and I---

25 MR. FOGLEMAN: Your Honor, I don't remember even a

1 question being asked. Doctor Wilkins shouldn't be  
2 talking. I object. It's not responsive.

3 THE COURT: Yes, sir, Doctor, please, let your  
4 responses be related to a question that's---

5 MR. CROW: Doctor, I'll---

6 THE WITNESS: I thought we were in a middle of a  
7 question that Mr. Crow just asked me before the --  
8 before the interruption.

9 THE COURT: Well---

10 MR. CROW: Let me start again, please.

11 THE COURT: Alright.

12 BY MR. CROW:

13 Q. Doctor, I don't remember what question I was asking you.  
14 I'll ask you this question.

15 A. I do.

16 THE COURT: Let's just start all over, okay.

17 BY MR. CROW:

18 Q. Have you have previous psychological evaluations?

19 A. Yes, I have.

20 Q. Any problems as far as the evaluations?

21 A. No.

22 Q. Alright.

23 A. Let me -- I'm sorry, go ahead.

24 Q. Doctor, did you perform a -- is there currently any  
25 outstanding offers to you for change in employment?

1 A. Yes, sir.

2 Q. In the teaching area?

3 A. Yes.

4 Q. Okay, what would you be teaching if you took those jobs?

5 A. Forensic psychology.

6 Q. Forensic psychology?

7 MR. CROW: Your Honor, at this point we would ask  
8 that Doctor Wilkins be qualified.

9 MR. DAVIS: I have one more question.

10 THE COURT: Alright.

11 VOIR DIRE

12 BY MR. DAVIS:

13 Q. Do you plan to go ahead and take this course in the State  
14 of Arkansas to qualify you before you enter into that teaching  
15 field?

16 A. Probably not because it is not necessary in other states.

17 Q. So it wouldn't be in the State of Arkansas?

18 A. No.

19 THE COURT: Alright, you may proceed.

20 MR. CROW: Thank you, your Honor.

21 CONTINUED DIRECT EXAMINATION

22 BY MR. CROW:

23 Q. Now, we can get down to business. Have you performed any  
24 I. Q. -- what is commonly known as I. Q. tests on this  
25 defendant?

1 A. Are we ready to get---

2 Q. Yes.

3 A. Okay. Let me change things here.

4 Yes, I did.

5 Q. Okay. Can you tell me a little bit about that?

6 A. I performed the standard one known as the Wechsler Adult  
7 and Intelligence Skill Revised. That is a fairly standard  
8 measure of intellectual ability.

9 Do you want me to describe his result?

10 Q. Yes, describe the results for us.

11 A. The -- the scale is designed with two broad sub-  
12 categories. One called verbal abilities and one called  
13 performance abilities. As the titles imply, verbal --uh -- uh  
14 -- measures -- uh -- verbal ability, ah, verbal reasoning,  
15 verbal thinking, verbal manipulation of things. Performance  
16 implies performance of -- of physical -- uh -- manipulation of  
17 things, objects, ideas.

18 On that -- uh -- uh -- scale -- uh -- Jessie received a  
19 full scale I. Q. of seventy-two with a verbal I. Q. of seventy  
20 and a performance I. Q. of seventy-five.

21 Q. What is considered average or normal?

22 A. Average is between eighty-four and a hundred and sixteen.

23 Q. Okay.

24 A. With the average average being one hundred as---

25 Q. One hundred is supposed to be the mean?



1 A. ---a mean. Mean -- yes, that's the mean score.

2 Q. Did you do -- can you describe some of the tests -- I  
3 believe there were---

4 A. I also did some -- did some -- if we -- if we look at  
5 intelligence from a qualitative sense rather than from a  
6 quantitative sense, we begin to look at some other kinds of  
7 areas. By qualitative I mean in terms of the -- of the -- uh  
8 -- uh -- kind of thinking processes that go on. A lot of the  
9 work for that comes from work of Jean Piaget or -- before he  
10 died. A lot of it comes from the work of Doctor Jerome  
11 Brunner at Harvard -- Piaget was in -- was in Switzerland.

12 Basically what we're looking at is -- is not just what  
13 you know, that is the factual information that you know, but  
14 how you deal with thinking about the world, understanding the  
15 world. Piaget's primary concern was that at different ages we  
16 literally think about the world in different ways and that for  
17 him then intelligence at different ages means different  
18 things.

19 So one of the things that we did with -- with Jessie was  
20 to look at -- at some of those issues regarding his -- uh --  
21 uh -- level of intellectual ability in a qualitative form.  
22 Those include things such as -- uh -- shall I demonstrate a  
23 few---

24 Q. Yes---

25 A. ---do you want me to do that?

1 Q. ---please, Doctor.

2 A. One of the things that you do is have the -- have the  
3 person take a lump of Play Doh and put it into round balls and  
4 you -- and then you ask the child to -- to agree upon that the  
5 two are equal sizes and they may or may not agree. They may  
6 move from one and eventually they'll decide that they're  
7 equal, they're the same size.

8 Then you take one of the balls and flatten it down like  
9 this. (DEMONSTRATING.) And ask them if they're now equal and  
10 they say, no, this one has more in it. Then if you do it this  
11 way and ask them, "Which one has more in it?", but they'll say  
12 this one. (DEMONSTRATING.) That is the kids are not bothered  
13 by the fact that they are blatantly inconsistent. Little  
14 children think in terms of one dimension, that is they think  
15 about height rather than height, weight being -- being the  
16 same, but little children think about things in terms of -- of  
17 -- of -- of -- of single dimensional things.

18 We do other things. Like, make -- make -- make a hot-  
19 dog, and change the size and they keep -- they keep agreeing  
20 that one is bigger. The other one is bigger. The other one  
21 is bigger. The other one is bigger, and they not -- they're  
22 not bothered by the -- the -- that kind of thing whatsoever.

23 The other thing that we -- that we do sometimes is  
24 like---

25 Q. How did Mr. Misskelley respond?

1 A. Mr. Misskelley responded with -- with the clay balls  
2 about like I would expect from a seven to eight year child.  
3 That is -- that is he -- he -- he -- he tends to have real  
4 difficulty in what's called the conservation of matter.  
5 That's what that's called.

6 Another one is -- is -- we take -- chips like this.  
7 (DEMONSTRATING.) And ask the child, which one has more in it?  
8 And they'll say this one. (DEMONSTRATING.) Then you have  
9 them count it. One. Two. Three. Four. Five. Six. One.  
10 Two. Three. Four. Five Six. Which one has more in it?  
11 This one. (DEMONSTRATING.)

12 Do it this way then and ask the child which one has more  
13 in it? They'll say this one. Have him count it again, one,  
14 two, three, four five, six. And at that time -- that's --  
15 again, we're looking at length and the number six is  
16 meaningless in terms of any kind of a -- of a criteria. Then  
17 the other thing that you can do is we move into the work  
18 what's -- what's known -- known as moral judgment based mostly  
19 on the work of Lawrence Kolberg.

20 Kolberg talks about making moral decisions in the same  
21 way that we make any kind of decisions -- size, differences.  
22 For example, if I say to -- as I -- as I -- as I -- as I did  
23 with Jessie, here's a child who is helping her father fill his  
24 fountain pen. He asked her to do that and she's doing that  
25 for him. She accidentally spills the ink, makes a spot this

1 big. (INDICATING.) There's another child who is playing with  
2 the ink bottle when he's not supposed to be, spills it, makes  
3 a spot this big. (INDICATING.) Which child did the worst  
4 thing? In response, the children -- Jessie is, this one  
5 because the spot's bigger. That is -- that is we deal with --  
6 with -- with the size -- with the consequence of the system,  
7 not any kind of notice of what the intent is.

8 If I ask Jessie questions like, suppose a man invented a  
9 cure for -- is stricken with cancer. This man's wife has that  
10 kind of cancer. He goes to the druggist and tries to buy it,  
11 and the druggist is charging Two Thousand Dollars for it. The  
12 man -- uh -- sells everything he has. He took everything he  
13 had and all he can get is Fifteen Hundred Dollars, and he goes  
14 to the druggist and said, all I can get is Fifteen Hundred  
15 Dollars. Can I buy a dose and I'll pay you back the other  
16 Five Hundred Dollars at some point at time? And the  
17 pharmacist says, no. So then the man breaks into the pharmacy  
18 at night and steals a dose of medication and give it to his  
19 wife. Now, the question is: Did the man do a right or wrong  
20 thing.

21 Now as we begin dealing with -- with -- with morality,  
22 legality, we get some very strange kinds of things happening  
23 to us. That is what we know what's moral, how we would decide  
24 those issues -- uh -- uh -- uh -- becomes strange. In  
25 Jessie's case, as in -- as in most children's cases -- most

1 concrete thinking cases -- that is that the man did an  
2 absolute wrong and Jessie is unable to entertain any kind of  
3 possible explanation, possible intentional issues that for  
4 Jessie it is blind obedience to authority. This is what the  
5 law is. This is what you do.

6 We did some other kinds of -- of -- of memory scale kinds  
7 of things. Do you want to deal with those now or as a  
8 separate issue?

9 Q. Basically, when you -- after all of these testings did  
10 you come to a conclusion, Doctor, as to what the mental  
11 reasoning?

12 A. My conclusion was -- was that Jessie reasons on the level  
13 of about of a -- between a six to eight year old. That --  
14 that his -- what's called a very -- a very concrete file of  
15 thinking. By concrete I mean is -- that is an inability to do  
16 abstracts, to -- to envision the world in terms of things that  
17 I have had concrete experience with. So things are taken and  
18 dealt with very literally. Let me give you an example --  
19 another example. Is that if you have a small child, you tell  
20 him, don't eat any cookies before supper, and you watch him  
21 and he goes to the cookie jar and he gets cookies and eats  
22 them before supper. And you say to that child, I told you not  
23 to eat cookies before supper? And the kid says, I didn't do  
24 it. You know, you're baffled, because you know you saw him do  
25 it. If -- if you question the child for a while longer he

1 will say to you, I was hungry and got something to eat. And  
2 for the child literally -- literally he did not get through  
3 when he shouldn't have done so, as he was hungry. That --  
4 that -- it's a very, very literal, absolute, direct definition  
5 of what the world is.

6 Q. Alright, Doctor. Did you do any evaluations of Mr.  
7 Misskelley on his reading levels?

8 A. Yes, I did.

9 Q. What were those?

10 A. Uh -- at the third grade level.

11 Q. What about his writing level?

12 A. At about the point seven level. That means less than  
13 first grade.

14 Q. How about his verbal comprehension?

15 A. Yes. Jessie has -- one of the things we looked at was I  
16 would read him a short story and ask him to give me details  
17 from that. Jessie was able to give one or two details out of  
18 a possible twelve, fourteen things in the story. Very, very  
19 impaired ability to do these kinds of things. Jessie,  
20 basically after a -- after a seven or eight word sentence  
21 begins to -- to -- to lose what's happening.

22 For example, on the -- on the first page of the second  
23 confession that he did. He's asked, "Alright, you told me  
24 earlier it was around seven or eight. Which time was it?"  
25 Jessie replies, "It was seven or eight." That is he -- he got

1 the last -- half of the sentence.

2 Q. Okay, Doctor---

3 A. --And the first half was -- was gone.

4 Q. Did you do any testing on Jessie as to his personality  
5 pattern, personality traits?

6 A. Yes, I did. I did the MMPI-2, a House/Tree/Person and  
7 Rorschach

8 Q. Okay. Can you tell me about some of the results?

9 A. The findings on the Rorschach were of no value. The  
10 Rorschach is a ten card picture. I show you a picture and ask  
11 you to describe what you see here. The scoring is done is --  
12 that first of all the person has to give a response that is --  
13 that is scorable according to the manual. None of Jessie's  
14 responses of the ten were scorable. So that is no -- which is  
15 -- which is not necessarily unusual. Some people have  
16 moderate intellectual ability.

17 Q. Okay.

18 A. The result on the -- on the MMPI found some moderate  
19 problems with being somewhat dependent, some antisocial  
20 characteristics and some of what are called schizotypal  
21 characteristics. Basically what we're looking at in terms of  
22 Jessie and terms of which are basic of personality structure  
23 if you want to look in terms of -- in terms of -- of -- of a  
24 diagnostic category.

25 The young man who is -- he's dependent upon others to

1 make major decisions for him. Who has some difficulty  
2 sometimes separating out fantasy from reality, and at times  
3 especially when he's under a great deal of stress becomes  
4 almost unable to decide which is which.

