

1 seriousness of the offense. Therefore, I find that he
2 is to answer to the Circuit Court as an adult.

3 Anything else?

4 MR. STIDHAM: No, your Honor.

5 OSCEOLA, ARKANSAS, DECEMBER 21, 1993, AT 9:30 A.M.

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

8 (THE FOLLOWING CONFERENCE TOOK PLACE AT THE
9 BENCH)

10 MR. STIDHAM: There's a couple of issues dealing
11 with -- other than the main issue we're dealing with
12 today. We'd like to take that up in chambers. Would
13 you prefer to do that now or after --

14 MR. FOGLEMAN: It's more to just talk about some
15 things than oral motions and arguments.

16 THE COURT: Let's do it afterwards. I don't
17 really know whether you can waive your client's
18 presence or not. I suppose you can.

19 MR. STIDHAM: I'll state that on the record, your
20 Honor.

21 THE COURT: This is also probably a motion I
22 could have ruled on just on briefs and then he
23 wouldn't necessarily have been there. It bothers me a
24 little bit.

25 MR. STIDHAM: I discussed it with his family. I

1 don't see any problem with waiving that. I'm just
2 afraid he'll get shot if we keep moving him around and
3 --

4 THE COURT: It's not healthy to move any person
5 around from courthouse to courthouse, certainly -- but
6 -- what is your opinion on that?

7 MR. FOGLEMAN: Judge, I don't have an opinion on
8 it. I don't know the law on it.

9 MR. STIDHAM: His family is here -- his mother
10 and father.

11 MR. FOGLEMAN: I do want to say this while I'm
12 thinking about it. Just to make sure there's no
13 misunderstanding -- the State as far as the trials are
14 concerned -- we have not made a decision yet about
15 cameras in the courtroom, and I just want to make it
16 clear that we hadn't agreed at this point for cameras
17 to be in the courtroom.

18 THE COURT: I thought you had.

19 MR. FOGLEMAN: No, we haven't.

20 THE COURT: You're talking about at trial?

21 MR. FOGLEMAN: Yes.

22 MR. STIDHAM: That's something we can talk about
23 after the hearing.

24 THE COURT: All right.

25 (RETURN TO OPEN COURT)

1 MR. STIDHAM: Your Honor, by way of preliminary
2 matters, I would like to state for the record the fact
3 that I have waived my client's presence for this
4 hearing.

5 It is my opinion that this hearing is only
6 regarding one issue and while it is a major issue, due
7 to other considerations, I didn't feel it appropriate
8 to have my client here today. Those considerations
9 are security measures.

10 The last time we were here there was a fight that
11 broke out downstairs in the lobby. It concerned me.
12 It concerned my client. Also, when he was transported
13 from the courthouse to the vehicle -- the sheriff's
14 vehicle -- there were some people that got dangerously
15 close to him and were spitting and cussing.

16 THE COURT: We can handle that situation. That's
17 not going to be tolerated again. I don't want you to
18 tell me you are waiving your client's presence here
19 out of some fear of his safety because that is simply
20 not going to be an issue. If you are waiving his
21 presence here because you consider it not to be a
22 material point in the total case, then that is a
23 different matter.

24 I also want to know, have you discussed it with
25 him? Did he want to be present? I certainly don't

1 want error to occur in some little bitty two hour
2 hearing that would erase whatever might be done for a
3 trial that will take a considerable period of time.

4 MR. STIDHAM: No, your Honor. I don't anticipate
5 the hearing taking more than a half an hour. He has
6 not expressed any desire --

7 THE COURT: Have you discussed this hearing with
8 him and did he give you his consent to proceed without
9 his presence?

10 MR. STIDHAM: Yes, your Honor. I have also
11 spoken with members of his family who are here, and I
12 have explained to them the situation, and they also
13 consent --

14 THE COURT: Do they agree and do they understand
15 that he has a right to be present at any proceeding
16 that might take place?

17 MR. STIDHAM: Mr. Misskelley, do you understand
18 what we're talking about and have you consented to the
19 fact that Jessie is not here today for this hearing?

20 MR. MISSKELLEY: Yes, sir.

21 MR. STIDHAM: I don't see a problem with that.

22 THE COURT: Jessie is being tried as an adult and
23 while I recognize his parents are giving him advice
24 and support, at the next appearance I want to be sure
25 that something is placed on the record that he

1 understood and he intelligently waived his presence at
2 this proceeding, or we will have to do it all over
3 again.

4 MR. STIDHAM: I don't see that as a problem at
5 all.

6 DOCTOR WILLIAM WILKINS

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

9 DIRECT EXAMINATION

10 BY MR. STIDHAM:

11 Q Will you please state your name?

12 A William E. Wilkins.

13 Q Where do you reside?

14 A I reside in Jonesboro.

15 Q What do you do for a living?

16 A I'm a psychologist.

17 Q Tell the Court about your education, your background and
18 experience.

19 A I have a Bachelors Degree in psychology from State
20 University of New York, Master's Degree in psychology from
21 Bucknell University, Ph.d. in psychology, Cornell University. I
22 taught for a number of years at the University of Houston, at
23 the University of New York. I have worked in a reform school.
24 I worked at a couple of mental health centers. I was clinical
25 director for George Jackson Mental Health Center. I've been in

1 private practice for five years in Jonesboro.

2 Q How many years of experience do you have?

3 A Twenty-two.

4 MR. STIDHAM: Your Honor, this witness has
5 previously been recognized as an expert in clinical
6 psychology. We'd ask that he be recognized for
7 purposes of this hearing.

8 MR. FOGLEMAN: No objection.

9 THE COURT: All right. You may proceed.

10 BY MR. STIDHAM:

11 Q Doctor, have you had an opportunity to evaluate the
12 defendant in this case, Jessie Lloyd Misskelley, Junior?

13 A Yes, I have.

14 Q Could you tell the Court how much time you have spent with
15 him during these evaluations?

16 A (EXAMINING) At this point it would probably be about
17 thirteen hours, fourteen hours.

18 Q You performed a battery of general intelligence tests?

19 A Yes, sir.

20 Q Can you tell the Court what tests you performed and what
21 they are called?

22 A We did a WAIS-R which is -- which is a Wexler Adult
23 Intelligence Scale, which is primarily a measure of adult
24 general intelligence.

25 I did a measurement of reading, spelling, achievement level

1 abilities. Did a Rorschach, MMPI, House/Tree/Person drawing
2 test, clock test, other tests measuring intellectual abilities,
3 achievement abilities, personality issues, psychopathology.

4 Q Were you able to determine Jessie's level of academic
5 achievement?

6 A Jessie's level of achievement is about at the third grade
7 level in spelling, arithmetic and reading.

8 Q That obviously doesn't conform to his chronological age,
9 does it?

10 A No. Ah, we would expect Jessie to be -- if he had remained
11 in school, he would be in the 11th or 12th grade. We would
12 assume he would be in the 10th, 11th, 12th grade level.

13 Q Do you know whether or not he ever failed any grades in
14 school?

15 A He failed several -- ah, also consistently was in remedial
16 resource rooms, special programs throughout the time that he
17 began kindergarten on.

18 Q Doctor have IQ scores traditionally been used by
19 psychologists as guides in identifying and distinguishing
20 different levels of mental retardation?

21 A Yes.

22 Q Can you tell the Court what the generally accepted levels
23 of mental retardation and their degrees of severity are in your
24 field?

25 A At the present time the DSM3-R recognizes --

1 Q Let me stop you right there. What is the DSM3-R --

2 A The DSM3-R --

3 THE COURT: I know what it is.

4 MR. STIDHAM: The Court is familiar with --

5 THE COURT: I have one in my library.

6 BY MR. STIDHAM:

7 Q Doctor, could you then explain what the normal accepted
8 ranges of I Q's and mental retardation are?

9 A There are typically -- there is a diagnosis of profound
10 mental retardation; that is, those who have IQ's of 20, 25 or
11 less. There is a level called severe, 25 to 35 or 40. Again we
12 have usually three or four ranges that we deal with.

13 Ah, moderate is, ah, 40, 45 to approximately 50, 55. Ah,
14 mild mental retardation is typically 55 to approximately 70 and
15 then there's another diagnosis called borderline intellectual
16 functioning which is approximately 70 to approximately 80.

17 Q I notice that you used the word "approximately" and that
18 some of these figures tend to overlap. Why is that?

19 A Several reasons. Ah -- ah -- ah the primary one is what is
20 called standard error of measurement. This is -- that is that
21 our assessments tests are not refined enough to provide exact
22 measurements.

