

1 (WITNESS EXCUSED)

2 THE COURT: We are going to take an early recess  
3 with the usual admonition not to discuss the case with  
4 anyone, and it is particularly important at this point  
5 that you not read newspaper accounts, watch the TV  
6 accounts or listen to radio accounts or let anybody  
7 discuss the media coverage of the case with you or in  
8 your presence. It doesn't mean that you can't watch  
9 your favorite TV program and you can watch the news  
10 except when it relates to this case. And I think all  
11 of you understand the need and importance of that.  
12 You need to have your mind made up by the evidence  
13 that you hear in court and not from outside  
14 influences.

15 With that reminder, you're free to go until in  
16 the morning at 9:30.

17 CORNING, ARKANSAS, JANUARY 27, 1994, AT 9:30 A.M.

18 (THE FOLLOWING CONFERENCE WAS HELD IN CHAMBERS)

19 THE COURT: Let the record reflect that this is a  
20 hearing out of the presence of the jury.

21 MR. DAVIS: In regard to Michael Moore there's  
22 photographs -- the State intends to offer photographs  
23 59A, 62A, 60A, 61A, 64A, 63A, 71A, 70A, 69A, 68A, 67A,  
24 72A, 73A, 65A and 66A.

25 THE COURT: Let Doctor Peretti look at those

1 first.

2 THE WITNESS: (EXAMINING)

3 THE COURT: Do those photographs aid and assist  
4 you in describing the wounds that you detailed on the  
5 decedent Moore?

6 THE WITNESS: Yes, they do.

7 THE COURT: Are they descriptive of the injuries  
8 you observed?

9 THE WITNESS: Yes, they are.

10 THE COURT: Will they aid and assist you in your  
11 testimony?

12 THE WITNESS: Yes, they will.

13 THE COURT: All right, gentlemen. Take a look at  
14 them. If you have any specific objections, refer to  
15 the photograph by number.

16 MR. STIDHAM: Your Honor, my specific objection  
17 would be that one photograph depicting each injury  
18 would certainly seem to be sufficient. They are very,  
19 very graphic. And jurors are lay people and they are  
20 not used to seeing this kind of stuff, and quite  
21 frankly, I'm not used to seeing this kind of stuff.  
22 My concern is the prejudicial nature of the  
23 photographs.

24 I think one photograph depicting the head injury,  
25 one depicting the injuries to the other parts of the

1 body are sufficient.

2 Also, the photograph, State's Exhibit 69A,  
3 depicting the anal area of the victim Moore -- the  
4 Medical Examiner has told me on numerous occasions  
5 that there's no evidence of any sodomy. We would  
6 specifically object to that photograph because it's  
7 not relevant.

8 THE COURT: Well, I can look at the photograph  
9 from about six feet away from you and see swelling and  
10 redness to the rear. I don't know what the doctor's  
11 testimony would be, but I certainly can see some  
12 trauma to his buttocks.

13 Doctor, what is that picture descriptive of?

14 THE WITNESS: That picture is descriptive of  
15 showing the buttocks region and surrounding the  
16 buttocks region there is a focal area of abrasions or  
17 scrapes, some lividity and minimal bruising.

18 THE COURT: Is that lividity or is it trauma?

19 THE WITNESS: You have lividity and you have the  
20 abrasions overlying the lividity.

21 MR. CROW: So that is not bruising?

22 THE WITNESS: No. Not right -- the bruising is  
23 the, ah, abrasions, the scrapes.

24 THE COURT: Doctor, lividity is the gathering of  
25 the blood in the buttocks after death.

1 THE WITNESS: Right.

2 MR. STIDHAM: Referring to 68A, can you not tell  
3 the same things from that photograph as you can from  
4 69A?

5 THE WITNESS: This is showing the buttocks that  
6 is not spread open to take the photograph. And it  
7 shows the lividity, some of the abrasions here, or  
8 scrapes, and some scrapes around the buttocks region  
9 here.

10 THE COURT: Will one of those photographs suffice  
11 to describe the injury and, if so, which one would  
12 best describe the injuries that you observed?