5 Also, looked at -- I guess it's not in terms of other  
6 testing but there's some other information in terms of  
7 interview data that we don't have to go into now.

8 Q. Did you do a -- some kind of a suggestibility test?

9 A. Yes, I did.

10 Q. Can you tell about that?

11 A. The---

12 MR. DAVIS: Your Honor, at this point regarding the  
13 suggestibility test, to my knowledge and I looked through  
14 the literature, I'm not sure that there are any  
15 scientific tests that qualifies as such and before we get  
16 into an area of speculation that is not based on any  
17 scientific research or data and or any reliable  
18 foundation. I don't want to get that testimony in front  
19 of anybody if this is just some off-the-wall theory.

20 MR. CROW: Can I back up a little bit, your Honor?

21 BY MR. CROW:

22 Q. I have a textbook you pulled out by -- I don't want to  
23 butcher his name -- Gisli Gudjonsson?

24 A. Yes.

25 MR. DAVIS: Your Honor, we may need to have a

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1 hearing outside the presence of the jury.

2 THE COURT: Alright, it's time for a recess anyway.

3 Alright, ladies and gentlemen, with the usual  
4 admonition not to discuss the case, you may stand in  
5 recess -- I hope for about ten or fifteen minutes. We'll  
6 just tell you when to come back in. We're going to stay  
7 here.

8 (RECESS.)

9 THE COURT: Alright, gentlemen, let the record  
10 reflect that this is a hearing out of the presence of the  
11 jury.

12 Alright, I---

13 MR. CROW: Thank you, your Honor, may I proceed?

14 THE COURT: Yes.

15 BY MR. CROW:

16 Q. Doctor, I have a text book in front of me by --  
17 apparently written by an author by the name of Gisli  
18 Gudjonsson.

19 A. Yes.

20 Q. Have you reviewed that text book?

21 A. Yes, sir, I have.

22 Q. Okay. What's the nature of the text book? What's it  
23 about?

24 A. The text book is title The Psychology of Interrogations,  
25 Confessions and Testimony. Basically what Dr. Gudjonsson is

1 doing is -- is -- as the title suggests is looking at a wide  
2 variety of issues in the psychology of interrogations and  
3 confessions testimony. This is in one place where he - uh --  
4 also reiterates some of the things he had done in the past on  
5 the suggestibility scale. As I recall in the past looking  
6 through the index, I think he lists fifty-six references to  
7 himself dealing -- dealing with this issues.

8 Q. Do you have any information about Mr. Gudjonsson?

9 A. He currently is a -- I think his title is -- uh -- uh --  
10 I don't know what his title is. He's at the Institute of  
11 Psychiatry in London, does fairly well -- well world wide --  
12 world wide recog -- worldly -- world wide recognized as a  
13 leading authority on false confessions and testimony and  
14 police interrogation techniques.

15 Q. So it's your testimony here today that Mr. Gudjonsson is  
16 a -- Dr. Gudjonsson -- excuse me -- is a world recognized  
17 authority on -- in this area?

18 A. Yes.

19 Q. Okay. Do you know anything about the suggestibility  
20 scale? Do you know who developed it?

21 A. Dr. Gudjonsson did.

22 Q. Dr. Gudjonsson did? Do you know, has it been employed---

23 A. Yes.

24 Q. Does it have a scientific basis?

25 A. Yes.

1 MR. CROW: I think we've met the argument showing,  
2 your Honor, that it's based on scientific criteria and  
3 that the---

4 MR. DAVIS: If I may voir dire---

5 THE COURT: Yes.

6 VOIR DIRE

7 BY MR. DAVIS:

8 Q. Is there a standardized Gisli Gudjonsson suggestibility  
9 scale?

10 A. Yes, there is.

11 Q. Is there a standardized test?

12 A. Yes.

13 Q. Is that the test that you have performed on Jessie  
14 Misskelley?

15 A. Yes.

16 Q. Okay. Do you have a copy of that test with you?

17 A. Yes, I do.

18 Q. Do you have the test results?

19 A. Yes, I do.

20 Q. Okay. What -- go ahead and get it out.

21 A. (COMPLIES.) There's a copy of the test. (HANDING TO MR.  
22 DAVIS.) Here's -- I'm sorry -- here's one. I don't think you  
23 can read this -- here's one. (HANDING TO MR. DAVIS.)

24 Q. What scientific or empirical data has been used to  
25 validate this test?

1 A. Dr. Gudjonsson has used it in a wide variety of  
2 circumstances -- used it in interpretating the differences  
3 with intelligence levels, self-concept levels, predictability  
4 in a wide variety of cases.

5 Q. How many American subjects and subjects in this country  
6 has he used in his evaluation?

7 MR. CROW: I object, your Honor. I don't see the  
8 relevance of whatever---

9 MR. DAVIS: --it's

10 THE COURT: --Well---

11 MR. CROW: ---excuse me, could I finish my  
12 objection, your Honor?

13 THE COURT: Go ahead.

14 MR. CROW: I don't see the relevance. If this was  
15 -- possible relevance I guess if this was done in some  
16 third world country or something that maybe the academic  
17 standards were lower, but this is in Great Britain and  
18 also in Iceland. I don't -- I think the standards are --  
19 are the same for educational excellence and I don't see  
20 the relevance.

21 MR. DAVIS: Your Honor---

22 THE COURT: Overruled. I can see some possible  
23 relevance. Proceed.

24 BY THE WITNESS:

25 A. I don't know how many Dr. Gudjonsson himself has done in

1 this country.

2 Q. Are you aware of any he's done in this country?

3 A. None that he has done.

4 Q. Okay. And the truth of the matter that the data and the  
5 empirical evidence that has been accumulated has been based on  
6 his tests of people in his native country and also in England,  
7 correct?

8 A. No, there are -- there is testing that they also do  
9 that's been used in this country as well.

10 Q. You're using his scale---

11 A. Yes.

12 Q. ---but you don't have any evidence that he -- that that  
13 has ever been tested on people from the United States of  
14 America?

15 A. As I recall, Doctor Ofshe has done some of that.

16 Q. The other expert in this case?

17 A. Yes.

18 Q. Okay, in fact in his book the primary reference that Mr.  
19 Gudjonsson makes as far as references to any expert, the  
20 person referred to most is himself, correct?

21 A. No, well, in terms of the -- I don't know whether that's  
22 true. In terms of the areas where he's used the  
23 suggestibility scale there are thousands -- hundreds of other  
24 references in there.

25 Q. Okay, but -- but how many times was it he referred to

1 himself as far as basing the expertise of his book?

2 A. Fifty-six.

3 Q. Okay, and he refers to the other expert out here -- the  
4 guy from Berkeley, California -- how many times?

5 A. Three or four, I don't know.

6 Q. Okay.

7 A. --Without looking.

8 Q. And you know whether -- what the age groups were that  
9 this empirical evidence was gathered on -- what age group of  
10 the people that were studied?

11 A. From ages -- I think some of the earlier ones were ages  
12 twelve and thirteen through older adults.

13 Q. Okay. This test here that we're talking about, do you  
14 have any evidence or can you show us any reference whether  
15 that test was done on an age group including people as young  
16 as seventeen years old?

17 A. I'm sure I can.

18 Q. Okay. Please find it.

19 A. What happened to the book?

20 Q. You need the book?

21 A. Yes.

22 On page -- uh -- two tests investigating the  
23 suggestibility scores of boys between the ages of eleven and  
24 sixteen. The results of both studies indicate that youths are  
25 no more suggestible than are adults unless their answers are

1 suggestive to negative feed-back. Then they become markedly  
2 more suggestible than adults.

3 Q. How many subjects were there in that test?

4 A. Thirty-one delinquent boys, twenty normal males, a second  
5 one with -- uh -- uh -- forty.

6 Q. So we're talking about empirical evidence based on ninety  
7 people?

8 A. At least -- one study. Beyond that we can find more if  
9 you want to---

10 Q. And those are ninety people that weren't born, raised,  
11 socialized in a society such as ours?

12 A. I don't know how many -- how many cross cultural  
13 differences you want to find, but it was obviously -- it was  
14 done in Great Britain. There are some differences.

15 Q. The cross cultural differences are a pretty important  
16 factor in determining whether your scientific research is  
17 valid or not, correct?

18 A. No, it should not be. The rationale of scientific  
19 inquiry is that it develops universal principles, universal  
20 concepts. It doesn't make any difference whether -- whether  
21 -- whether the laws of physics apply in -- in -- in the United  
22 States the same way they apply in Uganda. The basic rationale  
23 of scientific undertaking -- you are developing universal  
24 principles.

25 Q. Okay. So under that theory, I assume---

1 A. Now, there may well be individual differences within  
2 those theories possibly, but that should not make any -- if  
3 you're talking about scientific principles, it shouldn't make  
4 any difference where it was done.

5 Q. Well, if we're using a standardized test and we're using  
6 it on people who come from difference cultures and  
7 backgrounds, it's your testimony that it doesn't matter what  
8 culture or background it is?

9 A. I'm say -- no, I'm not saying that. I'm saying that --  
10 that if we're going to deal with the scientific basis -- the  
11 basic -- the basic premise of science is that we are trying to  
12 develop universal principles.

13 Q. But that's the question I asked. You don't know if you  
14 have developed a universal principle---

15 A. No.

16 Q. ---until you test it universally, do you?

17 A. Right.

18 Q. Well, and the truth of the matter is the test in this  
19 particular instance had been done with one small segment of  
20 the population in another country, correct?

21 A. As far as I know.

22 Q. Well---

23 THE COURT: Have you ever used this test before?

24 THE WITNESS: No, I have not.

25 THE COURT: Can you relate to the Court any person



1 in the field of forensic psychology in this state or any  
2 surrounding states or in this country that you know of  
3 that has utilized this test?

4 THE WITNESS: Doctor Ofshe from Berkeley. Doctor  
5 Arnett from Hawaii---

6 MR. FOGLEMAN: I think your question is forensic  
7 psychology.

8 THE COURT: Forensic psychologists. Are they  
9 forensic psychologists?

10 THE WITNESS: Then -- alright, then -- then Doctor  
11 Arnett in Hawaii, Doctor Unger right here in Minnesota,  
12 Doctor Gumaugh (phonetic) in Salt Lake City, Doctor  
13 Zimmerman in Louisiana. Those are some that come to my  
14 mind right---

15 THE COURT: Are you telling the Court that this is a  
16 universally recognized---

17 THE WITNESS: I'm -- I---

18 THE COURT: ---phenomenon in the field of  
19 psychology---

20 THE WITNESS: Suggestibility---

21 THE COURT: ---that is purported to be reliable and  
22 accepted in the field---

23 THE WITNESS: I -- I---

24 THE COURT: ---in general?

25 THE WITNESS: I'm saying that the area of

1 suggestibility has been investigated in psychology for a  
2 long time in a wide variety of areas.

3 THE COURT: Well, that's not -- I'm not---

4 THE WITNESS: This particular -- this particular  
5 test -- this particular test has been around eight, ten  
6 years -- I don't know the exact date -- something of that  
7 sort -- and it is a -- it is a method that is being -- uh  
8 -- experimented with and looked at and dealt with.

9 THE COURT: Well, I certainly understand  
10 suggestibility and I'm quite certain that it has been  
11 inquired into in learned treatises for years. The  
12 question is: Has this test been accepted in the field of  
13 psychology as a valid testing tool to determine  
14 suggestibility and is it accepted in the field?

15 THE WITNESS: And -- I don't know how to answer  
16 that, your Honor.

17 THE COURT: Well, yes or no?

18 THE WITNESS: But I don't know whether it's yes or  
19 no.

20 THE COURT: Well, are you telling me that it's not a  
21 universally accepted scientific tool that's utilized for  
22 testing?

23 THE WITNESS: I'm saying that the MMPI and the WAIS-  
24 R are not universally tested tools. They -- that --  
25 they---

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1 THE COURT: Well, they've been around for quite a  
2 while.

3 THE WITNESS: Yes. Um-hum. Yes. And what I'm  
4 saying to you is when you said, "Are they accepted in the  
5 field?", is that different people in the field accept  
6 different things as being valid and reliable. Different  
7 people in different parts of the field use different  
8 things.

9 THE COURT: Well, I'm just trying to dis --  
10 determine whether or not it's scientifically accurate.  
11 In the first place I have -- nobody's really indicated to  
12 me what the test is or what the scientific basis is.  
13 You've used the term that there were empirical studies  
14 done which means that somebody took a -- the effort to  
15 test it at least on some segment of society and  
16 documented the results.