23 Therefore, we are looking at a possibility of ah, -- for
24 example, in Jessie's case of a range of five to eight points
25 from the score we actually get on this one time. Ah, that is

1 why -- for the approximation. Also, as we begin dealing with
2 people who are more and more retarded, it becomes more difficult
3 to get precise estimates because of, ah, language difficulties,
4 language barriers, more complicated to do that. So those are
5 the two primary reasons why we have those kinds of approximate
6 levels.

7 Q So -- this is a terrible analogy, but it's sort of like a
8 political poll?

9 A Plus or minus five, plus or minus seven.

10 Q So it is an error range?

11 A Yes.

12 Q Are there other factors used by psychologists to determine
13 mental retardation?

14 A Um, when we look at retardation we look at not only the
15 actual IQ score but a variety of other behavioral, adaptive, ah,
16 characteristics.

17 Q What do you mean by adaptive characteristics?

18 A Ah, how well the person is able to adapt their behavior to
19 the generally accepted levels of response we would expect from
20 someone their age. Does that --

21 Q I believe that answers my question. The other day when we
22 were here -- I believe it was November 15th for a motion to
23 transfer to Juvenile Court -- I believe Mr. Fogleman asked you
24 whether Jessie Misskelley was mentally retarded. I don't have a
25 transcript in front of me, but I believe your response was

1 technically his IQ did not fit in a specific category. Could
2 you expound on that?

3 A Ah, again, in this particular instance with the assessment
4 I did -- Jessie's full scale IQ was 70 -- let me make sure
5 (EXAMINING) 72. Technically that falls within the range of
6 borderline intellectual functioning.

7 Ah -- ah -- ah -- and so these are difficult situations
8 where now we have to begin to decide on the basis of, ah,
9 measurement errors -- other -- other features, other
10 characteristics -- how are we going to classify this person in
11 terms of their actual competency level, their ability to cope
12 and survive, ah, adapt, function, ah, independently and those
13 kinds of issues.

14 Q So your testimony is that Jessie's IQ falls at 72?

15 A Yes.

16 Q I notice in your report --

17 MR. STIDHAM: I believe a copy of your report was
18 introduced at the last hearing. Does your Honor have
19 a copy of that?

20 THE COURT: I don't have it with me, but I read
21 it.

22 MR. STIDHAM: (HANDING)

23 BY MR. STIDHAM:

24 Q In your report I notice that you talk about a 90 percent
25 confidence level. Can you explain what that is?

1 A Again that is kind of like -- to use your example of a
2 polling -- if -- that -- that -- that if we gave Jessie the same
3 IQ test a hundred times and assuming he never learned anything
4 and couldn't -- couldn't -- it was always a pure test, okay, is
5 that ninety times out of a hundred he would have a score between
6 67 and 77. That takes into account that measurement error.
7 That tells us -- tells us that looking at in all probability an
8 IQ somewhere between -- of a -- of a true IQ -- what is known
9 technically -- ah -- ah -- ah -- ah -- between 67 and 77.

10 Q So his full scale IQ is 72, but his IQ from the 90 percent
11 confidence level ranges from 67 to 77?

12 A It's like for example if we look through Jessie's records.
13 He has one time an IQ of 67. I think that was the first one
14 done when he was a relatively small child. He has one of a 73
15 at one time and another one of 71 at one time, and I have 72.
16 So we are talking about a person who has four or five different
17 measurements we've gotten somewhere between 67 and 73. So over
18 time looking at -- that is kind of what we are looking at -- is
19 within this general ballpark.

20 Q Is that something that you would expect to remain pretty
21 much regular level throughout life?

22 A Yes, sir.

23 Q Once you are retarded you are basically retarded for life?

24 A Once you are retarded -- now -- now -- now it is not
25 possible for it to increase. It is possible for it to decrease,

1 ah, assuming some kind of, ah, illness, disease, head trauma
2 accident -- some -- some -- some kind of insult to the brain.
3 But beyond that, we would expect it to remain fairly constant
4 over the lifetime.

5 Q Doctor Wilkins, are you familiar with the definition of
6 mental retardation used by the Arkansas legislature with regard
7 to the imposition of the death penalty?

8 A Yes.

9 Q That is promulgated by Arkansas Statute five dash four dash
10 six eighteen?

11 A Yes.

12 Q You have reviewed that statute?

13 A Yes, I have.

14 Q I'm going to read from the statute. Basically, the
15 Arkansas legislature has determined that mental retardation for
16 purposes of this code section means, "significant sub-average
17 general intellectual functioning."

