

1 THE COURT: Okay. Okay, I think that's a good
2 point.

3 (RETURN TO OPEN COURT.)

4 THE COURT: Alright, I'm going to -- the lawyers
5 have pointed out a point that I have to agree with. To
6 my two alternates rather than send you home I'm going to
7 require that you stay here sequestered -- which means you
8 can sit in the jury box there or a comfortable place that
9 we find for you -- and ask that you stay in the event
10 that one of the twelve that goes back and deliberates
11 becomes ill. It being the flu season and I've heard an
12 unusual amount of coughing, so if I send you home then I
13 couldn't replace one of the jurors with you. So I'm
14 going to ask that you stay for at least a reasonable
15 period of time. Okay?

16 Alright, the twelve principal jurors can now retire
17 to the jury room to consider your verdicts.

18 (JURORS EXITING THE COURTROOM AT 4:20 P. M.)

19 (THE FOLLOWING HEARING WAS HELD OUT OF THE PRESENCE
20 OF THE JURY.)

21 THE COURT: Alright, let the record reflect that
22 this is a hearing out of the presence of the jury and
23 after the jury has proceeded to deliberations.

24 MR. CROW: Your Honor, we would move for a mistrial
25 on the following basis.

1 First, during the summation of Mr. Davis I believe
2 he made a veiled comment on the silence on the -- on Mr.
3 Misskelley's failure to testify. He talked about him
4 sitting there with his head bent over, in different
5 clothes, different hair cut, and won't look you in the
6 eye. We thought it was -- I don't have the exact quotes,
7 but the record will reflect exactly what all he said, and
8 I thought that was a veiled reference to this.

9 MR. STIDHAM: Your Honor, it amounts to a comment
10 that the defendant didn't testify.

11 THE COURT: Do you want to respond?

12 MR. DAVIS: Judge, I can't recall during -- exactly
13 what I said, but it certainly wasn't intended to be a
14 comment on his not testifying. It was a comment on the
15 fact that his appearance here in the courtroom has been
16 that of a meek, mild juvenile -- a pre-juvenile --
17 contrary to what his picture showed and contrary to what
18 his action indicated in the tapes. I don't think I made
19 any comment whatsoever on his failure to take the stand.

20 THE COURT: No, in fact he used the term "veiled",
21 Mr. Stidham. The Court was conscious and aware of the
22 comment made and did not feel at the time that it was an
23 inappropriate remark that would single out or call to the
24 attention of the jury the defendant's failure to testify.
25 It just simply was too remote to do that in my opinion

1 and a mistrial after several days of trial would be a
2 drastic remedy and if there was any error in that it was
3 so miniscule that it was harmless. And I frankly didn't
4 feel that from my observation of the closing argument,
5 the tactic that it was employed was a proper inference
6 that the jury could draw from the appearance of the
7 defendant from the photographs that were introduced and
8 his appearance during the trial, and, if anything,
9 reflected his demeanor during the trial, and not his
10 failure to testify in his own behalf and recant or deny
11 any statement he made.

12 So the motion for mistrial will be denied and the
13 record is made on that issue.

14 MR. CROW: Thank you, your Honor.

15 MR. STIDHAM: Thank you for your consideration, your
16 Honor.

17 MR. CROW: I have a couple of other ones, your
18 Honor, just real briefly.

19 I also ask for a mistrial on the ground of
20 prosecution's remarks during closing. He talked about
21 ninety-nine percent of the cases on people who confess,
22 they're guilty. I objected in the trial when that
23 response was solicited from Mr. Holmes -- that while he
24 was our witness, we certainly didn't ask that question,
25 your Honor. I objected. I thought that was using other

1 people's guilt or innocence to reflect on the guilt or
2 innocence of Mr. Misskelley. That has now been
3 compounded by the prosecutor's comment during closing,
4 and I feel that at this point we're entitled to a
5 mistrial.

6 THE COURT: Well, for several reasons I will deny
7 the motion for a mistrial. One, and perhaps the most
8 important reason for denying it is no objection was made
9 at the time. The Court was not given an opportunity,
10 therefore, to rule upon any objectionable comment, nor
11 was the Court given an opportunity to caution the jury on
12 excessive language that any attorney might use other than
13 the standard instruction that's given in one oh one. So
14 your failure to object at the time in my estimation is a
15 waiver of that objection.

16 Secondly, it seems to me to be fair comment based
17 upon the evidence and testimony in the nature of the
18 defense. Inasmuch as the defense called ex -- so called
19 experts or experts in the field of interrogation, and
20 suggested to the jury that the statement was contrived,
21 manipulated, coerced, and otherwise involuntary, that it
22 was an appropriate line of inquiry, and that the very
23 nature of the defense invoked those inquiries and made
24 that a pertinent subject matter of inquiry.

25 That would be my second reason for it.

1 MR. CROW: Thank you, your Honor.

2 (JURY ENTERING COURTROOM AT 12:10 A. M.)

3 THE COURT: Alright, ladies and gentlemen, you've
4 been deliberating a pretty good while now, and I'm going
5 to release you to go home for the evening and ask that
6 you report back at nine-thirty in the morning, and when
7 you report back you can just proceed to the jury room and
8 resume your deliberations. However, you can't begin your
9 discussion or deliberation until all twelve of you are in
10 the jury room where you comprise the jury, and I'm going
11 to give you the usual and same admonition that even
12 though you are a jury now, you're not to discuss this
13 case with anyone. You shouldn't read any media account
14 of it, watch it, listen to it, or let anyone, including
15 spouses, loved ones, neighbors, friends, or anyone
16 suggest to you what your verdict should be. And with
17 that admonition and warning, you're free to go until in
18 the morning at nine-thirty where I'll ask you to return
19 and resume your deliberations.

20 Wait just a minute. Everybody be seated.

21 While I know you've worked hard we've put a lot of
22 time into the case and I'm going to ask that you continue
23 your deliberations for a reasonable period tomorrow. So
24 everyone just stay in the courtroom and let me have some
25 deputies take the jury out the back way to their vehicles

1 and you're free to go until in the morning at nine-
2 thirty.

3 (ADJOURNMENT.)

4 CORNING, ARKANSAS, FEBRUARY 4, 1994, AT 9:30 A. M.

5 (JURY ENTERING JURY ROOM AT 9:30 A.M.)

6 (JURY ENTERING COURTROOM AT 12:00 P. M.)

7 THE COURT: Alright, ladies and gentlemen, have you
8 arrived at a verdict?

9 FOREPERSON: Yes.

10 THE COURT: If you would hand it to the bailiff,
11 please, or the Sheriff, please.

12 FOREPERSON: (COMPLYING.)

13 THE COURT: (EXAMINING.) Alright, ladies and
14 gentlemen, your verdicts are in good form and will be
15 accepted by the Court and I'll announce your verdict in
16 just a second.

17 Alright, ladies and gentlemen, I -- in the audience
18 -- I am acutely aware that your feelings are on edge,
19 that there is a great deal of emotion involved, and I
20 certainly can understand that, and everyone that
21 participates here can. But the Court cannot tolerate and
22 will not tolerate any verbal outburst, any display of
23 emotion whatsoever. So you're cautioned and warned as I
24 read the verdicts that you are not to show any outburst,
25 any emotion, or any display, and I recognize that that's