

1 THE DEFENDANT: Yes, sir.

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

5 THE DEFENDANT: No, sir.

6 THE COURT: Are you completely satisfied?

7 THE DEFENDANT: Yes, sir.

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

10 THE DEFENDANT: Yes, sir.

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

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Have you been truthful with them?

15 THE DEFENDANT: Yes, sir.

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

17 THE DEFENDANT: Yes, sir.

18 THE COURT: All right. Anything else?

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

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

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

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

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

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

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

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

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

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

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

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

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

1 with regard to first degree murder.

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

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

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

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

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

8 THE COURT: Yes.

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

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

22 MR. STIDHAM: Not all of his opinions.

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

1 probably admissible.

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

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

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

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

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

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

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

3 (RETURN TO OPEN COURT.)

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

5 THE COURT: Yes.

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

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

11 THE COURT: I'll tell them.

12 MR. STIDHAM: Okay.

13 (RETURN TO OPEN COURT.)

14 THE COURT: Are we ready?

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

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

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

24 THE COURT: Yes.

25 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT