

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 4

APPEARANCES

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BEFORE THE HONORABLE:

DAVID BURNETT, CIRCUIT JUDGE

BARBARA J. FISHER  
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1 CORNING, ARKANSAS, JANUARY 19, 1994, AT 10:30 A.M.

2 THE COURT: This is the case of the State of  
3 Arkansas versus Jessie Lloyd Misskelley, Junior.

4 How says the State?

5 MR. DAVIS: The State is ready, your Honor.

6 THE COURT: How says the defendant?

7 MR. STIDHAM: We're ready, your Honor.

8 Your Honor, we do have some matters we need to  
9 take up in chambers.

10 THE COURT: All right.

11 (THE FOLLOWING CONFERENCE WAS HELD IN CHAMBERS)

12 THE COURT: Let the record reflect this is a  
13 hearing out of the presence of the jury or the  
14 prospective jury.

15 First of all I want to put in the record the  
16 announcement --

17 MR. DAVIS: Your Honor, can we excuse the  
18 attorneys that aren't involved in this matter?

19 MR. STIDHAM: I don't have any problem with them  
20 being here, Judge.

21 MR. DAVIS: I do in regard to something that we  
22 discussed earlier.

23 THE COURT: They already know about it.

24 MR. STIDHAM: They told me about it before you  
25 did. Your Honor, I --

1 THE COURT: Wait a minute. I want to get that  
2 matter -- that announcement that was made in the  
3 record about --

4 MR. DAVIS: That's why we would ask that the  
5 other defense counsel be excused.

6 THE COURT: They are aware of it from the  
7 discovery and I have also told them that I expected  
8 the gag order to apply to them and the media is not to  
9 be informed or told whatsoever until further  
10 investigation can be carried out and determine whether  
11 or not it leads to evidence or not so as lawyers --

12 MR. PRICE: I agree with that.

13 THE COURT: -- You're duty bound and are ordered  
14 by the Court that you're not to discuss it, period,  
15 with anyone in the media or anywhere else.

16 All right, Mr. Fogleman, you can put it on the  
17 record what --

18 MR. FOGLEMAN: I informed Mr. Stidham and Mr.  
19 Crow this morning that I talked to Genetic Design  
20 yesterday in regard to a knife that had been sent to  
21 Genetic Design --I believe it was about January the  
22 eighth when it was sent -- and at Genetic Design they  
23 said that the blood on the knife was consistent with  
24 the blood of about eight percent of the population  
25 which was also the same type blood as Chris Byers.

1 That there were further tests they could run to narrow  
2 that further.

3 We also informed them that it had been received  
4 by the police department by Federal Express but we  
5 felt like that we could track down where it came from.

6 I also informed them that Genetic Design told us  
7 they should have some results early next week, and it  
8 is my understanding that none of this is to be  
9 discussed with anybody until we have an opportunity to  
10 investigate whether or not it has anything to do with  
11 the case or whether it is even relevant.

12 MR. STIDHAM: Your Honor, is there anything that  
13 would indicate a link between Mr. Misskelley and this  
14 new evidence?

15 MR. FOGLEMAN: I'm not aware of any direct link  
16 between Mr. Misskelley or Mr. Echols or Mr. Baldwin at  
17 this time.

18 MR. STIDHAM: Due to the exculpatory nature of  
19 the evidence -- it may or may not be -- obviously this  
20 could pose a problem with the prosecution of Mr.  
21 Misskelley if it's determined that it's the murder  
22 weapon and the DNA matches one of the victims and it  
23 is tied to someone else other than Mr. Misskelley or  
24 the other two co-defendants. I want to be certain I  
25 don't waive anything so that we don't get too far

1 along in this trial that we have to look for the  
2 governor to get a pardon. I don't want to by not  
3 standing up here and making a motion for a continuance  
4 today -- not waive that right if we do obtain  
5 information from Genetic Design or from other sources  
6 that would tend to show the innocence of Mr.  
7 Misskelley. I don't want to get too far down the road  
8 and not be able to stop this.