13 MR. FOGLEMAN: Your Honor, if I may -- Doctor  
14 Peretti, on the photograph which is shown as State's  
15 69A, is it correct that you found anal dilation on  
16 this victim Michael Moore?

17 THE WITNESS: Yes, I did.

18 MR. FOGLEMAN: Does that photograph depict that?

19 THE WITNESS: It shows some of the dilatation.

20 MR. FOGLEMAN: Does the other photograph depict  
21 the dilatation?

22 THE WITNESS: No.

23 THE COURT: I'm going to allow both of them.

24 If your only objection is the fact that the  
25 photograph by its very nature might have some

1 prejudicial effect, that is basically what you are  
2 objecting to all of these?

3 MR. STIDHAM: Correct, your Honor, and also the  
4 cumulative nature of them as well. Here's another  
5 photograph, 67A, showing the abrasions on the buttock  
6 area of the victim.

7 THE COURT: It also shows his legs and hands tied  
8 by what appears to be a shoestring.

9 MR. CROW: Your Honor, isn't it possible for one  
10 picture to show two things? I mean this one picture  
11 could show the abrasions and the tying.

12 MR. STIDHAM: We could eliminate one of these it  
13 seems.

14 MR. DAVIS: Judge, one thing we would like to  
15 proffer is what has been marked State's Exhibits 300,  
16 301 and 302 and State's Exhibit 300 is another  
17 photograph showing the bindings which the State  
18 withheld or didn't ask --

19 MR. CROW: Is that from the local --

20 MR. DAVIS: No. These are Medical Examiner  
21 photographs. These are three pictures which are  
22 proffered for the purposes of showing that the State  
23 made an effort to introduce photographs that depict  
24 the injuries without showing those that are unduly  
25 gruesome.

1           THE COURT: Doctor, do the three photographs that  
2 we are speaking of -- 67A, 68A, 69A -- do each of  
3 those three photographs separately depict an area of  
4 your clinical evaluation and assessment of the  
5 injuries of Michael Moore?

6           THE WITNESS: Photograph 67A shows the bindings.  
7 That is what that picture represents. The photograph  
8 69A is the photograph of the anus showing no tears  
9 around the anal orifice, and it shows some of the  
10 scrapes on the buttocks region, and State's 68A is a  
11 similar photograph with the buttocks not spread open.  
12 This shows some of the injuries, but it doesn't show  
13 the anal orifice.

14          THE COURT: Is it significant to depict the anal  
15 orifice to describe your findings relative to that  
16 portion of the anatomy?

17          THE WITNESS: Well, this photograph shows the  
18 anal dilatation, and it shows that there is no trauma  
19 around the orifice.

20          THE COURT: Does that aid and assist you in  
21 describing your findings?

22          THE WITNESS: Yes, it would.

23          MR. CROW: Doctor, is there anything in 68A that  
24 can't be shown from 69A?

25          THE WITNESS: 69 shows everything that's in 68.

1 THE COURT: You're saying we can eliminate 68A?

2 THE WITNESS: Yes.

3 THE COURT: We're going to eliminate 68A and 301,  
4 302 and 300. They may be attached for demonstration  
5 purposes to illustrate what photographs have been  
6 excluded.

7 (STATE'S EXHIBITS 68A, 301, 302 AND 300 ARE  
8 RECEIVED FOR IDENTIFICATION)

9 MR. STIDHAM: State's Exhibit 59A depicts head  
10 wounds to the victim Moore as does 62A and we would  
11 ask that only one of those photographs be submitted.

12 THE COURT: Do you have another one showing the  
13 chest and right shoulder?

14 MR. STIDHAM: No, your Honor.

15 THE COURT: 59A shows from the trunk up. It  
16 doesn't show his lower extremities. It depicts an  
17 injury to right below the right clavicle and scrape  
18 marks above the right nipple. Is that what it  
19 depicts?

20 THE WITNESS: Yes, sir.

21 MR. FOGLEMAN: Your Honor, it also shows on the  
22 right, the swelling which the other photographs do  
23 not.

24 THE COURT: These two photographs show completely  
25 different injuries. In the Court's opinion they are

1 not that gruesome.

2 MR. STIDHAM: 61A and 60A. Doctor Peretti, is  
3 there any difference in those two photographs?

4 THE WITNESS: 61A shows two impact sites on the  
5 scalp, whereas 60A is a close-up of the forward, the  
6 most anterior wound. It's showing the type of injury  
7 close up.

8 MR. STIDHAM: Could you not do that with just one  
9 of the photographs?

10 THE WITNESS: You can see both of them here.  
11 This is just a close-up of it.

12 THE COURT: Take out the close-up then. 60A.  
13 Although I think it clearly is admissible and could be  
14 used, I'm going to remove 60A.

15 (STATE'S EXHIBIT 60A IS RECEIVED FOR  
16 IDENTIFICATION)

17 MR. STIDHAM: With regard to the remaining  
18 photographs, we just have a general objection to the  
19 prejudicial nature.

20 THE COURT: Overruled.

21 MR. DAVIS: Judge, these are the photographs in  
22 regard to Steve Branch. 70B, 71B, 72B, 73B, 63B, 62B,  
23 61B, 64B, 65B, 59B, 66B, 67B, 68B, 69B and 60B.

24 THE COURT: Doctor, in 71B and 73B is there any  
25 significant difference between those photographs?

1 THE WITNESS: 71 -- excuse me. 73B shows the  
2 neck hyperextended, and it's showing some additional  
3 injuries on the neck region and State's Exhibit 71B  
4 you don't see those injuries on the neck, but you can  
5 see the facial injuries. But 73B is a close-up --

6 THE COURT: -- of 72B. Can you describe those  
7 injuries from one of those photographs or two of them?

8 THE WITNESS: 72B shows some additional injuries  
9 that are not clearly visible in 73 and 71.

10 MR. STIDHAM: What you're saying you feel like  
11 you need all three of those to demonstrate those  
12 wounds to the jury?

13 THE WITNESS: I can use all three but if you  
14 would eliminate one, I would eliminate 71B.

15 MR. FOGLEMAN: Of course, it doesn't show the  
16 wounds to the front of the face.

17 MR. STIDHAM: But they're only on one side.

18 MR. FOGLEMAN: Well, you've got a pattern above  
19 his eye that you can't see on the other --

20 THE WITNESS: Yes. Right. There's this here --

21 MR. DAVIS: And also the injury to the top of the  
22 nose.

23 THE COURT: Okay. What about 62B and 63B?

24 THE WITNESS: These are -- 63 and 62 demonstrate  
25 the injuries on the ear, in front of the ear and back

1 of the ear.

2 THE COURT: Do you think both of those are  
3 necessary for you to accurately describe the injury  
4 and to depict what you're describing?

5 THE WITNESS: Yes, sir.

6 THE COURT: 64B and 65B shows the penis and  
7 scrotum of the victim Branch. Are they both necessary  
8 to describe the injuries?

9 THE WITNESS: Yes. These are.

10 THE COURT: What is the difference in the two?

11 THE WITNESS: Here what I'm trying to show -- you  
12 can see the front of the penis, the head of the penis  
13 with some scratching and bruising, and on State's  
14 Exhibit 64B I'm trying to point out the  
15 circumferential nature of the injury, how it  
16 completely encircles the penis. There's one part of  
17 the penis that is clearly involved -- the head of the  
18 penis. And the shaft is not involved.

19 MR. STIDHAM: We would strongly object to both of  
20 those. We would ask that the Court consider allowing  
21 only one of those into evidence due to the prejudicial  
22 nature of the photographs.

23 THE COURT: The mere fact that they depict the  
24 genital region and describe an injury to an  
25 eight-year-old child alone is not sufficiently

1 prejudicial to override its probative value of  
2 evidence.

3 MR. CROW: I understand, your Honor. But I  
4 believe the injury on the penis is basically the same  
5 in both places. He can testify to the fact that is  
6 around the whole shaft.

7 THE COURT: If they aid and assist him in his  
8 testimony, I'm going to allow them. The same would be  
9 true of all of these.

10 MR. FOGLEMAN: We would proffer to show that we  
11 picked less offensive -- number 303, 304, 305, 306 and  
12 307.

13 THE COURT: (EXAMINING) I will have to admit that  
14 the ones you just handed me are a whole lot worse than  
15 the ones you're tendering in evidence. These may be  
16 attached as an exhibit to show that an effort was made  
17 to remove gruesome photographs that were not necessary  
18 to establish the injuries observed by the Medical  
19 Examiner.

20 (STATE'S EXHIBITS 303, 304, 305, 306 AND 307 ARE  
21 RECEIVED FOR IDENTIFICATION)

22 THE COURT: I'm going to allow the others over  
23 the standard objection made.

24 MR. CROW: I would state that I don't feel it is  
25 necessary for every single injury to be shown. I

1 think at some point we get to the point of overkill.

2 I just don't think --

3 THE COURT: I'm not trying to tell the  
4 prosecution what they need to put in and what they  
5 don't need to put in. If they choose to show all the  
6 injuries and have some desire or interest to do so as  
7 long as it is not overly gross or offensive, then I'm  
8 going to allow it to some extent.

9 I'm aware of the latest cases on it. For years  
10 and years it didn't matter how gruesome or horrible  
11 the photographs might be. If it had evidentiary value  
12 it was allowed. And just very recently in the last  
13 year our Court has tempered that ruling to some extent  
14 and basically it's, as I understand it, left with the  
15 discretion of the Court to make an effort to prevent  
16 the unnecessary display of gruesome, horrible  
17 photographs. I think we're doing that as best as  
18 possible. Just the facts of the case that the  
19 injuries occurred.

20 MR. CROW: I understand that, your Honor. Just  
21 note my objection, please.

22 MR. DAVIS: The next photographs are photographs  
23 of Chris Byers and the ones we anticipate introducing  
24 are 60C, 59C, 64C, 63C, 68C, 67C, 66C, 61C, 62C, 69C,  
25 70C, 71C, 65C and 72C.

1 THE COURT: Let me see the ones that you have  
2 excluded. Were all these taken in the Medical  
3 Examiner's office?

4 THE WITNESS: Yes, sir.

5 MR. FOGLEMAN: (HANDING) I haven't marked them  
6 yet. They will be State's Exhibits 308 and 309.

7 THE COURT: Doctor, between 59C and 60C it  
8 appears that one of them is a close-up of the facial  
9 injuries this victim sustained.

10 THE WITNESS: Yes, sir.

11 THE COURT: Is there any reason why you cannot  
12 use the close-up rather than showing the length of his  
13 torso?

14 THE WITNESS: 59C would be sufficient. 60C is  
15 more of an identification photograph.

16 THE COURT: 60C will be excluded by the Court as  
17 being duplicative of 59C.

18 (STATE'S EXHIBIT 60C, 308 AND 309 ARE RECEIVED  
19 FOR IDENTIFICATION)

20 THE COURT: 69C and 70C, can you explain the need  
21 for both of those photographs in your testimony?

22 THE WITNESS: 69C shows the genital mutilation,  
23 but it also shows the injuries situated on the right  
24 thigh. Whereas 70C is a close-up showing the genital  
25 mutilation and the injuries around the penile area and

1 the cutting wounds of the thighs.

2 MR. STIDHAM: Obviously that photograph is to  
3 show the mutilation, not the bruise on his thigh, and  
4 we would submit that one of those would be sufficient.  
5 He can testify that there's a bruise on his thigh.

6 MR. DAVIS: It also depicts where the bindings  
7 were on his legs.

8 THE COURT: I'm going to allow these photographs  
9 as well.

10 MR. STIDHAM: Your Honor, this would probably be  
11 an appropriate time to talk about -- I anticipate that  
12 Doctor Peretti might also be asked to testify with  
13 regard to a knife that was located in a lake behind  
14 where one of the co-defendants lived.

15 We would submit that that is not relevant in our  
16 case here today, and we filed a motion in limine  
17 asking to exclude the evidence that may tend to show  
18 that the co-defendants were involved in this matter  
19 but don't tend to have any relevance or show any  
20 involvement on the part of Mr. Misskelley.

21 MR. FOGLEMAN: Your Honor, at this point it is my  
22 understanding that at this point we are not intending  
23 on getting into that in this trial -- with that  
24 particular issue not related to Doctor Peretti.

25 THE COURT: I understood you were going to

1 compare or -- from talking to one of you or listening  
2 to y'all talk -- that you were going to compare one of  
3 the knives that you found --

4 MR. FOGLEMAN: Not in this trial.

5 MR. STIDHAM: It might be appropriate to talk  
6 about what I anticipate Miss Sakevicius might be  
7 testifying to in regard to fiber or hair comparisons  
8 with regard to the other co-defendants. We would  
9 submit that that is not relevant in this case and  
10 also, your Honor, I anticipate that she's going to say  
11 that a hair fragment found at the scene or on one of  
12 the bodies is microscopically similar to Jason  
13 Baldwin.

14 However, the Alabama Crime Lab fellow, Mr.  
15 Kilbourn, told me on the telephone last week that it's  
16 impossible to make that comparison because the hair is  
17 not long enough and doesn't possess significant  
18 characteristics in order to do a comparison.

19 We would ask, first of all, that that be held  
20 irrelevant and not be allowed in a case against Mr.  
21 Misskelley.

22 Second of all, if the Court determines that it is  
23 somehow relevant, we would ask that the State put Mr.  
24 Kilbourn on to show that there isn't so we get a true  
25 and accurate description of the hair. After all, they

1 are the ones that hired the Alabama Crime Lab.

2 MR. FOGLEMAN: Your Honor, number one, we say  
3 that it's relevant. Mr. Misskelley said these people  
4 were involved. I think that in order to show that  
5 what he said was true, I think we ought to be allowed  
6 to show other evidence that these other two people  
7 that he said were involved were involved.

8 On the thing about the hair related to Jason  
9 Baldwin, my information from the Crime Lab wasn't  
10 exactly what Dan said. That may be what he told him.  
11 I'm not saying he didn't tell Dan that. But what he  
12 told me was that in his opinion because of the color  
13 or lack of color in the hair, he himself was not able  
14 to give any kind of opinion.

15 Lisa says she feels like she can give an opinion.  
16 I'm willing to stipulate that the guy from Alabama  
17 would say -- if we can talk to him on the phone or  
18 something and get what he says -- I'm willing to  
19 stipulate to that. I hate to fly him down here to say  
20 that in his opinion it is inconclusive.

21 MR. CROW: We'd obviously much rather have him  
22 here.

23 MR. STIDHAM: A stipulation read into evidence is  
24 simply not as powerful as live testimony.

25 THE COURT: Subpoena him. Get him here.

1 MR. CROW: We have issued a subpoena. We weren't  
2 sure about the fact that he was in Alabama if he would  
3 have to honor it.

4 MR. FOGLEMAN: I think he told you he would be  
5 willing to come --

6 MR. CROW: -- he said someone has to pay for his  
7 airfare and motel. Obviously we don't have the -- we  
8 want to get the Court's --

9 THE COURT: -- If he's within a thousand miles  
10 he's subpoenaable. Get him here.

11 MR. STIDHAM: Will we be allowed to introduce his  
12 testimony at the same time the State offers that, or  
13 are we going to have to wait until our case?

14 THE COURT: You will have to wait until your case  
15 in chief and call him as your witness to give a  
16 contrary opinion, if he has one. That's normally the  
17 way it's done. I don't care. If he's here at the  
18 same time and he is available, it is fine with me. I  
19 don't have any objection to that.

20 MR. STIDHAM: I assume the Court is ruling that  
21 that is going to be relevant?

22 THE COURT: My notion of the case is from the  
23 very beginning Misskelley has been characterized as an  
24 accomplice, or stood by, aided and assisted or in some  
25 way assisted the other two in the perpetration of

1 these crimes and the fact that evidence is adduced as  
2 to the other two is simply a part of the case.

3 MR. STIDHAM: Part of our defense is that Mr.  
4 Misskelley made up this story and it is not out of the  
5 realm of possibility that Damien and Jason did do it,  
6 but that's not relevant against Mr. Misskelley --

7 THE COURT: I think the total circumstances of  
8 what allegedly happened there are admissible and a  
9 part of the res gestae and that whatever applied to  
10 them applied to Misskelley as an accomplice.