17 MR. CROW: Your Honor, for the record, we would  
18 tender the test that was done.

19 THE COURT: Alright, I'm going to read the -- read  
20 it here in a minute.

21 MR. STIDHAM: Your Honor, am I to understand the  
22 State's objecting that this Doctor Gudjonsson is from  
23 Iceland and practices psychiatry in London?

24 MR. FOGLEMAN: Doctor Gudjonsson is not testifying.

25 MR. STIDHAM: Well, it seems to me that -- that the

1 prosecution's objection was based on, "Well, this is  
2 something that comes from Great Britain."

3 THE COURT: Are you making a statement or an  
4 objection?

5 MR. STIDHAM: Your Honor, I'm making a -- I'm trying  
6 to determine what the nature of their objection is.

7 THE COURT: Well, their objection is that the test  
8 that he's purporting to report is not scientifically  
9 accurate. It does not meet the Frye Test, and is not of  
10 scientific import and, therefore, not admissible. Now,  
11 that's the plain simple objection and I'm trying to weed  
12 it out and determine whether or not it's a test based  
13 upon any credible research and whether or not it's a test  
14 that is recognized in the field and one which people rely  
15 upon. That's the sole issue.

16 MR. STIDHAM: I thought the witness testified to  
17 that, your Honor.

18 MR. FOGLEMAN: He said he didn't know whether it was  
19 generally accepted or not.

20 MR. CROW: He also testified that he didn't think  
21 the MMPI was generally -- excuse me -- universally  
22 accepted.

23 THE WITNESS: It is generally accepted by a wide  
24 number of people. Now, what that means to the field, I  
25 don't know.

1 THE COURT: (EXAMINING DOCUMENT.)

2 Did you make up this suggestibilities tale here  
3 yourself?

4 THE WITNESS: No, I did not.

5 THE COURT: And is this little scenario -- is that  
6 the one that's suggested in this textbook?

7 THE WITNESS: Yes.

8 THE COURT: Are there any other variations of it?

9 THE WITNESS: No. That one is not in the textbook.  
10 It's from -- from -- from an article by Doctor Gudjonsson  
11 where the actual scale is published, but he makes  
12 reference to---

13 THE COURT: --What is the scale? Tell me what the  
14 scale is.

15 THE WITNESS: The scale -- initially what you --  
16 what you -- what you're concerned with is -- is you read  
17 a short story about some facts, then your concern is --  
18 is that -- is that how well the person recalls the facts  
19 of the story. Then you're concerned with if I begin to  
20 apply pressure to you, will you change your response?

21 That's -- that's---

22 THE COURT: What is the scientific method that's  
23 employed in this?

24 THE WITNESS: I'm not sure what you're asking me.

25 THE COURT: Well, if you had a---

1 THE WITNESS: There is---

2 THE COURT: ---seventeen year old boy---

3 THE WITNESS: There is a---

4 THE COURT: ---that had a low I. Q. in front of you  
5 and you being a professional person, a doctor---

6 THE WITNESS: Um-hum.

7 THE COURT: ---would that not in and of itself --  
8 the position you hold -- create some level of  
9 suggestibility?

10 THE WITNESS: Probably. Which is -- which is --  
11 which is---

12 THE COURT: Well, what is the scientific method  
13 that's employed?

14 THE WITNESS: There is -- there is a story criteria  
15 to measure yield -- what's called yield. There is --  
16 there is a -- a -- a statement about what you say to them  
17 to apply pressure which is standardized.

18 THE COURT: Well, what is the standardization that's  
19 employed in the method? It would seem to me that whoever  
20 the testing---

21 THE WITNESS: And I -- I guess my thought about that  
22 is there is probably some subjective elements to that,  
23 but we stand -- we just spent a half hour a while ago  
24 talking about the subjective elements in a lot of tests  
25 in psychology. That -- that, you know -- that that --

1 you know -- some of them are -- are less objective than  
2 others.

3 THE COURT: Alright. I don't know. Go ahead.  
4 Whatever -- any other questions?

5 MR. CROW: Your Honor, if I may briefly. My  
6 understanding of the Arkansas Supreme Court is they have  
7 abrogated the Frye Rule. We're not under Frye anymore.  
8 It's now based on Seven Oh Three -- Rule Seven Oh Three.  
9 The last sentence of Seven Oh Three says, that -- they're  
10 talking about a test -- anything the expert can base his  
11 opinion on -- "If of a type reasonably relied upon by  
12 experts in a particular field" -- not generally, you know  
13 -- "by experts in a particular field in forming opinions  
14 or references upon a subject the facts or data may not  
15 admissible in evidence."

16 Your Honor, I think he testified as to numerous  
17 experts in the field that have relied on this test.

18 THE COURT: Well, I think that's what I asked him --  
19 was this a recognized test that's relied upon by experts  
20 in his field.

21 THE WITNESS: And to that I answered, "Yes." And he  
22 asked me, "Is it widely" -- I don't know what he means by  
23 widely, and I was not trying to be difficult. I was  
24 trying to decide where -- what -- if we're talking about  
25 it being universal or not, or by nine-tenths, or two-

1 thirds, or what---

2 THE COURT: What -- what is it that -- that an  
3 expert in this area can -- how they can benefit the  
4 jury's finding of the fact? That's what I want to know.  
5 What is it that he can testify to that a jury wouldn't  
6 already have the capability of doing on their own?

7 MR. CROW: Your Honor, I think every individual  
8 would have a different suggestibility -- amount of  
9 suggestibility, and that's -- I don't think that's  
10 obvious from a jury watching Mr. Misskelley from across  
11 the room or even listen to him testify as to how  
12 suggestible he is or isn't. Similarly, while the jury  
13 may have a general idea of what someone's I. Q. is, if  
14 you look at them and watch them you kind of get an idea  
15 of whether -- what you think, but we're certainly  
16 allowing evidence every day as to someone's I. Q.

17 THE COURT: Well, the issue in this case -- besides  
18 guilt or innocent, which is probably the paramount  
19 concern -- is your defense notion and idea that the  
20 police overrode his free will and either told or  
21 suggested to him what his responses should be in a  
22 confession or statement -- however you characterize it.

23 Now, that's an issue that the jury will have to  
24 resolve.

25 MR. CROW: Yes, your Honor.



1 THE COURT: So what is it that this expert or any  
2 other expert can give to the jury that would aid and  
3 assist them in arriving at that ultimate finding that he  
4 was over-reached or---

5 MR. STIDHAM: Your Honor, Doctor Gudjonsson's scale  
6 measures suggestibility in individuals. It's empirical.  
7 Doctors and psychologists use that to measure  
8 suggestibility among individuals. The suggestibility  
9 scale and the results that Doctor Wilkins conducted on  
10 Mr. Misskelley would help the jury understand his level  
11 of suggestibility.

12 MR. CROW: Some -- some individuals may have a high  
13 level of suggestibility, other ones may have low, and  
14 we're going to -- we're attempting to find out.

15 THE COURT: Well, I'm -- I'm reading the -- Rule  
16 Seven Oh Four with regards to the ultimate issue, and the  
17 annotation of nineteen eighty-four by Congress amending  
18 it -- I don't know if Arkansas has amended it and  
19 apparently we haven't, but---

20 MR. STIDHAM: We have not, your Honor.

21 THE COURT: ---the quote is added to Rule Seven Oh  
22 Four is, "No expert witness testifying with respect to  
23 the mental state or condition of a defendant in a  
24 criminal case may state an opinion or inference as to  
25 whether the defendant did or did not have the mental

1 state or condition constituting an element of the crime  
2 charged or a defense thereof."

3 MR. CROW: Your Honor---

4 THE COURT: And I'm inclined to believe that the  
5 Arkansas Court would accept that modification.

6 MR. CROW: Your Honor, if I may respond to that.  
7 Nothing we're going to put on here is going to have  
8 Doctor Wilkins or any other expert testify as to what was  
9 -- as to whether Mr. Misskelley had the proper mental  
10 state to commit this alleged crime. The issue---

11 THE COURT: That's not the sole issue.

12 MR. CROW: Your Honor, I understand that, but as to  
13 whether or not he is suggestible or not -- if that is --  
14 you're going back so far -- again a mental state includes  
15 I. Q., and we certainly allow that type of evidence in,  
16 your Honor. And to say that just because anything  
17 dealing with mental state suddenly we don't let it in, is  
18 a total abrogation of what the Rules are.

19 Your Honor, whether or not Mr. Misskelley is  
20 **suggestible** is a separate issue from whether he was guilty  
21 **or innocent**. The jury could find he was very  
22 **suggestible**, yet believes that he's guilty.

23 MR. STIDHAM: The jury could decide the  
24 voluntariness of this statement to the police, your  
25 Honor. The suggestibility goes toward the voluntariness

1 of the statements that were made by Mr. Misskelley.

2 MR. DAVIS: Your Honor, the point---

3 THE COURT: I can read and that goes to a fact of  
4 your defense.

5 MR. DAVIS: What the State is concerned about is  
6 whether somebody is easily suggestible or whether they  
7 caved in to police coercion or whatever as the defense  
8 alleges, that's something that the jury can make a  
9 determination of. If they're provided with some hocus-  
10 pocus test---

11 MR. CROW: I object to that, your Honor.

12 MR. STIDHAM: Your Honor, that's ridiculous.

13 MR. DAVIS: ---object, all you want, I'm  
14 characterizing it as I see it -- some hocus-pocus test.  
15 Doctor Wilkins who's testified four thousand forensic  
16 evaluations, never used it before in his life, for the  
17 first time in this test -- in this case decides to use a  
18 test that has admittedly doesn't have universal  
19 acceptance. He can cite only his other expert witness in  
20 **this case** as using it, and he's not even a psychologist.

21 MR. CROW: That's not a correct statement, your  
22 **Honor**. He said several other individuals have used it.

23 MR. DAVIS: Well, he cited them from Hawaii---

24 MR. CROW: From Louisiana.

25 MR. DAVIS: Right. And he's never used it himself.

1 He's never administered it himself.

2 MR. STIDHAM: Your Honor, Mr. Davis' interpretation  
3 of law is not correct.

4 MR. FOGLEMAN: Your Honor, there has to be a  
5 scientific basis. That's Rule Seven Oh Two.

6 MR. CROW: Sure.

7 MR. STIDHAM: The witness has testified to that,  
8 your Honor.

9 THE COURT: Well, I'm not sure I have understood  
10 what the scientific basis of the test is yet.

11 Try to explain that to me again, Doctor Wilkins.

12 THE WITNESS: I -- I think we're having trouble with  
13 the -- what -- I'm not sure we're talking about what  
14 scientific basis means and in the same way. That may be  
15 what -- I'm trying to figure out what -- how I can  
16 explain to you -- you know -- I'm going to -- if that --  
17 if that -- if that's the issue.

18 THE COURT: The issue is I want to hear some  
19 scientific basis that would justify on a general scale a  
20 person in your profession and in your field utilizing and  
21 relying upon this particular test, and what degree of  
22 assurance you would have that -- that it was valid.

23 THE WITNESS: The -- the -- the general issue of  
24 suggestibility has been around a long time, okay. It has  
25 been studied in a wide variety of ways for a long time.

1 The present issue about this particular scale -- the  
2 scale was developed in nineteen eighty -- uh -- if I can  
3 find the date here -- yeah -- nineteen eighty-two --  
4 three -- nineteen eighty-one, I guess. The scale was  
5 designed to try to assess and to understand how the  
6 process of false confessions may happen. And part of the  
7 issue involved here is -- is -- is do false confessions  
8 happen. The results -- the generally accepted results  
9 are yes in about eighteen percent of all murder cases.

10 Now -- then if they do happen, how are we to study  
11 -- how are we to look at those instances in those places  
12 where that may or may not have happened and what factors  
13 are involved in the person involved in that who would be  
14 more inclined, more -- would be more inclined to be  
15 influenced into making a false confession. The scale  
16 then is one of many options that if used, much like we  
17 don't depend on any one scale for personality assessment,  
18 we use several. The suggestibility scale which has been  
19 used in a wide variety of places -- many of them in Great  
20 Britain, I agree -- but -- but they have been used in a  
21 wide variety of places. It has all kinds of read out  
22 reliability data of a -- of a -- it has validity data.  
23 There is -- there is a -- it is demonstrated to be a  
24 valid and reliable instrument. It has been used a great  
25 deal outside this country. It is becoming increasingly

1 used in this country.

2 The first time -- I haven't used it before in my  
3 practice before, but I've never done -- I -- I have -- I  
4 have not until recently -- the last couple of years done  
5 any false confession statement. I did one a while ago  
6 -- so in this case then as far as my using it, it has  
7 nothing to do with it being worthless -- it has to do  
8 with the fact that I've never had need for it before.  
9 So---

10 THE COURT: It's not based upon the objective  
11 findings of the examiner?

12 THE WITNESS: It is based upon the objective  
13 findings of the---

14 THE COURT: Your conclusions that are drawn from  
15 questions that you ask after you read a one paragraph  
16 statement to someone.

17 THE WITNESS: Yes.

18 THE COURT: Is it not based further upon your  
19 interpretation of those responses to some standard?

20 THE WITNESS: No. Well, I -- I don't know what you  
21 mean by that. There is -- there is a yes-no category.  
22 If they say this, it's yes, if they don't say that, it's  
23 no. So in that sense there is -- there is -- my  
24 interpretation has nothing to do with this. It depends  
25 on what they say if it fits in category A or category B.

1           So my -- my interpretation of what they say is not  
2 at issue.

3           THE COURT: Well, it's not like math where there is  
4 an exact response.

5           THE WITNESS: There is -- there is---

6           THE COURT: Is it something that has to be  
7 interpreted?

8           THE WITNESS: There is -- there is -- there is  
9 nothing in psychology that's an exact response like math.

10          THE COURT: Alright, have you got any other  
11 questions?

12          MR. DAVIS: Yes, sir.

13          THE COURT: Go ahead.

14 BY MR. DAVIS:

15 Q.    Isn't it -- how -- how do you perform this test? How do  
16 you do it?

17 A.    You -- you -- you tell the person that you're doing it  
18 on, "I'm going to read to you a story. I want you to remember  
19 as many things as you can."

20 Q.    Okay, and then you read them the story?

21 A.    Yes.

22 Q.    And then who asks the questions?

23 A.    I do.

24 Q.    Okay, and is it the reflection (sic) in your voice on  
25 certain questions and how the question is asked in order

1 that---

2 A. No.

3 Q. ---in order to increase the suggestibility?

4 A. No.

5 Q. You just ask them in a deadpan fashion---

6 A. Yes.

7 Q. ---each question?

8 A. Yes.

9 Q. No difference each time?

10 A. No.

11 Q. No inflection?

12 A. No.

13 Q. And then you interpret from their responses---

14 A. Yes.

15 Q. ---based on this scale?

16 A. You -- what you first do there is to see in the -- in the  
17 questions there are some questions that -- that -- that are  
18 accurate in the sense of being what is in the story. There  
19 are some questions that you ask them that are not accurate in  
20 terms of what's being said in the story regarding size, race,  
21 weapons, different things. Was it three people or was it two  
22 people? The question is, "Which was it -- three people?" And  
23 they answer yes or no.

24 Now, the questions are designed so that it's either  
25 factual or non-factual according to what's in the story



1    itself.  You then see what their score is in terms of -- of  
2    how many accurate ones that they get.  You then say to them,  
3    "This is really important.  You didn't do very well this time.  
4    I want you to think carefully about it and we're going to do  
5    it again."

6    Q.    And the manner in which you say that would determine the  
7    degree of suggestibility that that has on the person?

8    A.    Certainly.  And then if you get -- and if you get more  
9    and more hostile, you may get more and more yield.

10   Q.    And the manner in which you -- your mannerisms, your  
11   characteristics, the tone of voice, your appearance, how close  
12   you are to them, all of those things may affect it, correct,  
13   Doctor?

14   A.    And all of that is the point of doing it.

15   Q.    Well, all of those things---

16   A.    Yes.

17   Q.    ---would affect it?

18   A.    Surely.  Yes.

19   Q.    Okay.  And you have never administered this test before,  
20   correct?

21   A.    No.

22   Q.    Have you had any -- gone to any schools or training---

23   A.    No.

24   Q.    ---on how to give it?

25   A.    No.

1 Q. This textbook that you showed us looked nearly brand new.  
2 Did you buy it right before you gave the test?

3 A. No. In fact I got the test -- the test came a long time  
4 ago.

5 Q. Did you buy the book after the test?

6 A. Uh -- may have because -- because -- because it came out  
7 not very long ago. I can't remember when I got it.

8 Q. So you hadn't even read the book before you gave the  
9 test, correct?

10 A. Uh -- yes, I had in fact. Or I -- I -- I -- I had read  
11 parts of the books, yes. See, the book was published in  
12 nineteen ninety-two.

13 Q. Okay. You've never had any training on how to give this  
14 test, right?

15 A. Well, I'm not sure how they'd do that, no.

16 Q. Okay.

17 A. It's described word-for-word what you do in the -- in the  
18 -- in demonstrations and instructions.

19 Q. Well, you've had training in how to give the MMPI,  
20 correct?

21 A. Yes.

22 Q. In fact you go to school to learn how to give those---

23 A. Yes.

24 Q. ---tests, right?

25 A. Yes.

1 Q. Standardized tests you learn in school and you learn as  
2 part of your professional training how to give those tests,  
3 correct?

4 A. Yes.

5 Q. Okay. In this you've never had any training at all on  
6 how to give it, right?

7 A. No.

8 Q. And the first time you ever gave it was on this guy  
9 sitting over here? (INDICATING.)

10 A. Yes.

11 Q. Okay. And you're in here today and you plan to testify  
12 as an expert based on a test that's never been -- never been  
13 scientifically tested in this country on male individuals in  
14 the United States of America based on one test and no training  
15 in that particular test field. Is that right?

16 A. I guess so.

17 MR. DAVIS: Your Honor---

18 MR. CROW: Your Honor, as far as training goes, I  
19 think it's clear that he followed -- he followed the  
20 instructions given.

21 THE WITNESS: And I think beyond that, too, is that  
22 -- I also have -- plenty years of experience in a wide  
23 variety of other issues which also -- would also make it  
24 like I -- I'm not the first test -- it's not the first  
25 test I've ever seen.

1 BY MR. DAVIS:

2 Q. Well, could have Mr. -- could Mr. Crow have picked up  
3 those directions and read them and conducted this test on his  
4 client?

5 A. Yes.

6 Q. He would be just as qualified as you to testify as to the  
7 results if he had read---

8 A. No, he wouldn't be -- he would be -- he would not be as  
9 qualified to interpret their meaning.

10 Q. But you haven't had any training in how to interpret  
11 that, correct?

12 A. I've had training in how to interpret suggestibility.  
13 It's well known in the field. It's -- it's been taught  
14 forever.

15 THE COURT: What is the ultimate thing you're trying  
16 to get him to testify to on -- based on this test?

17 MR. STIDHAM: Your Honor, Mr. Misskelley's results  
18 from the Gudjonsson suggestibility scale which is a  
19 scientific test which has empirical findings to back it  
20 up and they're all in this book. Doctor Wilkins has  
21 testified to the fact that it is commonly used by experts  
22 in this field and we submit that under the Rules of  
23 Evidence it's admissible and it goes to -- it should go  
24 to the trier of fact to help them determine the issue of  
25 voluntariness of the statements made to the West Memphis

1 Police Department.

2 MR. DAVIS: Your Honor, of course, our basis for  
3 objection is that it is not -- there hasn't been a  
4 basis or clear showing that the results of this test in  
5 this particular instance under these circumstances have  
6 any scientific validity based on the failure to show  
7 proper scientific and empirical data to support the test  
8 based on the test examiner's lack of qualifications,  
9 training or experience in giving the test and his very  
10 own admission that his interpretation is an important  
11 aspect of the results of the test and he told the Court  
12 that he has no training, no experience, no background in  
13 conducting this test until this particular case.

14 MR. STIDHAM: Your Honor, the State has had nine  
15 months to retain an expert to put in front of the jury to  
16 testify in rebuttal to this.

17 MR. DAVIS: Judge, the State doesn't believe that  
18 there's an expert on the face of the earth that can give  
19 any kind of test that can tell any more about  
20 suggestibility than what twelve people sitting right  
21 there can figure out on their own.

22 MR. STIDHAM: Judge, I have one in the next room  
23 that I plan to call to testify here in a few minutes.

24 MR. DAVIS: Well, and we don't believe he's worth  
25 the---

1 MR. CROW: Your Honor, if I understand the State's  
2 last comment then, it's not an issue of any type of  
3 training for this test that's at issue, or any type -- or  
4 how many times he's used it, whether it's once or twenty  
5 million, that doesn't mean he doesn't think the test is  
6 valid. That's -- that's not for him to decide, your  
7 Honor.

8 THE COURT: I'm going to take a ten minute recess so  
9 I can weed through all of this garbage.

10 MR. STIDHAM: Thank you, your Honor.

11 (RECESS.)

12 (THE FOLLOWING HEARING TOOK PLACE OUT OF THE  
13 PRESENCE OF THE JURY.)

14 THE COURT: You want to call another witness?

15 Alright, Doctor Wilkins, you can stand down, please,  
16 sir.

17 THE WITNESS: (COMPLIES.)

18 THE COURT: Alright, let the record reflect that  
19 this is a continuation of a hearing out of the presence  
20 of the jury for the purpose of questioning the scientific  
21 veracity of a test. I guess that's what we're doing.

22 Go ahead.

23 DOCTOR VAUGHN RICKERT

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

## DIRECT EXAMINATION

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BY MR. DAVIS:

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

A. Vaughn Rickert.

Q. And, Mr. Rickert, are you a -- how are you employed?

A. I'm employed as an associate professor of pediatrics at the University of Arkansas for Medical Sciences, and on the professional staff at Arkansas Children's Hospital as a pediatric and adolescent psychologist.

Q. Okay, and could you explain what your background and training is in the field of psychology?

A. Yes. I received a Masters and Specialist Degree in school psychology and then returned for a professional degree in psychology or a Psy B in clinical psychology and graduated after completing my internship at Johns Hopkins University School of Medicine in Baltimore where I took a job as an assistant professor there at the university.

During the course of time that I have been employed I have come to specialize in two areas of -- of interest and **research**. One is in clinical treatment of adolescents that **may or may not** have medical problems but also have mental **health difficulties**. I've done a lot of research in terms of adolescents and substance abuse and adolescents use of primary care.

An on-going part of my clinical responsibilities have

1 been since I arrived has been the evaluation of children who  
2 have -- children and adolescents who are suspected of being  
3 handicapped whether that be mental retardation, autism,  
4 learning disorders or emotional impairments which affect their  
5 ability to get classroom education in the regular school  
6 system.

7 MR. DAVIS: Your Honor, we would submit Doctor  
8 Rickert as an expert in that field of psychology.

9 MR. STIDHAM: Do you have a license?

10 THE WITNESS: Yes, I do have a license to practice  
11 -- eighty-seven, sixteen.

12 MR. STIDHAM: We stipulate, your Honor.

13 THE COURT: Alright.

14 BY MR. DAVIS:

15 Q. Let me ask you for the record. You're not under --  
16 currently under any disciplinary action by the board or  
17 anything in the field of psychology?

18 A. No, I'm not.

19 Q. Or under probation?

20 A. No, I'm not.

21 THE COURT: Did I understand you to say you are also  
22 a medical doctor?

23 THE WITNESS: No, I'm a psychologist.

24 THE COURT: Psychologist. Alright.

25 THE WITNESS: But I'm on staff with the medical



1 school.

2 BY MR. DAVIS:

3 Q. Now, you've heard this talk about this test regarding  
4 suggestibility?

5 A. Yes, I have.

6 Q. Had you ever heard of the Gisli Gudjonsson Scale of  
7 suggestibility prior to entering the courtroom today?

8 A. Um -- no, I had not.

9 Q. Okay. Have you ever seen it administered in your  
10 practice or in your years working as a psychologist?

11 A. No, I have not.

12 Q. Okay. Now, did you understand that the test -- how the  
13 test procedure -- explain to us how you understood the test  
14 was administered?

15 A. From what I understood from the testimony was that a  
16 short paragraph is given or it's read in a very usual tone and  
17 then the subject is asked to respond to a list of questions  
18 immediately following the presentation of that story and then  
19 sometime later he is also asked the same list of questions  
20 again but told that some of his answers -- several answers --  
21 are incorrect.

22 Q. And you indicated to me after you heard that testimony  
23 that there would be some serious concerns you would have about  
24 the validity of such tests because of what?

25 A. I would be concerned about the validity of such a measure

1 with children, adolescents, or adults who have significant  
2 memory impairments. That is, individuals who have difficulty  
3 recalling the auditory information especially so that they may  
4 not be -- you may not be assessing suggestibility or truth  
5 versus not truth or statement versus non-statement, but simply  
6 guessing because of an inability to remember what the subject  
7 had just heard.