9 THE COURT: I understand that reservation. This  
10 is the date that's been set for some time. It will be  
11 almost a year within the next few months. There's no  
12 way to continue this at this time for the State to  
13 fall within the speedy trial requirement. If you're  
14 asking for a continuance, then that might be something  
15 to consider. At this point we have not picked the  
16 first juror. The Court has merely qualified the jury.  
17 What I would like to do -- and of course, it will be  
18 up to you and Mr. Crow.

19 MR. STIDHAM: Before you go any further, let me  
20 go ahead and make the motion at this point. Due to  
21 the potential evidence, I want to preserve the record  
22 here.

23 I would like to wait until we know what this  
24 evidence is going to say before we go any further. I  
25 know this case has been set for some time. I know

1 we've got snow on the ground, and it will be difficult  
2 to get here. We've already had a twenty-four hour  
3 delay. But at the same time I don't want to do  
4 anything whatsoever to prejudice the rights of the  
5 defendant, and I couched my words earlier with the  
6 understanding that the Court would not continue it.  
7 We would like the Court to consider that possibility,  
8 give us some time to figure out what is going on. I  
9 know we have got a hundred people setting out there  
10 and we are here and ready to go today but this could  
11 be evidence that would tend to show that Mr.  
12 Misskelley is not guilty.

13 THE COURT: In what way?

14 MR. STIDHAM: For example, it has been our  
15 contention that Mr. Misskelley had nothing to do with  
16 this. If this knife and evidence comes back to Billy  
17 Joe and Jim Bob in Beaumont, Texas, and links them to  
18 this, that that would tend to show that the statement  
19 that Mr. Misskelley gave was obviously incorrect. We  
20 submit that it is and, therefore, we think the  
21 prosecution would probably dismiss the charge and  
22 prosecute the perpetrator and not someone who gave a  
23 statement to the police.

24 I know that is pretty farfetched at this point,  
25 but that is a possibility. From a judicial economy

1           standpoint, I don't want to go to work for a week or  
2           week and a half and put a jury in the box and get  
3           started halfway through a trial or three-fourths  
4           through the trial and realize we did it all for  
5           nothing.

6           THE COURT: Is there anything at all remotely  
7           likely to develop that some fourth person that is  
8           completely unrelated to the three defendants in this  
9           case perpetrated this crime? Is there even any remote  
10          suggestion that this piece of evidence could --

11          MR. FOGLEMAN: I don't know what it is going to  
12          show. I don't know how to answer the question.

13          MR. STIDHAM: Just from a logic standpoint I  
14          think it's logical to assume that Jessie didn't mail  
15          it from the jail cell in Piggott and I would probably  
16          go so far as to say that Jason and Damien didn't do it  
17          either.

18          THE COURT: How are they ever going to find out  
19          anything about it? It may be just a mystery. I just  
20          recently had the same situation come up in Poinsett  
21          County where a knife was discovered that supposedly  
22          was the murder weapon and it absolutely turned out to  
23          be a huge sham, totally unrelated to the case. And  
24          that could very well happen here. On the other hand,  
25          it might be evidence.

1 MR. FOGLEMAN: I can't say that it won't do what  
2 you asked me. I can't say that it will either. I  
3 don't have enough information at this point.

4 THE COURT: You have been informed on it. I'm  
5 going to go ahead and start picking the jury. I think  
6 the remedies you just discussed were not all the  
7 remedies that you have. If this, of course, turns out  
8 to be newly discovered evidence that points a finger  
9 at totally different people, then this Court would  
10 declare a mistrial or grant you a new trial.

11 If there is newly discovered evidence that would  
12 suggest another person committed the crime or if it  
13 exonerates Mr. Misskelley in any way, that the Court  
14 could grant a new trial, and I certainly would.

15 MR. FOGLEMAN: I think we'll know a whole lot in  
16 ten days.

17 THE COURT: How long will it take to pick a jury?

18 MR. STIDHAM: I think we can have a jury by  
19 Friday afternoon.

20 MR. DAVIS: I have some serious reservations that  
21 we can have a jury by that time.

22 THE COURT: Well, I'm going to guess that it will  
23 take us at least until late Friday afternoon or even  
24 perhaps Monday. We'll pick alternates. Then I'll  
25 discharge the panel. Before I even swear the jury

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1 we've selected, I'll see where we stand on this and if  
2 we need to continue for two or three days before we  
3 even begin the first witness, we will do it before we  
4 ever swear the jury and put him in jeopardy. But I  
5 don't see any problem in beginning the voir dire.

6 MR. STIDHAM: This trial itself has cost the  
7 taxpayers so much money. I just hate to do it and  
8 find out that we didn't need the jury. Of course,  
9 that would make me joyous to learn that my client is  
10 innocent as I think he is. I want to be real careful  
11 that I don't waive anything because I may have to ask  
12 to do an independent analysis of some evidence.  
13 There's a lot of things that could come up. If we  
14 pick a jury and actually get testimony started, to get  
15 a continuance at that point it would really be a  
16 problem.

17 THE COURT: We are going to start picking a jury.  
18 I'm not going to continue it at this point because  
19 there's nothing that really even rises to the level of  
20 evidence yet. Possibly it could. So let's proceed.

21 MR. STIDHAM: I don't want to kick a dead horse,  
22 and I don't want to make the Court angry at me, but I  
23 felt tied up in there not being able to say some of  
24 the things I want to express about the way the voir  
25 dire examination should be conducted. Mr.

1 Misskelley's life is in jeopardy. Capital murder  
2 cases are normally done individually sequestered.

3 THE COURT: No, they're not.

4 MR. STIDHAM: I think three would not be  
5 prejudicing anyone. I think the prosecution would  
6 request that as well.

7 THE COURT: I have already said I would do that.

8 MR. STIDHAM: But you said you were going to  
9 limit what questions we could talk about. You know,  
10 "Have you ever been on a jury before? Do you know the  
11 lawyers?"

12 But pre-trial publicity has been absolutely  
13 rampant. I think if one juror stands up and says,  
14 "The son-of-a-gun is guilty. I know he is because I  
15 read it in the Commercial Appeal" --

16 THE COURT: I'm going to caution them about doing  
17 that.

18 MR. STIDHAM: Why would we want to ask those kind  
19 of questions if they're not going to be able to answer  
20 it? That's why we need to do it back here.

21 THE COURT: I told you those kind of questions  
22 you can ask back here.

23 MR. STIDHAM: Another issue -- there's several  
24 motions that haven't been ruled upon. One motion --  
25 the motion -- the only one that affects us today, your

1 Honor, would be the motion that I faxed you yesterday  
2 and also we filed a motion back in October that  
3 basically is going to run parallel to the issue.

4 We asked that if the Court did determine the  
5 statement to be voluntary, that that not be  
6 communicated to the jury and that counsel not be  
7 allowed to comment on that during the trial.

8 THE COURT: My ruling is a ruling of the case and  
9 I don't see any reason for either one of you to say  
10 that the judge found it to be voluntary. It is just  
11 evidence. I think that would be inappropriate if  
12 either of you did that.

13 MR. STIDHAM: So you will be granting our motion  
14 to --

15 THE COURT: Sure.

16 MR. STIDHAM: With regard to our motion that we  
17 filed --

18 THE COURT: Are you talking about the polygraph  
19 and introduction of the results of polygraph?

20 MR. STIDHAM: That's correct.

21 MR. CROW: We just want that -- in addition to  
22 what Dan is going to argue -- we just want it  
23 clarified as to where we are going to go because I  
24 think it will affect the questions and what we are  
25 going to do on voir dire.