11 MR. STIDHAM: At this time it might be  
12 appropriate to talk about the other prong of our  
13 argument.

14 I anticipate that the State may attempt to  
15 introduce out-of-court statements made by Mr. Echols.  
16 With regard to the substance of that, will be  
17 basically, "I did it," or he told someone else that he  
18 did it and we would like to make an argument on that  
19 issue. We would strongly object to the State putting  
20 on any evidence from any witness saying that Mr.  
21 Echols said he did it outside of court. I think that  
22 specific rule was addressed in -- Mr. Crow knows more  
23 about that than I do. I could turn that over to him.

24 MR. CROW: I don't have the rule book in front of  
25 me.

1 MR. STIDHAM: I think it's 804(b)3.

2 Your Honor, basically it deals with when an  
3 out-of-court statement by a co-defendant is  
4 admissible, and we would submit that under the rule it  
5 is not admissible.

6 THE COURT: Do you intend to introduce that kind  
7 of evidence?

8 MR. FOGLEMAN: Yes, sir.

9 MR. CROW: It starts off by saying, "As a hearsay  
10 exception a statement against interest is an exception  
11 to the hearsay rule." Then an exception to the  
12 exception in the rule says, "If the statement  
13 implicates a co-defendant or other individual in a  
14 criminal case, it is not within that exception and  
15 therefore is back to hearsay."

16 If they are contending -- well, I was going to  
17 say that obviously any statement that Mr. Echols made  
18 would be used against Mr. Misskelley. Therefore, it  
19 is not an exception to the hearsay rule.

20 THE COURT: (EXAMINING) If it is offered to  
21 exculpate the accused.

22 MR. CROW: No, your Honor, right before that.  
23 Any statement made by a co-defendant.

24 MR. FOGLEMAN: Your Honor, I would agree with  
25 just about everything that Mr. Crow said there. The

1           only problem is, is that rule says that any statement  
2           made by a co-defendant --

3           MR. CROW: -- Or other person.

4           MR. FOGLEMAN: -- Or other person which would  
5           inculcate, which is incriminating of the defendant,  
6           would be excluded. It is not incriminating of the  
7           defendant. It doesn't mention the defendant. Damien  
8           says, "I did it."

9           MR. CROW: If it is not incriminating of the  
10          defendant, it is not relevant.

11          MR. FOGLEMAN: It is relevant in the sense that  
12          it corroborates Mr. Misskelley's confession.

13          MR. CROW: If it is corroborating Mr.  
14          Misskelley's confession, it is incriminating Mr.  
15          Misskelley.

16          MR. FOGLEMAN: The statement itself by itself  
17          does not. The circumstances make it incriminating.

18          MR. CROW: Your Honor, that's the very purpose of  
19          the rule is to keep an out-of-court statement in a  
20          criminal case by a co-defendant that in any way  
21          inculpates the defendant from coming in.

22          MR. STIDHAM: If it is not relevant, why are you  
23          trying to introduce it?

24          MR. FOGLEMAN: I didn't say it wasn't relevant.

25          MR. CROW: If it is offered to try to implicate

1 Mr. Misskelley, then it is not an exception.

2 MR. FOGLEMAN: That is not what the rule says.

3 MR. STIDHAM: Your Honor, there's also a right of  
4 confrontation issue there. We can't put Mr. Echols on  
5 the stand and ask him whether he said it or not  
6 because he'll invoke the Fifth Amendment.

7 MR. FOGLEMAN: Any statement against interest you  
8 cannot do that.

9 MR. CROW: That's another reason why in a  
10 criminal case these kinds of situations are not  
11 admissible.

12 MR. STIDHAM: That's the very purpose of the  
13 rule, your Honor.

14 MR. FOGLEMAN: No, the purpose of the rule is if  
15 Echols had said, "Me and Jessie did it." Well, it is  
16 a statement against Echols' interest, but it also  
17 specifically incriminates the defendant and in that  
18 case it would be inadmissible. But in this case he  
19 didn't say that. It is simply to corroborate the  
20 defendant's confession --

21 MR. CROW: -- if it's being offered --

22 MR. FOGLEMAN: -- I'm talking.

23 MR. CROW: I'm sorry.

24 MR. FOGLEMAN: It's merely to corroborate the  
25 defendant's confession when he says that Echols was

1 involved, and it does corroborate that.