8 Q. And you have evaluated or examined the report provided by  
9 Doctor Wilkins based on his examination of this defendant?

10 A. Yes, I have.

11 Q. And you've also examined the testimony of Doctor Wilkins  
12 at the prior two hearings involving this matter?

13 A. Yes, I have.

14 Q. Okay, and it's your opinion that what would be -- what  
15 could very likely be measured in this test would not be  
16 suggestibility but would be his ability to remember?

17 A. I would based on Doctor Wilkins' report where he  
18 indicated that Mr. Misskelley has significant impairments in  
19 visual and auditory memory.

20 Q. Would you yourself feel comfortable in testifying as an  
21 expert if you had never received any training in how to  
22 administer a test and had never administered a test to anyone  
23 before in that particular area?

24 A. I would be very uncomfortable.

25

CROSS EXAMINATION

1 BY MR. STIDHAM:

2 Q. Doctor, what do you do? I mean, at the U. A. M. S.?

3 A. I'm a pediatric and adolescent psychologist. I evaluate  
4 children. I provide direct clinical service. I provide  
5 educational experience for the residents and do research.

6 Q. How many kids do you work with that have been drilled or  
7 interrogated by the police?

8 A. I have not.

9 Q. So you don't have any experience in that?

10 A. I do not have any experience in that.

11 Q. Are you shocked that you've never heard of the Gudjonsson  
12 Suggestibility Test?

13 A. No, I'm not shocked, but I have not heard about it.

14 Q. Have you read the literature of -- in regard to this test  
15 and how to perform the test?

16 A. No, I briefly scanned one of the chapters so I could  
17 better understand how the test was administered.

18 Q. How briefly is briefly?

19 A. During the ten minute recess that the Judge called.

20 Q. That's pretty briefly, isn't it?

21 A. It is very brief.

22 Q. Now, isn't the ability to remember things -- wouldn't  
23 that be a part of suggestibility?

24 A. It depends upon what you're assessing. If the point of  
25 the evaluation is to determine how much information a subject

1 can remember, then you're assessing memory. If in fact you  
2 want to assess suggestibility in this particular case, that is  
3 compromised in my professional opinion by a subject's ability  
4 to remember. That is, if I can't remember what was just said  
5 to me, how I -- how am I going to know whether I was suggested  
6 or not suggested to do something if I'm simply guessing.

7 Q. Well, what if you had read the answers ahead of time and  
8 you simply repeat the answers?

9 A. That would be fine for normal subjects. Typically people  
10 do remember more information if he presented it over, and  
11 over, and over again. All I'm testifying to is I would have  
12 some concerns based on Doctor Wilkins' report where he  
13 indicated that Mr. Misskelley had difficulties in auditory and  
14 visual memory skills. And I would be concerned that the  
15 results that Mr. Misskelley obtained on this particular  
16 instrument may be compromised and in my professional opinion  
17 are significantly compromised because of his memory  
18 impairment.

19 Q. Have you read Doctor Gudjonsson's book?

20 A. I have not.

21 Q. Except during the recess a while ago?

22 A. That is correct.

23 (WITNESS EXCUSED.)

24 THE COURT: Alright, gentlemen, the Court's ruling  
25 is as follows:

1           The Court is of the opinion that the test regarding  
2 suggestibility is flawed in that it does not meet a  
3 scientific standard upon which the profession generally  
4 relies. Secondly, that Doctor Wilkins' absence of  
5 experience, training, and education in the utilization of  
6 the test would fatally flaw any results that he might  
7 conclude from such test. I will, however, allow Doctor  
8 Wilkins to continue his testimony, for you to elicit from  
9 him his opinion -- if he has one -- as to the defendant,  
10 Jessie Misskelley's, likelihood or probability of having  
11 information suggested to him.

12           In other words, I will allow you to ask Doctor  
13 Wilkins, "Doctor Wilkins, based upon your examination,  
14 your testing, and your complete information," -- from  
15 whatever source -- "regarding Mr. Misskelley, do you have  
16 an opinion as to whether or not he is an overly  
17 suggestible individual?" And if he says, "I have such an  
18 opinion, based upon that training and information and  
19 testing," what is the opinion, and he'll be allowed to  
20 give that opinion.

21           If that opinion is that he is suggestible, then I'm  
22 going to allow the State to do everything they can to  
23 discredit that testimony -- calling additional expert  
24 witnesses, questioning his data, questioning his  
25 competency in the area, but I'm not going to allow him to

1 parrot out the results of a test that I consider to be  
2 lacking in scientific foundation, first, and, secondly,  
3 his ability to administer such test should it have any  
4 scientific basis that's recognized within the field.

5 So it's a twofold objection that I'm ruling. That  
6 one is I don't think it's scientific. Two, if it is  
7 scientific he's not qualified to administer it, but that  
8 does not preclude him from testifying as to his general  
9 opinion and notions based upon the field of forensic  
10 psychology that Mr. Misskelley was suggestible. If that  
11 makes sense.

12 MR. STIDHAM: May I have a moment, your Honor, to  
13 confer?

14 THE COURT: Alright.

15 MR. CROW: Note our objection, your Honor.

16 THE COURT: Sure.

17 MR. CROW: May we approach the bench, your Honor?

18 THE COURT: Yes.

19 MR. CROW: We would offer this suggestibility test.

20 THE COURT: Well, it would be a proffer then if  
21 you're offering it. Is this being offered as a proffer?

22 MR. CROW: Yes, your Honor.

23 THE COURT: Alright, it may be received for  
24 identification purposes as a proffer to evidence.

25 MR. DAVIS: Your Honor, we'll agree to a copy being

1 substituted. I think---

2 THE COURT: Sure. Okay.

3 (DEFENDANT'S EXHIBIT SEVEN IS RECEIVED AS AN OFFER  
4 OF PROOF.)

5 MR. CROW: I've just got a question for the Court  
6 just for record purposes.

7 THE COURT: Well, she's not getting it right now.

8 MR. CROW: Okay. At this point, let me just ask the  
9 question and she -- whether she gets it or not.

10 As far as preserving our record do we need to have  
11 him to go into off -- but what he would have testified to  
12 about the results? Can we just tell the Court what---

13 THE COURT: Why don't you just outline what he would  
14 have testified to. Just dictate it right now.

15 MR. STIDHAM: Okay.

16 THE COURT: This is as an offer of proof of the  
17 testimony that Doctor Wilkins would have given had the  
18 Court permitted him to testify with regard to the  
19 suggestibility scale -- is that what it's---

20 MR. STIDHAM: Gudjonsson Suggestibility Scale.

21 THE COURT: Okay. Spell that, because I sure  
22 couldn't say it.

23 THE REPORTER: I've got it.

24 MR. STIDHAM: Your Honor, would it be appropriate to  
25 have the witness---

1 THE COURT: Yeah, you can say what it would have  
2 been, but let him testify if he wants to.

3 MR. CROW: We'll have him just very briefly outline  
4 it, your Honor.

5 THE COURT: Okay, that's fine. I've heard that  
6 sometimes and changed my mind, so it might be a good  
7 idea.

8 MR. CROW: Just briefly outline---

9 MR. STEPHAN: Just briefly outline for the Court  
10 what your testimony would have been with regard to  
11 Gudjonsson Suggestibility Scale.

12 DOCTOR WILKINS: I would have -- I would have  
13 reported that I had given the scale and that the -- yield  
14 scores, as they're known as, and would have given---

15 MR. CROW: You'd have gone through how the -- how  
16 the test was given?

17 DOCTOR WILKINS: Yes, I would have.

18 MR. CROW: And how -- how the scoring was done?

19 DOCTOR WILKINS: Yes, I would have.

20 MR. CROW: And explained how the pressure was  
21 stepped up at each state?

22 DOCTOR WILKINS: Yes.

23 MR. CROW: And the results?

24 DOCTOR WILKINS: Yes.

25 THE COURT: Well, let me ask you this: I assume



1 that you have an opinion based upon your evaluation. Is  
2 your opinion based solely and only and entirely upon this  
3 suggestibility test?

4 DOCTOR WILKINS: No, it is not.

5 THE COURT: Alright, then I -- I assume that if I  
6 allow you to give your opinion, that your opinion would  
7 not be altered or affected by the Court's ruling  
8 prohibiting a discourse on the method, the questions, and  
9 the technique employed in the suggestibility scale.

10 DOCTOR WILKINS: No, it would not.

11 THE COURT: Alright. Alright, gentlemen.  
12 Basically, you're saying it wouldn't make any difference  
13 how I ruled.

14 MR. CROW: We would still like to offer this scale.

15 THE COURT: Sure. Sure.

16 MR. STIDHAM: Thank you, your Honor.

17 MR. CROW: Thank you, your Honor, very much.

18 THE COURT: Okay, I guess---

19 Gentlemen, you understand that if he gives that  
20 opinion the State's going to be permitted to go into the  
21 factual basis and to go into all of this stuff that we've  
22 just been spending twenty-five minutes on about how  
23 reliable are some of the test data.

24 MR. STIDHAM: Your Honor, he's not going to testify  
25 to---

1 THE COURT: --But on the other hand I don't want you  
2 all to go into a test that I've basically said I don't  
3 have much confidence in, but certainly his ability to  
4 administer the test might be appropriate.

5 MR. CROW: Your Honor, I think his testimony is that  
6 -- what was proffered is that his opinion as to  
7 suggestibility outside taking this test completely away  
8 is that he is still suggestive.

9 MR. FOGLEMAN: Then why was it even proffered in the  
10 first place?

11 MR. CROW: It's one of the things he bases his  
12 opinion on, your Honor, but it's---

13 MR. DAVIS: Your Honor---

14 THE COURT: Well, I think he would have been allowed  
15 to give that opinion or any other qualified person would  
16 have been able to give an opinion that's based upon their  
17 education, training, and experience. What you wanted to  
18 do was introduce the actual test.

19 MR. STIDHAM: That's correct, your Honor.

20 THE COURT: Well, I mean, he's apparently telling us  
21 now that it wouldn't have mattered and it wouldn't have  
22 affected his opinion, and it would have been the same.

23 MR. STIDHAM: He still has an opinion that's based  
24 not simply on the -- what we've offered -- the proffer.

25 THE COURT: Well, let me ask another question.

1           Doctor Wilkins, could you have arrived at your same  
2 opinion based upon a reasonable degree of scientific  
3 certainty in the field of forensic psychology had you not  
4 administered or even obtained the results on the  
5 suggestibility scale?

6           DOCTOR WILKINS: Yes.

7           THE COURT: Alright, gentlemen.

8           MR. STIDHAM: Thank you, your Honor.

9           THE COURT: Let's proceed.

10          MR. DAVIS: Is that opinion based on any other test?

11          THE COURT: I don't know. That's something you'll  
12 have to ask. I've asked enough.

13          Call the jury back in. I'm going to let the jury  
14 have a recess and I'm going to announce that question,  
15 gentlemen, that -- okay.

16                           (JURY ENTERING COURTROOM.)

17                           (RETURN TO OPEN COURT.)

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

19          Alright, ladies and gentlemen, again I'm going to  
20 apologize for having you pop up and down and the number  
21 of recesses we've taken, but if you will remember back  
22 when we were picking the jury I warned you that those  
23 interludes would occur and that they're necessary and  
24 that they're in the interest of justice. So please be  
25 patient with us, and again, I apologize for it.

1 I received a question from one of the jurors -- I  
2 believe it was Ms. Luter -- that "Why was the rule not  
3 invoked for Doctor Wilkins as it was with all the other  
4 witnesses?" The rule as you've heard me described can be  
5 waived for members of the family, can be waived for  
6 persons that are testifying in an expert capacity. The  
7 State now has a psychologist in the courtroom that will  
8 be allowed to hear pertinent parts of the testimony and  
9 for those reasons, Doctor Wilkins was excused from the  
10 rule. So that shouldn't give you any concern whatsoever  
11 in your consideration of this case. The Court had -- had  
12 made that ruling and I simply didn't tell you, so now I  
13 am telling you. The experts, the rule is generally  
14 waived for them -- not in all cases, however, but in this  
15 case it was.

16 Anything else, gentlemen, before the noon recess?

17 We're ready to proceed, ladies and gentlemen, but  
18 I'm tired, the Court Reporter is tired, and we're going  
19 to take a lunch break at this time until one o'clock --  
20 one o'clock.

21 With the usual admonition not to discuss the case  
22 among yourselves or with anyone, and you should not let  
23 anyone attempt to influence you at all in this case and,  
24 with that reminder, you may stand in recess until one  
25 o'clock.

1 (RECESS.)

2 DOCTOR WILLIAM WILKINS

3 having previously been duly sworn to speak the truth, the  
4 whole truth, and nothing but the truth, further testified as  
5 follows:

6 CONTINUED DIRECT EXAMINATION

7 BY MR. CROW:

8 Q. Doctor Wilkins, did you personally interview Mr.  
9 Misskelley?

10 A. I did.

11 Q. How much time did you spend with him?

12 A. I spent during the testing and the interview time  
13 probably in the neighborhood of eighteen to twenty hours.

14 Q. Do you have an opinion based on your interaction with  
15 him, your observance, as to whether or not he was easily  
16 suggestible, more so, less so, or average?

17 A. I think Jessie would be quite suggestible.

18 Q. Did you do any evaluation as to his dependency status?

19 A. We talked. Part of that comes from Jessie's social  
20 history as we pointed out in the past that Jessie comes from a  
21 family system that has a fair amount of alcohol abuse and some  
22 child abuse as well. When we look at dependent -- I'm sorry  
23 -- when we look at abusive families one of the things we see a  
24 lot of is what's called co-dependency.

25 And by co-dependency we're talking about people in the

1 system taking responsibility for other people's actions and  
2 people's feelings. In this case in terms of -- in terms of  
3 children. One of the things they begin to look at and deal  
4 with is that -- is that it -- somehow they're doing something  
5 wrong. That they're the fault, they're the cause of the abuse  
6 occurring. Therefore, they can figure out how to please --  
7 how to act right -- whatever that may be -- for the abusing  
8 person -- that the abusing person would stop abusing them.  
9 That is a kind -- a kind of general tendency to accept fault  
10 and to try to please the -- uh -- uh -- abusing person.

11 CROSS EXAMINATION

12 BY MR. DAVIS:

13 Q. Doctor Wilkins, you indicated that you had examined  
14 Jessie Misskelley for some eighteen hours. Is that correct?

15 A. Yes.

16 Q. Have you done an examination on him since we last had  
17 some hearings?

18 A. Yes, I have.

19 Q. Okay. Now, and at that time you gave basically the same  
20 opinion that you've given here and at that time you had done  
21 eleven hours of examination. Is that correct?

22 A. In terms of the information that we dealt with, yes, at  
23 that time is basically the same.

24 Q. Okay. So it's your opinion that you're telling us about  
25 was formulated after a total of eleven hours of examination

1 with this defendant?

2 A. No. There were -- there were -- there were -- there were  
3 additional things that were done in the hours afterward that  
4 also -- also were important to me.

5 Q. Any significant changes that we should be aware of in  
6 your nine page report that you made based on those first  
7 eleven hours?

8 A. Uh -- one of -- one of the sessions with Jessie was -- I  
9 made up a false story and in about half an hour got Jessie to  
10 confess to a robbery that didn't occur---

11 MR. DAVIS: Your Honor, at this point -- excuse me.  
12 Your Honor, we're going to have to approach the bench on  
13 that one.

14 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT  
15 OF THE HEARING OF THE JURY.)

16 MR. DAVIS: I had never heard this story before, but  
17 I think what he's getting ready to say in some sort of  
18 creative test that he came up where he created a false  
19 story and then as I understand it, he was going to say in  
20 ten minutes he had Jessie confessing to something in his  
21 office regarding some made up story about an aggravated  
22 robbery.

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

24 MR. FOGLEMAN: I think he already testified to that,  
25 didn't he? We'd ask that that be stricken.

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1 THE COURT: Well, I---

2 MR. FOGLEMAN: And his question -- his answer was  
3 unresponsive.

4 (RETURN TO OPEN COURT.)

5 THE COURT: Alright, ladies and gentlemen, the last  
6 answer was not responsive to the question asked by the  
7 prosecutor. You're instructed to disregard the last  
8 answer of the witness as unresponsive to the question  
9 directed to him.

10 BY MR. DAVIS:

11 Q. Doctor, did you take a history from the defendant prior  
12 during the course of your examination of him?

13 A. Yes, I did.

14 Q. Okay, and in that history tell us what he related to you  
15 regarding his drug and alcohol use and gas huffing, and things  
16 of that nature.

17 A. He related to me that particularly a period I think I  
18 recall from about age thirteen to fifteen or so he huffed gas  
19 regularly on a pretty regular basis almost daily. He also had  
20 used alcohol and also had experimented with other drugs.

21 Q. What other type drugs?

22 A. Pot as I recall.

23 Q. Okay, and this person that you characterized as being  
24 about -- I think education wise -- a second or third grader,  
25 did he also indicate to you regarding the number of sexual



1 partners he had had?

2 A. Yes, he did.

3 MR. CROW: Your Honor, I object.

4 THE COURT: I'm sorry?

5 MR. CROW: I object, your Honor. May we approach  
6 the bench?

7 THE COURT: Alright.

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

10 MR. CROW: I fail to see the relevance of talking  
11 about sexual partners.

12 MR. STIDHAM: It is not within the scope of direct  
13 examination.

14 MR. DAVIS: It's my understanding that they have  
15 characterized the defendant to be a childlike, mentally  
16 slow individual, and I think his actions which are  
17 consistent with those of a teenager are those of a more  
18 mature individual.

19 THE COURT: Alright, I'll allow you to ask in that  
20 fashion. Yes. Wait a minute. Wait a minute.

21 MR. CROW: In response to that, we all know where --  
22 are familiar with mentally retarded people who function  
23 in a very low basis.

24 MR. DAVIS: Your Honor---

25 MR. CROW: Excuse me, if I can finish -- that have

1 sexual liaisons that have nothing to do with the  
2 truthfulness or---

3 THE COURT: Well, the way he's proffered the  
4 question to the Court at the bench here, is that's a  
5 legitimate premise that he can direct to the doctor and  
6 then ask him, "Is that in conformity with normal  
7 adolescent behavior?" I mean you're talking about an  
8 argumentative factor which you can, of course, interject.

9 (RETURN TO OPEN COURT.)

10 THE COURT: Alright.

11 BY MR. DAVIS:

12 Q. Doctor, in your report initially -- and I'm looking at  
13 page three of that report -- do you have a copy of it?

14 A. Yes, I do.

15 Q. Okay. Jessie advised you that he was a heavy gas huffer  
16 for approximately two years?

17 A. Yes.

18 Q. And that was when he was approximately thirteen or  
19 fourteen?

20 A. As I recall, yes.

21 Q. And he also stated that he had used pot. Is that  
22 correct?

23 A. Yes.

24 Q. And he also stated that he had been a heavy alcohol user  
25 as well?

1 A. Yes.

2 Q. And he also indicated to you that he had been active  
3 sexually with a number of partners. Is that correct?

4 A. Yes.

5 Q. And sexual activity while may not -- maybe not be  
6 condoned by society, that is something that is -- people in  
7 the teenage range become interested in in the normal  
8 developmental course, correct?

9 A. Yes.

10 Q. Okay. And so the indication that he had a number of  
11 sexual partners by the age of seventeen when you evaluated  
12 him, that would be consistent with a normal developmentally --  
13 developmental teenager, correct?

14 A. Not necessarily.

15 Q. Would it be inconsistent with that?

16 A. No, it wouldn't be inconsistent, but not necessarily be  
17 consistent.

18 Q. Now, you've indicated that on your exams that you  
19 performed the WAIS-R Test?

20 A. Yes.

21 Q. Is that a standardized test?

22 A. Yes.

23 Q. Is that a test that involves any objectivity or  
24 subjectivity on your part?

25 A. Yes.

1 Q. Okay. And the WAIS-R is the test that you use to  
2 determine the defendant's I. Q.?

3 A. Yes.

4 Q. Okay. And in that particular test what was the  
5 performance I. Q.?

6 A. Seventy-five? Yes.

7 Q. Now, you had in your file some past tests that had been  
8 conducted on Jessie to determine I. Q., do you not?

9 A. Yes, I did.

10 Q. Okay. And in eighty-nine did you have a test -- an I. Q.  
11 test that was performed on him to determine what his function  
12 was at that point?

13 A. Uh -- let me -- yes, I did. I need to find records to  
14 find exactly what it is. I can't remember -- where is that  
15 other report. Yes, I'm sorry. Yes.

16 Q. Okay, and what was that performance I. Q. in nineteen  
17 eighty-nine?

18 A. Nineteen eighty-nine. I'm sorry. I'm not sure which  
19 report it's in. Let me look further. In -- which are we  
20 talking about now?

21 Q. Nineteen eighty-nine.

22 A. Nineteen eighty-nine -- we have a performance of eighty-  
23 four, and a verbal of sixty-eight, and a full scale of  
24 seventy-four.

25 Q. Okay, and in nineteen ninety-two there was also prior to

1 the time you did you examination there was another I. Q. test,  
2 correct?

3 A. Yes.

4 Q. And what was his performance I. Q. at that time?

5 A. Eighty-eight.

6 Q. Okay, and what was his full scale I. Q. at that time?

7 A. Seventy-three.

8 Q. Okay. So the two past I. Q. examinations that have been  
9 performed on him immediately prior to the one that you did  
10 indicated that his performance level was in the average range.  
11 Is that correct?

12 A. Um -- low average, yes. In the first place -- well, low  
13 average, yes.

14 Q. Okay. Well, in my -- am I correct in understanding  
15 anything above eighty is in the average?

16 A. That depends on the criteria you want to go by.  
17 Typically it's -- it is. Social Security uses eighty above,  
18 other places use eighty-four -- uh -- uh -- uh -- so -- yes.

19 Q. So by most criteria eighty-four and eighty-eight would be  
20 in the average range?

21 A. Yes. Yes.

22 Q. Okay. And when we talk about performance I. Q., describe  
23 what that is -- what that involves.

24 A. Those entail problem solving, conceptualization tasks,  
25 thinking tasks that are non-verbal. Example -- putting

1 together puzzles, or being able to -- I show you a pattern of  
2 blocks, and you have to build designs that match the pattern  
3 out of blocks. That is -- it is -- it is -- it's  
4 conceptualization in a non-verbal form -- problem solving in a  
5 non-verbal form.

6 Q. And in regard to that he ranked about average, right?

7 A. On -- on those two testings, yes.

8 Q. Okay. Now, the MMPI-2, that was another test you  
9 conducted on him. Is -- is that correct?

10 A. Yes.

11 Q. Okay. Now, I don't want to get too complicated. I don't  
12 understand all of this stuff, but I notice down here you said,  
13 he had a high -- or you said a mild elevation in the F Scale?

14 A. Yes.

15 Q. Okay. Now, Doctor, it's true that what you actually  
16 found was a T value in that F scale of eighty-three?

17 A. Yes.

18 Q. Okay. Now, are you telling me that that's a mild  
19 elevation?

20 A. It's an elevation above normal levels.

21 Q. Well, don't they rank the elevation as far as the T scale  
22 is concerned -- isn't that something that's actually ranked in  
23 term of low range, middle range, moderately high range, and  
24 very high range?

25 A. Yes. I may have mispronounced what it was supposed to

1 be.

2 Q. This is a text regarding MMI -- MMPI handbook. Show me  
3 here what an eighty-two to eighty-eight F -- T score on the F  
4 scale indicates to you in that book. (HANDING TO WITNESS.)

5 A. (EXAMINING.) Uh -- very high.

6 Q. Very high range, correct?

7 A. Yes. This -- this will not be quite the same as an MMPI-  
8 2 which is changed criteria, but it would still be in the high  
9 range.

10 Q. Okay. So when you put in here that that was a mild  
11 elevation, that would not be accurate, would it?

12 A. No, it would not be. No.

13 Q. Okay. And then from that statement that it was a mild  
14 elevation, you interpreted that that could show malingering,  
15 right?

16 A. Yes. Yes.

17 Q. Okay. And malingering means what, Doctor?

18 A. It means making up stuff. Uh -- uh -- trying to present  
19 yourself as being ill when you're not---

20 Q. Now---

21 A. ---for some particular gain.

22 Q. Did you explain to Jessie what these tests were being  
23 performed for?

24 A. We talked some about them in general, yes.

25 Q. Okay. He knew that you were coming to court to testify

1 about the results of these tests?

2 A. Yes.

3 Q. Okay, and you talked with his lawyers before you took the  
4 tests or gave him the tests?

5 A. Yes.

6 Q. Okay. Do you know whether he talked with his lawyers  
7 that he was going to take those tests?

8 A. Not that I know of. I don't know.

9 Q. Okay. Well, in your report you said that because of that  
10 elevation in that T scale -- that eighty-three score --  
11 because of that mild elevation that gave you some concern  
12 about malingering.