1 MR. STIDHAM: Your Honor, the Arkansas courts,  
2 the federal courts and the United States Supreme Court  
3 have held that it's vital for the defendant to be able  
4 to explain to the jury the issue of voluntariness and  
5 some of the case law that I cited in my brief  
6 yesterday with regard to this issue is very, very  
7 compelling. Kagebein, which is an Arkansas Supreme  
8 Court decision, deals with the issue we just disposed  
9 of.

10 THE COURT: Kagebein is that case where there  
11 were three teenagers from over near DeWitt that killed  
12 a man and left him out by a car on a road by a duck  
13 club or something. I remember that case.

14 MR. STIDHAM: Your Honor, the Crane case, which  
15 is a United States Supreme Court case, and some of the  
16 language in that case is very, very powerful and if  
17 you limit the defendant Mr. Misskelley's right to tell  
18 the jury about the polygraph exam and the results of  
19 the exam, you're restricting his power to describe to  
20 the jury the circumstances that prompted his alleged  
21 confession and the defendant is effectively disabled  
22 from answering the one question that every juror needs  
23 answered. If the defendant is innocent, why did he  
24 previously admit his guilt. That is very compelling  
25 and right on point.

1 THE COURT: You are wanting to use third persons  
2 to testify for him. Are you wanting to put him on the  
3 stand and let him say they had overridden my  
4 voluntariness and forced me to do it, fine. I noticed  
5 that you didn't even put him on the stand in the Denno  
6 hearing.

7 MR. STIDHAM: That was a trial strategy decision  
8 that we had a right to make.

9 THE COURT: It wouldn't have been admissible at  
10 trial, but the thing that bothers me is you want to  
11 get into a contest between two polygraph examiners as  
12 to which one of them was accurate.

13 MR. STIDHAM: That is for the jury to determine.

14 THE COURT: No, it is not because in my  
15 estimation polygraph testimony is unreliable and has  
16 never been accepted as reliable in any court other  
17 than by consent of the parties.

18 What you are proposing to do is to have two  
19 polygraph examiners get up and quibble about who is  
20 right and who is wrong and assuming that the jury  
21 would believe your man is right, that they falsely  
22 accused him of lying and that, therefore, he made a  
23 statement.

24 I'm willing to let you put on proof that a  
25 polygraph was administered and after the polygraph he

1 was told that he failed and after that he made a  
2 statement if that's what you want to do.

3 MR. STIDHAM: That would be like saying our  
4 client flunked a polygraph and then he gave them a  
5 confession. Why would we want to tell them that? We  
6 need to tell them everything or nothing at all.

7 THE COURT: The results of the polygraph simply  
8 aren't admissible.

9 MR. STIDHAM: Why should the West Memphis Police  
10 Department be able to pick up a mentally handicapped  
11 kid, take him down to the West Memphis Police  
12 Department, hook him up to this machine, tell him he's  
13 lying his ass off and we cannot get up and challenge  
14 the credibility of the officer and challenge the  
15 credibility of the test itself. That's exactly what  
16 the Court in Crane is talking about.

17 MR. FOGLEMAN: Do you have any cases where the  
18 results of the polygraph -- or a person contested the  
19 results of a polygraph?

20 MR. STIDHAM: I believe the Minnesota decision is  
21 exactly on point.

22 Also in the Leach case we have a very similar  
23 situation. We're talking about plea negotiations. In  
24 that case the defendant was told by the prosecuting  
25 attorney, "If you give me a statement right now, I

1           won't charge you with capital murder."

2           MR. FOGLEMAN: That's -- the case was reversed.

3           MR. STIDHAM: That is inadmissible to talk about  
4 plea negotiations in front of the jury. Yet, the  
5 Court reversed it and cited the Crane case.

6           THE COURT: That is promise or inducement. That  
7 is something totally different.

8           MR. DAVIS: Our big concern is those test results  
9 go to one of the ultimate issues that the jury is  
10 required to determine, credibility of witnesses. And  
11 it is putting it onto some scientific machine and  
12 giving them some sort of false sense of security in  
13 that this machine may be right or may be wrong, and it  
14 matches the qualifications of operators and polygraph  
15 experts when in reality it is unreliable, and it  
16 shouldn't be used for the jury to determine what  
17 witnesses are credible and which ones aren't.

18          MR. STIDHAM: Why should the police be allowed to  
19 use it to extract confessions from mentally  
20 handicapped defendants? They're getting to use it,  
21 but we can't.

22          THE COURT: In the first place the Court has  
23 found him not to be mentally handicapped. His IQ is  
24 in excess of 70 which makes him borderline  
25 functioning, and he's not handicapped.

1 MR. STIDHAM: If that is not a handicap, I don't  
2 know what is.

3 MR. FOGLEMAN: The Arkansas Supreme Court has  
4 ruled it is not permissible for some expert to get up  
5 there and say, "I believe so and so is telling the  
6 truth."

7 MR. STIDHAM: We're not asking for that.

8 THE COURT: That's what your man did, in a sense.  
9 He said he believed he was telling the truth when he  
10 said he didn't know anything about it.

11 MR. STIDHAM: All he said in his report is,  
12 "There was no indication of deception on the polygraph  
13 with regard to the questions concerning the homicide."

14 THE COURT: What does that mean?

15 MR. FOGLEMAN: It means he thought he was telling  
16 the truth.

17 MR. STIDHAM: We are asking that you allow the  
18 expert to testify about his analysis of the case. But  
19 in the very least you should at least let him testify  
20 and show the jury that in our opinion he passed it  
21 and, therefore, that is why he gave the confession.  
22 You could even offer a jury instruction to the effect  
23 that they are not to consider the evidence of the  
24 polygraph to prove innocence or guilt. All we're  
25 trying to establish, Judge, is that was a catalyst to



1 obtain the confession of the defendant. That is  
2 within the range of what the jury should consider.  
3 The Crane case, the Leach case, the Kagebein case all  
4 point and say --

5 THE COURT: Kagebein didn't have anything to do  
6 with a polygraph.

7 MR. STIDHAM: They didn't have anything specific  
8 to do with the polygraph, but the Tanner case did.  
9 And it specifically says that, "It is necessary in the  
10 question of voluntariness of statements made by Tanner  
11 which was submitted to the jury as to weight and  
12 credibility that there would be an explanation of what  
13 took place during the period of time the appellant was  
14 alone with the officer."

15 MR. DAVIS: There was never a polygraph exam  
16 given in that case. There were no results to discuss.  
17 The jury would never have been led to ask, "I wonder  
18 what the results were," because the only testimony  
19 was, "We were preparing him for a polygraph test when  
20 he confessed."

21 So, therefore, you don't throw the skunk in the  
22 jury box and cause them to say, "I wonder what the  
23 results were."

24 MR. FOGLEMAN: There's also an Arkansas statute  
25 that says polygraph results are inadmissible.

1 MR. STIDHAM: When you consider the Rock and  
2 Patrick analysis that leads you back to --

3 THE COURT: I'm going to stick to my initial  
4 ruling that the results of the polygraph are not  
5 admissible either by the State or any defense expert.  
6 Any other purposes you can use him for like  
7 interrogation techniques. I'm going to allow you to  
8 do that.

9 MR. CROW: We are not going to put on evidence --  
10 if that is the Court's ruling -- we not going to put  
11 on evidence that he took a polygraph test and was told  
12 he was flunked. Rule 37 would happen.

13 THE COURT: I noticed in one of the cases there  
14 that is exactly what they did. In that case the Court  
15 gave some kind of ruling about polygraph tests not  
16 being admissible, not having any -- I'm willing to do  
17 that if you want to do it from that standpoint.

18 MR. CROW: At this point in time we are not  
19 planning on doing that, your Honor. I think that  
20 would be tantamount to -- that would cause problems.

21 MR. STIDHAM: You're saying if you instruct the  
22 jury to disregard this as to guilt or innocence,  
23 you'll let us testify about whether he passed or  
24 flunked?

25 MR. CROW: No, he'll let us put on evidence that

1 he was given a test and that he was told he flunked.

2 THE COURT: You can give all the circumstances  
3 that go into the voluntariness of his confession.

4 MR. STIDHAM: Why would we want to tell them that  
5 he flunked?

6 THE COURT: No, I'm not saying you can tell them  
7 he flunked.

8 MR. CROW: We can tell them he was told he  
9 flunked.

10 THE COURT: Yes. Whether he did or not would be  
11 inadmissible.

12 MR. STIDHAM: Why can't we just tell the jury  
13 everything and tell them the polygrapher examiner told  
14 him he flunked --

15 THE COURT: You can tell him that. I'm going to  
16 tell the jury they are not to consider that because  
17 whether he passed or failed it is not credible  
18 evidence.

19 MR. STIDHAM: We'd ask for a ruling that no one  
20 talks about the polygraph.

21 THE COURT: That will be granted. The results of  
22 it.

23 MR. CROW: Or the fact that he was given one.

24 THE COURT: That's fine, too.

25 MR. FOGLEMAN: The only problem that might

1 present itself is if they start raising questions  
2 about what happened in this period between the time  
3 when the polygraph examiner starts talking to him and  
4 when Gitchell and Ridge start talking to him.

5 MR. CROW: I would suggest that the officer  
6 testify he was the one interrogating him in that time  
7 period. He can talk about what questions he asked  
8 him. There's no reason to mention that he is a  
9 polygraph examiner or that he was giving a polygraph  
10 test.

11 MR. STIDHAM: It makes no sense to tell the jury  
12 the prosecution stuff but not the defense stuff.

13 THE COURT: That's not what I'm saying. I'm  
14 saying you can tell them anything you want about it  
15 except the results of the polygraph. I'm not going to  
16 get into a swearing match between experts on the  
17 polygraph as to whether they passed or failed.

18 MR. STIDHAM: Are you ruling that --

19 THE COURT: I'm ruling that polygraph results by  
20 state statute and by every case law I know are  
21 inadmissible. Anything else you want to do I'm going  
22 to let you do.

23 MR. STIDHAM: Are you also ruling that it is not  
24 within the jury's, ah, credence or within a jury's  
25 role to not determine the credibility of the

1 confession and the credibility of the witnesses with  
2 regard to the polygraph?

3 THE COURT: I'm not ruling that at all. I'm  
4 ruling that the results of the polygraph, pass or  
5 fail, by either the operator for the State or the  
6 expert for the defense is not admissible. You can do  
7 anything you want --

8 MR. CROW: The only thing the expert for the  
9 defense could testify to is the results of the  
10 polygraph. I don't see any other way for him to  
11 testify about the polygraph exam that was given --

12 THE COURT: He can testify that that is a tool  
13 used by officers to --

14 MR. STIDHAM: That would be implicating that he  
15 flunked it then.

16 THE COURT: As long as they don't testify to what  
17 the results were either way, I don't care what he  
18 says. So if you want to use his testimony in that  
19 regard, you can.

20 MR. STIDHAM: What you're saying is that the  
21 statute supercedes any of the defendant's rights --

22 THE COURT: I'm not saying that the statute  
23 supercedes any defendant's rights, not at all, not  
24 even close to what I'm saying. I'm saying you have  
25 got to determine what evidence you want to put in, and

1 I'm not saying your expert can't testify. I'm saying  
2 there are many things he can testify to. But I'm not  
3 going to allow him to testify, "In my opinion the  
4 defendant passed the polygraph." I'm not going to  
5 allow the State's man to say, "We think he failed."