2 MR. CROW: So the "statement or confession  
3 offered against an accused" -- unquestionably it would  
4 be offered against the accused -- "made by a  
5 co-defendant or another person implicating himself and  
6 the accused is not within this exception."

7 Are you trying to say this statement does not in  
8 any way implicate Mr. Misskelley?

9 MR. FOGLEMAN: Not from the statement itself.

10 MR. STIDHAM: How can you draw a line between the  
11 two? You're offering it against him.

12 MR. FOGLEMAN: That's right. You know, I didn't  
13 -- Damien's the one who said it. I didn't.

14 MR. CROW: Neither did Mr. Misskelley.

15 MR. FOGLEMAN: That's right. And it was a  
16 statement against Mr. Echols' interest. As far as Mr.  
17 Echols was concerned, he didn't say anything about  
18 Jessie.

19 MR. STIDHAM: Then it shouldn't be relevant.

20 MR. FOGLEMAN: It is relevant because it  
21 corroborates his confession.

22 MR. CROW: If it is relevant, it's implicating  
23 Mr. Misskelley. If it implicates Mr. Misskelley, it  
24 is not admissible.

25 MR. DAVIS: But for the statement of Jessie

1 Misskelley, but for his confession, this statement --  
2 it would have no purpose in this trial but all it does  
3 is corroborate --

4 THE COURT: Are you planning to put it on in your  
5 case in chief or rebuttal?

6 MR. FOGLEMAN: Case in chief. As evidence to  
7 corroborate -- they're saying Mr. Misskelley made all  
8 this stuff up. Now they're saying maybe he guessed  
9 that Damien was involved.

10 They can't have it both ways, Judge. They want  
11 to argue false confession but when we try to prove  
12 that what he says is accurate, then they want to say,  
13 "No, you can't do that."

14 THE COURT: I'm going to rule on it later.  
15 Before you bring that testimony up, call it to the  
16 Court's attention, and we will continue this hearing.

17 MR. FOGLEMAN: One other thing, your Honor. I'm  
18 planning on getting into the statement today. I was  
19 kind of left in question about where we stood on the  
20 polygraph issue. I understood that you had ruled no  
21 results.

22 THE COURT: (NODS HEAD)

23 MR. FOGLEMAN: Of course, if the defense doesn't  
24 want any mention of polygraph at all in view of the  
25 Court's ruling, we don't want to mention it. But if

1 it is going to be an issue just the circumstances of  
2 it, we would like to know that.

3 MR. STIDHAM: Would the Court consider allowing  
4 us to talk about the polygraph and the results and  
5 offer the jury an instruction they are not to consider  
6 the results of the test as evidence of innocence or  
7 guilt of the accused?

8 MR. CROW: I don't intend -- if I understand what  
9 the Court's ruling to be that we can tell the jury;  
10 one, he took a polygraph; two, they told him he  
11 flunked it and we're not going to be able to put on  
12 our expert, I don't --

13 THE COURT: I didn't say you couldn't put your  
14 expert on.

15 MR. CROW: Expert about polygraph, your Honor.

16 THE COURT: No, I didn't say that. You can  
17 mention it just like you propose to do. You can put  
18 your expert on if you want to, but I'm not going to  
19 allow two experts --

20 MR. CROW: -- I understand.

21 THE COURT: -- to get into a controversy over  
22 whether one was correct and the other one --

23 MR. CROW: -- I understood he could testify --

24 THE COURT: -- was not.

25 MR. CROW: -- that they could coerce him, but

1           you're not going to allow the expert to testify as to  
2           whether or not he passed the test.