13 A. Yes.

14 Q. Okay, but you characterized it as a mild elevation?

15 A. Yes.

16 Q. Okay. When you characterized it as a significant or very  
17 high elevation, it gives you more concern for malingering,  
18 doesn't it?

19 A. Uh -- the T value, I used the raw scale value so -- so,  
20 no, I didn't -- it -- give you pause for both malingering and  
21 for how valid the scale is for a variety of reasons.

22 Q. Well, you indicated in your report that a mild elevation  
23 would give pause, correct?

24 A. Any elevation gives pause.

25 Q. Well, a very high elevation would give you -- for lack of



1 a better word -- a whole lot of pause?

2 A. Yes.

3 Q. Okay. And what you did was in your report instead of  
4 saying that -- interpreting that to mean malingering, you just  
5 discounted that and said that -- you just didn't place any  
6 significance on it, correct?

7 A. I don't think that's what I said, but---

8 Q. Well, you didn't indicate in your report that you felt  
9 like it was malingering or that he was not actually attempting  
10 to answer the questions correctly or anything of that sort.

11 A. I said that -- that it did not appear to be the most  
12 appropriate interpretation of that report that he was  
13 malingering.

14 Q. You said there was a mild elevation in the F scale --  
15 "Can be used as an attempt at malingering, however, this does  
16 not appear to be the most appropriate interpretation."

17 A. Yes.

18 Q. Okay. So when presented with the option of whether he  
19 was malingering on the test or whether he's giving you valid  
20 responses, you chose the valid responses, correct?

21 A. With caution, yes.

22 Q. Well, then you go on to make a great deal of the  
23 interpretations about the results of that MMPI, correct?

24 A. Yes.

25 Q. Now, is it true -- and I want to be sure I understand

1 this -- I talked about -- I asked you about the F scale and in  
2 an MMPI there are two other scales, the L and the K?

3 A. Yes.

4 Q. Okay. So the F scale is kind of there to determine if  
5 the person is giving a valid response?

6 A. That is correct.

7 Q. Okay. And he ranked very high in terms of whether he  
8 might not be?

9 A. Right.

10 Q. Okay. And then the L and the K are the ones that you  
11 really draw your conclusions from as far as the significance  
12 of the test, right?

13 A. No.

14 Q. What do the L and the K tell you?

15 A. The L, F, and K are each what are called validity scales.  
16 They each measure a different part of whether or not you're  
17 looking at a valid profile. If they're responding valid, they  
18 look at different things. You draw your interpretation on the  
19 other ten scales that come afterwards. Now, the purpose of  
20 the first three scales -- the L, K, and F -- are to decide is  
21 because of ten things I have going over here are they -- are  
22 they real or valid. Do they look like the -- that they're --  
23 that the person tried to lie, they tried to make up stories,  
24 and you use these three to decide that so you make an  
25 interpretation of these.

1 Q. Did you indicate that the responses on L and K were  
2 normal?

3 A. Yes.

4 Q. Okay, and then you got the high -- very high range on the  
5 F scale?

6 A. Yes.

7 Q. How did you draw the conclusion from normal scores on the  
8 L and K range? You said the validity profiles indicate normal  
9 responses.

10 A. On the L and K.

11 Q. Right. And then the F has this high range that's either  
12 indicative of malingering or not understanding the questions?

13 A. Yes.

14 Q. And then you go on to draw nearly -- well---

15 A. And all I said again is that -- is that -- is that -- uh  
16 -- uh -- that we need to -- that we need to consider this very  
17 carefully because of that high F scale.

18 Q. And if in fact malingering was what we have on this test,  
19 then the validity of the other scores would not be relevant,  
20 correct? It would not be a -- you would not depend on them?

21 A. Right. Right.

22 Q. Now, you also gave what's called a Bender Gestalt?

23 A. Yes.

24 Q. What is -- what in the world is a Bender Gestalt?

25 A. That's a series of -- of nine stimulus pictures you have

1 a person copy.

2 Q. So if I'm giving -- you show me a picture if I'm taking  
3 the Bender Gestalt?

4 A. Yes.

5 Q. Then I have a pen or pencil and I try to draw that  
6 picture?

7 A. Yes.

8 Q. Okay. And what were the results you found out about --  
9 let's see -- you found significant problems with perseveration  
10 and line qualities?

11 A. Yes.

12 Q. What does that mean?

13 A. Perseveration means the tendency to go on, and on, and  
14 on, and on, and on. Some -- some of the drawings have dots  
15 and lines, and the tendency to not be able to stop -- stop  
16 with the drawing and not going on.

17 The -- uh -- uh -- line quality refers to light, dark  
18 line qualities.

19 Q. And didn't you note in your report, also, that the  
20 defendant seemed to have a tremor or shake in his hands?

21 A. Yes. Yes.

22 Q. Okay, wouldn't that affect the validity of the results  
23 you get on a Bender Gestalt---

24 A. It may well---

25 Q. ---if the person's kind of got a shake to their hand?

1 A. It may well.

2 Q. So when you say this in your report about the results of  
3 the Bender Gestalt that may not even be valid if he's got a  
4 tremor?

5 A. No. No. The tremor would be more in terms of wavy lines  
6 sketches rather than heavy-light.

7 Q. Well, you said as a part of your diagnosis is based on  
8 line quality, right?

9 A. Line quality is not the same -- light and dark line  
10 quality is not the same as consistency of lines.

11 Q. And from him drawing these ten pictures, you said you  
12 could expect memory problems and a difficulty with attention  
13 and comprehension?

14 A. Yes.

15 Q. Okay. So you found some memory problems with him?

16 A. Yes.

17 Q. Now, you also -- this is -- you said that you gave him a  
18 House/Tree/Person test?

19 A. Yes.

20 Q. Tell these ladies and gentlemen what you do for that  
21 House/Tree/Person test.

22 A. You tell a person to draw -- you tell a person to draw a  
23 house and you give them paper and pencil and they draw a house  
24 and you take that away and you give them paper and say, Draw  
25 me a tree. They draw you a tree. You say, Draw me a person,

1 and they draw you a person.

2 Q. Alright, and in this case when you do that -- when  
3 somebody draws you a house, and draws you a tree, and draws  
4 you a person, what in world do you do -- I mean, how do you  
5 evaluate that?

6 A. There is a -- a -- a scoring manual. The things you look  
7 for is the location on the page, how big the drawings are, how  
8 small the drawings are, if they have bars over the windows, or  
9 if they have chimneys, if they don't have chimneys, if they  
10 have big door, little doors. If the people have eyes, no  
11 eyes. If they're big or they're little, if they look like  
12 monsters. If the trees look like penises -- if the trees look  
13 like Christmas trees---

14 Q. If the trees look like what?

15 A. Penises.

16 Q. Okay. Did you find any of those trees like that in his  
17 test?

18 A. Jessie's?

19 Q. Um-hum.

20 A. I don't think so.

21 Q. You've got his picture there?

22 A. Yes, I think I do. (EXAMINING.) Yes.

23 Q. Now, from those three pictures -- those drawings that  
24 Jessie did, did you determine that he was of abnormal low  
25 levels of inferiority, insecurities, dependency, low self-

1 assurance, low self-concept, a lot of withdrawal, and over-  
2 concerned with interpersonal warmth, a need to demonstrate  
3 masculinity, a marked pattern of very weak and inadequate  
4 strength, sexual immaturity and some preoccupation with  
5 phallic symbols?

6 A. Yes.

7 Q. And that was all in those three little pictures?

8 A. Yes. Yes.

9 Q. Okay. Where were the phallic symbols in that?

10 A. Uh -- in terms of the tree itself -- it look phallic.

11 Q. Wait. Wait. Wait a minute. Is that picture the ~~one~~  
12 you're saying? (INDICATING.)

13 A. (EXAMINING.) Yes. Yes. Um-hum.

14 Q. And -- now, is this---

15 A. The fact that it's a large chimney, yes. It deals with  
16 over-concern with sexuality.

17 Q. Okay. That -- that chimney on this picture is where you  
18 come up with the over-concern for sexuality?

19 A. One of the places.

20 MR. DAVIS: Your Honor, could I have this marked as  
21 State's Exhibit whatever?

22 THE WITNESS: My ethics require they only go to  
23 somebody who is licensed to look at them.

24 THE COURT: Well, I'm going to overrule that and I'm  
25 going to allow it to be received into evidence.

1 (STATE'S EXHIBIT NUMBER ONE A IS RECEIVED INTO  
2 EVIDENCE.)

3 BY MR. DAVIS:

4 Q. Would you circle the part of that that shows where it is  
5 that he has -- what was that -- with sexuality?

6 A. Over-concern. (MARKING.)

7 MR. DAVIS: Your Honor, I'll just make these a  
8 composite exhibit -- State's Exhibit whatever the number  
9 is.

10 THE COURT: And, gentlemen, if there's any question  
11 about my ruling as to the admissibility it would be my  
12 further ruling that any confidentiality provision or  
13 privilege has been waived.

14 MR. STIDHAM: I believe that's what the doctor was  
15 referring to, your Honor.

16 THE COURT: Well, I think that's what it was, too.  
17 And that -- under these circumstances you're proffering  
18 the witness -- they're waived.

19 BY MR. DAVIS:

20 Q. Doctor, also in addition to that long litany of things I  
21 read that you gathered from these three drawings, you also  
22 gathered that you see defensiveness, aggressive tendencies,  
23 and the need to compensate for feelings of inferiority. Is  
24 that also true?

25 A. Yes.



1 Q. Okay.

2 MR. DAVIS: Your Honor, may I exhibit these to the  
3 jury?

4 THE COURT: Yes, you may.

5 (STATE'S EXHIBIT NUMBER ONE A IS EXHIBITED TO THE  
6 JURY.)

7 BY MR. DAVIS:

8 Q. Now, I under -- is there any sort of written test that  
9 goes along with this---

10 A. No.

11 Q. ---that you made all of these conclusions from?

12 A. No.

13 Q. Now, the WRAT-R test---

14 A. Yes.

15 Q. ---and that's not like R-A-T, that's like W-R-A-T, right?

16 A. Right.

17 Q. Okay. What is that?

18 A. It's a measure of reading, writing, and spelling basic  
19 skills.

20 Q. And what you measure in that is his performance on those  
21 tests, correct?

22 A. Yes.

23 Q. Okay, and there is a difference between function and  
24 performance, correct?

25 A. Yes.

1 Q. In other words, I could go in and completely fail a test  
2 whereas I could go out in the real world and function in  
3 society and do certain acts.

4 A. Under certain circumstances.

5 Q. Okay. And in fact if the person intentionally or fails  
6 to put out a proper effort, then what you're actually  
7 measuring is his performance and not his ability to function?

8 A. In any test you're always measuring performance.

9 Q. And if the person going into it knows that it would be to  
10 his benefit to have a low performance, then they can act in  
11 such a way that that's just exactly what they did?

12 A. Surely.

13 Q. Now, the next test, the REY. It's a auditory-verbal  
14 learning test?

15 A. Yes.

16 Q. Okay. Now, what does that one involve?

17 A. That involves a list of words that you read to the  
18 subject and they try to remember as many of them as they can,  
19 then you read the list again, and again, and see how many they  
20 remember over trial.

21 Q. Would it be a fair -- you just keep reading the list to  
22 them and the same words are in there---

23 A. Yes.

24 Q. ---and then after a period of time they should remember  
25 more words as you go along?

1 A. Yes.

2 Q. So you expect to see a curve with an increase in the  
3 number of words they recall?

4 A. Yes.

5 Q. Which indicates that they're smart enough to pick up on  
6 it?

7 A. It indicates that their memory for individual items is  
8 fairly normal in this case.

9 Q. Okay, and that's what you found out, correct?

10 A. Yes.

11 Q. In other words, you did -- the REY test when you give  
12 those words to him, this defendant sitting over here was  
13 pretty normal?

14 A. Yes.

15 Q. Now, the clock drawing test.

16 A. Yes.

17 Q. I couldn't find that in my book. What is that?

18 A. That's -- that's a drawing designed to -- a test designed  
19 by Edith Cappa at Boston University.

20 Q. Okay. What do we do when we take that test?

21 A. That's basically you have the person draw you a clock and  
22 they put the -- they put the -- draw the clock with the face  
23 and then you ask them to set the time at twenty minutes to  
24 four.

25 Q. And what did that test tell you?

1 A. Looking at -- at -- do they-- can they conceptualize the  
2 time -- can they recognize a fairly accurate perception from  
3 memory of a fairly common object.