6 If any of you bring that up, I'm going to give an  
7 instruction to the jury according to all those cases  
8 that you've briefed that the results of a polygraph  
9 are inadmissible, are inappropriate and that they  
10 shouldn't consider it. But anything short of that  
11 that you want to use to show or suggest that his  
12 confession was other than voluntary, you can do.

13 MR. STIDHAM: You are considering the  
14 constitutional issues that we've put into our brief  
15 with regard to the Sixth Amendment and due process --  
16 you are considering those in making this ruling.

17 THE COURT: I hope he's getting due process now.

18 MR. CROW: At this point in time, we do not  
19 anticipate -- I don't want to be foreclosed -- but we  
20 do not anticipate putting on evidence that he was  
21 given a polygraph and was informed that he flunked.  
22 With that in mind we request that they not be voir  
23 dired about polygraph, that the polygraph not be  
24 mentioned.

25 THE COURT: Let me make my ruling clear. I'm not

1 saying that you're barred from mentioning the fact  
2 that he took a polygraph test and that by taking that  
3 polygraph test some way the officers removed his  
4 voluntariness or that they in any way affected his  
5 mental approach to his statement -- you can by  
6 inference or innuendo or however you want to do it  
7 through your expert suggest that, but the results  
8 themselves are not admissible.

9 MR. CROW: I understand the Court's ruling -- I  
10 understand it to be that we can put on evidence that  
11 he was given a polygraph test. We can put on evidence  
12 that he was informed he flunked it. We cannot put on  
13 evidence as to what the State's results were.

14 THE COURT: That's right. You can put on your  
15 expert, and I think there are a lot of things that he  
16 can do that could help you in that regard. I'm not  
17 going to let the two polygraph people say, "He passed.  
18 He failed."

19 MR. STIDHAM: You're not going to permit the  
20 State to voir dire on that issue, then are you?

21 MR. DAVIS: The only thing we would voir dire on  
22 -- and I think this would be safe -- is when we get  
23 them back here three at a time is to ask them, "Is  
24 there any recent -- within the last four weeks have  
25 you read anything regarding this trial."

1 MR. FOGLEMAN: Any tests, or anything.

2 MR. DAVIS: I don't know if we need to go that  
3 far. "If you read anything, do you recall what it was  
4 you read?" And ask them and see if they recall  
5 anything and ask them --

6 THE COURT: I'm going to let you all ask  
7 questions like that. I don't want you to ask anything  
8 that infers he took a polygraph.

9 MR. DAVIS: I won't mention the word, polygraph.

10 THE COURT: If you want to use that as your  
11 defense, go right ahead. I see some merit to it. I'm  
12 not barring that. I'm barring an argument between two  
13 experts as to whether they passed or failed.

14 MR. CROW: We may change our mind but at this  
15 point in time --

16 THE COURT: You can certainly suggest by your  
17 expert that he was told he failed and by failing --  
18 and telling him something contrary is an investigative  
19 technique that is employed. He can testify to those  
20 things.

21 But I don't want this case to boil down to where  
22 the jury would have to decide whether the expert is  
23 correct or not on passing or failing on what by state  
24 law is not credible evidence and by every case law I  
25 know is not credible evidence. The issue of whether



1 he passed or failed is really immaterial. It is  
2 whether or not he believed he passed or failed and  
3 what he did as a result of it.

4 MR. CROW: You realize our argument is he was  
5 convinced that he was going to pass. When they told  
6 him he failed, he was so dumbfounded and confused that  
7 lead to --

8 THE COURT: You can still argue that to the jury.  
9 In fact that one case that you cited in there -- that  
10 is exactly what they did and I think the Court either  
11 failed to instruct on it not being credible or they  
12 did and I don't remember. But if you do that, I'm  
13 going to instruct the jury that polygraph results are  
14 notoriously incorrect, that they are not credible  
15 evidence and that courts do not accept the results of  
16 a polygraph test and they should not consider any  
17 results.