3           THE COURT: That's exactly right. The results of  
4           the test from either examiner will not be admissible.  
5           Y'all need to decide right now which way you want to  
6           go. If you don't want the polygraph mentioned, that's  
7           fine. If you want to go into it as being coercive to  
8           Jessie Misskelley to the extent that it would have  
9           overridden his free will, then you're going to have a  
10          free opportunity to do that, but the results are not  
11          admissible. I'm not going to get into a swearing  
12          match between two so-called experts on a device that  
13          hasn't even been declared scientifically accurate in  
14          any court that I know of unless it was by stipulation  
15          and agreement.

16          There's a specific statute in Arkansas that  
17          prohibits the use of polygraph or the results in  
18          court, and I am relying on that, and I am also relying  
19          on the other cases that have said basically what I did  
20          that if you want to go into it you can, but I'll have  
21          to give an instruction to the jury that they are not  
22          to even consider the results of a polygraph and  
23          whatever the other language is in the cautionary  
24          instruction. But I'm not going to get into a swearing  
25          match between two people on a device that is not even

1 considered to be scientifically accurate.

2 MR. STIDHAM: Judge, it would be illogical and  
3 probably ineffective assistance of counsel for us to  
4 be willing to say that he took it and flunked it and  
5 not be able to say that he passed it. Therefore, we  
6 would ask that we be allowed to make an offer of proof  
7 with regard to what our expert would say with regard  
8 to the polygraph and the coercive nature --

9 THE COURT: You have already done that. We took  
10 testimony on that.

11 MR. STIDHAM: And also we would like to have the  
12 Court rule that there be no mention of polygraph. If  
13 we're not going to be able to put all of it out there,  
14 we don't want to put any of it out there due to the  
15 prejudicial nature.

16 THE COURT: Well, you're not going to put the  
17 Court in the position of barring your testimony. You  
18 will just have to make an election --

19 MR. STIDHAM: -- We understand --

20 THE COURT: -- based on my ruling. And my ruling  
21 is very simple and narrow --

22 MR. STIDHAM: -- yes, your Honor. We understand.

23 THE COURT: -- and that ruling is that the  
24 results from either expert are not admissible.  
25 Basically, everything else goes.

1 MR. STIDHAM: But it would be extreme prejudice  
2 to the defendant for us to say that he took it and  
3 flunked it because that's going to make the jury --

4 THE COURT: I'm not going to allow the  
5 prosecution to say that he flunked it.

6 MR. CROW: The only way it would come in at all  
7 would be that he took it and he was informed he  
8 flunked it. The jury is going to surmise that the  
9 officer is not lying to them.

10 MR. STIDHAM: If we can't tell them the whole  
11 story, Judge, we don't want to tell them anything  
12 about it. We'll just make an offer of proof.

13 THE COURT: So what do you want to do?

14 MR. STIDHAM: We don't want to mention anything  
15 about it.

16 THE COURT: Y'all are told that you cannot  
17 mention the polygraph at all.

18 MR. CROW: One last thing, your Honor, I guess  
19 Lisa is going to testify tomorrow?

20 MR. FOGLEMAN: Right.

21 MR. CROW: On the tee shirt, I assume it is not  
22 going to be mentioned at all?

23 MR. FOGLEMAN: No.

24 MR. STIDHAM: Will Lisa be informed, or was it  
25 Kermit?

1 MR. FOGLEMAN: No, it's DeGuglielmo.

2 MR. CROW: But if we ask Lisa what she found,  
3 she's not going to talk about the tee shirt?

4 MR. FOGLEMAN: I'll try to remember -- well,  
5 Kermit's the one --

6 MR. CROW: I'm talking about the wrong person.

7 MR. FOGLEMAN: I'll make myself a note to mention  
8 it to Kermit.

9 MR. DAVIS: One thing on Doctor Peretti's  
10 testimony is we anticipate he'll identify the  
11 photographs, introduce the photographs of all three  
12 boys first and then ask him to go before the jury and  
13 take the first case, Michael Moore, present the  
14 photographs, explain it to the jury, then exhibit  
15 those photographs to the jury and let them view those  
16 photographs while he gets his reports ready for the  
17 next one. Then after they view those photographs,  
18 take up Steve Branch and do the same thing and then  
19 Chris Byers.

20 THE COURT: All right.

21 (RETURN TO OPEN COURT)

22 DOCTOR FRANK PERETTI

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

25 DIRECT EXAMINATION