4 Q. What result did you get -- I don't see anything -- is  
5 there anything in your report about your clock test?

6 A. Maybe there's not -- there should have been.

7 (EXAMINING.) Uh -- that must have been overlooked. It is not  
8 -- it was fairly normal.

9 Q. Oh, okay.

10 A. So I -- just the drawing itself was fairly normal. There  
11 was no major---

12 Q. Okay.

13 A. It was of no particular value in terms of information.

14 Q. Okay. So that test really didn't tell you much of  
15 anything?

16 A. No.

17 Q. Okay. What about this bi -- you indicated there was a  
18 bicycle drawing test?

19 A. Yes. You just -- you just have the person draw you a  
20 bicycle.

21 Q. So during this course of the test Jessie got to draw a  
22 tree, a house, a person, a clock, and a bicycle?

23 A. And he also got to draw some designs -- he got to draw  
24 some designs from memory. Uh -- uh -- got to do the WAIS-R,  
25 got to do the MMPI, got to do a achieve -- basic achievement

1 test in reading, spelling, and arithmetic, got to do a  
2 Rorschach test.

3 Q. What -- what about the bicycle drawing test. You said in  
4 here it's indicative of Jessie's difficulty and recall of  
5 visual information?

6 A. Yes. Jessie did a fairly simply drawing of a bicycle.  
7 He has trouble recalling details of---

8 Q. So would I -- let me -- let me see if this is right. You  
9 show him a bicycle?

10 A. No, I don't show him anything.

11 Q. Okay. You just ask him to draw one?

12 A. Yes, from memory.

13 Q. Okay. And then you evaluate what he draws?

14 A. Yes.

15 Q. Okay, whether it's a good looking -- I mean, how do you  
16 evaluate what---

17 A. Uh -- uh -- uh -- uh -- there's a twenty point scaling.  
18 It has a twenty point score, and it deals with the details,  
19 the size of the tires, whether it has handlebars, whether it  
20 has a gear sprocket, whether it has spokes, those are the  
21 kinds of things that you measure how complete or incomplete it  
22 is.

23 Q. Okay. And so that's another basis that your opinion  
24 rests on?

25 A. Yes.

1 Q. Now, the Rorschach test you indicated there were no non-  
2 remarkable responses to it. Is that true?

3 A. Yes.

4 Q. Okay. And he tended to pick out pieces and to produce  
5 fairly normal and common responses. There is no indication of  
6 significant psychopathology. Is that correct?

7 A. Yes.

8 Q. Okay.

9 A. On that test. Okay -- on that test there was not---

10 Q. Okay. And the Rorschach is kind one of the cornerstones  
11 of psychology. Isn't that true? I mean one of the real---

12 A. For -- for certain people, yes.

13 Q. Okay. Well, it's the ink blot test, right?

14 A. Yes.

15 Q. Okay.

16 A. Behaviorists would call it absolutely worthless so it  
17 depends upon what field you're in.

18 Q. And as far as Jessie was concerned there was no  
19 indication of psychopathology. What does that -- what is  
20 psychopathology?

21 A. Uh -- uh -- psychiatric illness.

22 Q. You've got mental diagnosis?

23 A. Yes.

24 Q. Okay. There is no indication of that on that test?

25 A. No.

1 Q. Okay. Now, you also told us about these stories that you  
2 told him the Kolberg moral development?

3 A. Yes.

4 Q. Are those standardized tests?

5 A. Standardized in that they are fairly widely used and  
6 there is -- there are scoring instructions and manuals for  
7 them.

8 Q. A validity scale to determine whether you get valid  
9 results or not?

10 A. Uh -- not in the same way as for MMPI.

11 Q. Okay. So you don't know if a person is actually putting  
12 forth any effort or whatever or whether they're actually  
13 attempting honestly to answer your questions and respond to  
14 that test?

15 A. You never know that.

16 Q. But some of these standardized tests actually -- like the  
17 one we talked about -- the F scale -- they include things  
18 that---

19 A. The MMPI -- the MMPI includes things that -- that tip you  
20 off.

21 Q. And in this case when you saw that, you disregarded that  
22 in his evaluation, correct?

23 A. No, I did not.

24 Q. Now, this Piaget stuff with Play Doh?

25 A. Yes. Yes.

1 Q. Okay. That -- that test is designed -- is to determine  
2 to find if the person is a concrete thinker or not, right?

3 A. That one is designed to -- to -- test what's called  
4 concept assessments, yes, with the concrete -- whether they  
5 can form concepts or not.

6 Q. It's designed to determine difference between abstract  
7 thinking and concrete thinking?

8 A. Yes -- in broad terms, okay.

9 Q. Okay. And there is nothing -- a -- a -- probably at  
10 least half the population to some extent are what are called  
11 concrete thinking. Would you agree?

12 A. Yes.

13 Q. Okay. So I mean the fact that the test indicated this  
14 defendant is a concrete -- has concrete thought patterns---

15 A. Not -- not in the same way, no. I'm saying that there is  
16 a difference between being able to conserve matter as being a  
17 concrete thinker. That being a concrete thinker is a higher  
18 level of development than being able to conserve matter.

19 Q. But -- but there are a lot of people that as far as a --  
20 concrete thinking and the results on this test can function  
21 perfectly normally in society and be concrete thinkers as  
22 indicated by that test?

23 A. People can be concrete thinkers and perform relatively  
24 normal in society.

25 Q. Okay. You know right from wrong?



1 A. Yes.

2 Q. And conform their conduct to what the law requires?

3 A. Yes.

4 Q. Which is what you found in this case? This defendant  
5 knew right from wrong, correct?

6 A. Yes. Um-hum.

7 Q. And no doubt at the time this incident occurred he knew  
8 what criminal conduct was and he knew you shouldn't do it?

9 A. Yes.

10 Q. Now, as I understand it, based on your evaluation, you  
11 did not -- in fact you specifically found that Jessie  
12 Misskelley was not mentally retarded, correct?

13 A. Yes.

14 Q. Okay. And he---

15 A. In a -- in a psychological sense.

16 Q. And the diagnosis that you rendered for Jessie Misskelley  
17 was, one, adjustment disorder with depressed moods?

18 A. Yes.

19 Q. Okay. And, Doctor, would you -- would it be expected  
20 that someone that was incarcerated awaiting trial on a capital  
21 murder charges of three eight-year-olds would be suffering  
22 from depressed moods?

23 A. That's -- that's precisely the reason for the diagnosis,  
24 yes.

25 Q. Okay. So nothing---

1 A. That is not terribly exciting.

2 Q. Okay, and then the next diagnosis is psychoactive  
3 substance abuse?

4 A. Yes.

5 Q. And that has to do with his drug use and his gas huffing  
6 and alcohol, and marijuana?

7 A. Yes.

8 Q. Okay. And then you have borderline intellectual  
9 functioning which is your I. Q. evaluation?

10 A. Yes.

11 Q. And then you have the developmental disorder?

12 A. Yes.

13 Q. And that N. O. S. Is that correct?

14 A. Yes.

15 Q. And that means he didn't fit any of the normal diagnoses,  
16 that's just kind of a catch-all?

17 A. He -- he had trouble with some reading, some writing,  
18 some things we would normally expect someone his age to become  
19 better at.

20 Q. And doesn't your -- the DSMR-3 which, you know, is kind  
21 of the Bible of psychology, doesn't that tell you that you  
22 don't make those N. O. S. diagnoses. You be very careful with  
23 those?

24 A. Yes.

25 Q. Because those are real borderline?

1 A. Yes.

2 Q. Okay. In fact if it was a real close call between a  
3 diagnosis and somebody who's normal?

4 A. Not necessarily.

5 Q. But---

6 A. It may mean they don't fit neatly into anything with a  
7 category.

8 Q. But the manual -- the DSM-3 -- tells you you don't make  
9 that diagnosis and to be very careful before you put somebody  
10 in that category, correct?

11 A. I suppose you'd be very careful placing anybody in -- in  
12 -- in any category, I would think, and extra caution on that  
13 one.

14 Q. So that -- so Jessie knew the difference between right  
15 and wrong?

16 A. Yes.

17 Q. And he had the ability to conform his conduct as that  
18 required by the law at the time of this incident?

19 A. Yes.

20 Q. And he wasn't mentally retarded?

21 A. No.

22 Q. In fact, on his previous I. Q. test he had an average  
23 performance level?

24 A. Yes.

25 Q. Doctor, let me ask you: Which one of these tests that

1 we've gone over contributed to your determination that this  
2 defendant was suggestible?

3 A. Uh -- some on the House/Tree/Person.

4 Q. Those three drawings that we just looked at?

5 A. Yes. Yes.

6 Q. Okay.

7 A. Uh -- probably the majority would have come from -- uh --  
8 uh -- interview data.

9 Q. Okay. Just in talking with him. Just---

10 A. Social history.

11 Q. Okay. Now, was that an opinion that you drew based on  
12 that first eleven hours or is that---

13 A. Yes.

14 Q. Okay. And so basically that's not a result of any test.  
15 That's just kind of a gut feeling you have based on your  
16 experience and expertise?

17 A. Yes.

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

19 REDIRECT EXAMINATION

20 BY MR. CROW:

21 Q. Doctor, I'll try to be brief.

22 The full scale I. Q. score for the eighty-nine results?

23 A. Results for eighty-nine, were -- uh -- full scale is  
24 seventy-four, verbal is sixty-eight.

25 Q. Okay. Full scale for the ninety-two results?

1 A. Uh -- seventy-three.

2 Q. And the full scale you gave?

3 A. Seventy-two. I'm not sure here---

4 Q. I think that's correct.

5 A. Yes. There's that one from -- from eighty-three that was  
6 a sixty-seven.

7 Q. Was Jessie Misskelley ever been diagnosed in the past as  
8 being mentally retarded?

9 A. Yes.

10 THE COURT: Anything else

11 RECESS EXAMINATION

12 BY MR. DAVIS:

13 Q. You yourself didn't diagnose this defendant as being  
14 mentally retarded, correct?

15 A. No, I did not.

16 REDIRECT EXAMINATION

17 BY MR. CROW:

18 Q. When you say mentally retarded that's using a  
19 psychological standard?

20 A. Right.

21 Q. Not applying a legal standard?

22 A. No.

23 MR. DAVIS: Judge, from my knowledge of this -- for  
24 purposes of this trial there is no legal standard.

25 MR. CROW: I believe there is, your Honor.

1 THE COURT: Approach the bench, gentlemen.

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

4 THE COURT: What is the legal standard you're  
5 suggesting? Because as far as I know that the legal  
6 standard is going to be determined by what the  
7 psychiatrist and psychologist say. I know what you're  
8 talking about on the -- on that statute. It just says  
9 it's rebuttable presumption at below sixty-five.

10 MR. CROW: It sets out exactly the qualifications.  
11 It's not dealt by I. Q. It defines what mentally  
12 retarded is. By the statute, your Honor, it says if it's  
13 this, this, or this, it is.

14 MR. STIDHAM: The legislature defined it.

15 MR. CROW: The legislature defined it, your Honor.  
16 I mean, I don't -- I don't know any way around that.

17 THE COURT: Okay. Let me see that statute.

18 MR. CROW: Yes, your Honor.

19 (RETURN TO OPEN COURT.)

20 THE COURT: Alright, ladies and gentlemen, we're  
21 going to take a ten minute recess with the usual  
22 admonition not to discuss the case with anyone.

23 (RECESS.)

24 THE COURT: That's the closest we've been to ten  
25 minutes. Okay. Well, we're getting better.

1           Alright, Court will be in session. Call your next  
2 witness.

3           MR. STIDHAM: Your Honor, we have a witness who came  
4 in from out-of-state a little bit out of order we would  
5 like to call now.

6           Johnny Hamilton.

7                                 JOHNNY HAMILTON

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

10                                 DIRECT EXAMINATION

11 BY MR. STIDHAM:

12 Q.     Please state your name for the Court.

13 A.     Johnny Michael Hamilton.

14 Q.     And where do you reside, Mr. Hamilton?

15 A.     Knoxville, Tennessee.

16 Q.     Where were you residing back on May fifth of nineteen  
17 ninety-three?

18 A.     Route Two, Box One Oh Three, Marion, Arkansas, at  
19 Highland Trailer Park.

20 Q.     Okay. Are you familiar with the defendant, Mr.  
21 Minkelley?

22 A.     Yes, sir, I am.

23 Q.     Do you remember the events of May fifth, nineteen ninety-  
24 three, that night -- does that day or night stand out for any  
25 particular reason for you?