18 MR. STIDHAM: We need to move on to another  
19 issue. I learned that there was a possibility that  
20 the prosecution might attempt to impeach our expert,  
21 Doctor Wilkins, with regard to some allegations about  
22 him, some ethical violations that perhaps the State  
23 Psychological Board is investigating, and we are  
24 asking in limine that the prosecution be prohibited  
25 from trying to impeach him in that regard.

1 MR. CROW: Unless it goes to the truthfulness of  
2 his testimony or some crime that fits within the --

3 MR. STIDHAM: -- The rules of evidence are clear  
4 that it is not proper, and we don't want that to  
5 happen when we put him on the witness stand for the  
6 prosecutor to stand up and say, "Isn't it true that at  
7 the present time there is an investigation pending  
8 against you with regard to some problems," same thing  
9 if one of us were being investigated --

10 THE COURT: What is he talking about?

11 MR. DAVIS: What I anticipated asking him was is  
12 he a member in good standing with the Arkansas Board  
13 of Psychologists.

14 THE COURT: That's a fair question.

15 MR. STIDHAM: He is.

16 MR. DAVIS: I don't anticipate asking anything  
17 beyond that. I am aware that he is under  
18 investigation.

19 THE COURT: For what?

20 MR. CROW: It has nothing to do with  
21 truthfulness. I'm not sure --

22 MR. DAVIS: He's under investigation for a few  
23 things.

24 THE COURT: For competency?

25 MR. CROW: Competency was not the issue, I don't

1 believe.

2 MR. STIDHAM: It would be absolutely improper for  
3 the prosecutor to impeach him on any of that.

4 MR. CROW: He hasn't had a hearing yet.

5 MR. STIDHAM: He hasn't had a hearing. There's  
6 one scheduled. For the prosecutor to make that  
7 inference is absolutely and totally --

8 THE COURT: He said he wasn't going to do that.

9 MR. DAVIS: There is one thing -- and I'm not  
10 going to go into the specific questions I may ask him  
11 -- but I anticipate in his testimony he would indicate  
12 that a number of tests he gave were subjective in  
13 nature. In other words it was his personal  
14 interpretation of that test that rendered the result  
15 --

16 THE COURT: -- Those are fair questions.

17 MR. DAVIS: I may ask some things about his  
18 personal situation as far as his state of mind that  
19 would go to bearing on that subjective analysis.

20 THE COURT: That's all right. I don't think you  
21 need to ask him about any pending investigation by any  
22 licensing body, particularly if there's no -- if there  
23 had been a decision by them, that might have been a  
24 fair question.

25 MR. STIDHAM: Are you going to prevent the

1 prosecutor from asking him if he is a member in good  
2 standing?

3 THE COURT: Why not? Is he a member of the board  
4 or society?

5 MR. STIDHAM: He is, yes.

6 THE COURT: Those questions are asked when you  
7 are qualifying a doctor. Are you a member of whatever  
8 boards or societies. I think those are proper  
9 questions. I don't think you need to go into any  
10 inference that he's being investigated or likely to  
11 lose his license, particularly if there has been no  
12 hearing on it. I'd grant the motion in that regard.

13 MR. STIDHAM: Moving along, on October 19th Mr.  
14 Crow and I on behalf of Mr. Misskelley joined in some  
15 death penalty motions that were heard in Jonesboro. I  
16 neglected to get an order. I just want to make sure I  
17 have the record straight. There was a motion to quash  
18 the information on the ground that it was  
19 unconstitutional due to its overlap.

20 THE COURT: Our Supreme Court has already ruled  
21 on those.

22 (RETURN TO OPEN COURT)

23 (VOIR DIRE PROCEEDINGS ARE HELD)

24 CORNING, ARKANSAS, JANUARY 20, 1994, AT 9:30 A.M.

25 (WHEREUPON, A JURY COMPOSED OF TWELVE MEMBERS AND