18 I'm going to break that down into four parts for you so we
19 can talk about it one at a time and talk to each one of those
20 definitions.

21 Significant sub-average general intellectual functioning.
22 What exactly does that mean, Doctor?

23 A That means below average. The term "significant" is open
24 for some possible interpretation. Mostly I think that what they
25 are saying is it is not just a point or two below average but a

1 fairly substantial amount below average.

2 Q Did you find significant sub-average general intellectual
3 functioning in Mr. Misskelley?

4 A I think when he has a diagnosis of low borderline -- ah,
5 borderline mild -- yeah, I would call that sub-average, yes.

6 Q The factors that you are using in making that determination
7 -- is that his reading level and --

8 A No, I would -- I would call him sub-average just on the
9 basis of his IQ score.

10 Q The second part of the statutory definition is,
11 "accompanied by significant deficits or impairments in adaptive
12 functioning."

13 So what the legislature is saying is we have to have
14 significant sub-average general intellectual functioning and the
15 second part of that is, "accompanied by significant deficits or
16 impairments in adaptive functioning." Did you find these
17 significant deficits or impairments in Jessie?

18 A Yes. Jessie is able to do simple addition problems, for
19 example, if he has paper and pencil. He is, ah, probably not
20 able -- not probably. He is not able to manage his own
21 financial affairs. Probably would not be self-sufficient in
22 terms of living independently without a fair amount of
23 supervision by guardian -- some ah -- some ah -- someone.

24 Ah, Jessie has a hard time, ah, understanding ah -- ah --
25 ah -- a variety of things. Ah, from my point of view there is

1 some -- some issue involved as to whether or not Jessie even
2 understood his Miranda rights, for example. That ah -- that ah
3 -- his ability to ah -- to ah -- to understand very complicated
4 or not even very complicated ah -- ah -- ah -- concepts are very
5 difficult for him.

6 For example, with Miranda even the most conservative
7 estimates say you have to read at least the sixth grade level to
8 understand those. Ah, Jessie reads at a third grade level. Ah,
9 to do -- to do a wide variety of ah -- of ah -- of everyday
10 functioning things requires reading levels at the third, fourth
11 and fifth grade level at a bare minimum. Jessie doesn't have
12 that. Therefore, trying to fill out job applications, trying to
13 ah -- ah -- ah -- figure out income tax -- all the everyday
14 basic functions that we would expect someone as a young adult to
15 do -- Jessie would have great difficulty with.

16 Q Doctor, the third part of the definition states that this
17 sub-average general intellectual functioning which are
18 accompanied by the significant deficits or impairments in
19 adaptive functioning must manifest themselves in the
20 developmental period no later than age eighteen.

21 Even though that appears to be obvious in this case because
22 Jessie is now eighteen and the alleged crime took place when he
23 was seventeen I still would like for you to go into that.

24 A Well, ah -- ah -- throughout all of his school records we
25 find from the time he entered kindergarten that his ability to

1 adapt to general classroom behavior patterns was -- was -- was
2 not there. His ability to do simple pre-reading skill things,
3 recognizing alphabets, things we would expect a normal child of
4 five and six to be able to process fairly readily, ah, Jessie
5 was not able to do that.

6 And so throughout his academic performance we see a
7 consistent pattern of, ah -- of being -- of having difficulty
8 not only to complete the work but also to adjust to the -- to
9 the, ah -- rules and demands.

10 Ah, his parents and I -- ah, have had long interviews with
11 them, that they -- they have always assumed and always did kind
12 of treat Jessie like he wasn't able to function independently
13 and would solve many of his problems for him. So in that sense
14 mental retardation is a lifelong process -- ah -- ah -- ah -- or
15 failure to adapt is.

16 Q Is there any doubt in your mind that this significant sub-
17 average general intellectual functioning accompanied by
18 significant deficits in adaptive functioning have manifested
19 themselves prior to age eighteen?

20 A No.

21 Q The last section of the definition deals with deficits and
22 adaptive behavior. In your evaluations of Mr. Misskelley, did
23 you also find deficits in adaptive behavior?

24 A Yes. We have just talked about those.

25 Q Are those very similar to the deficits in adaptive

1 functioning?

2 A Yes.

3 Q Is Jessie an independent type person? I mean, would he be
4 able to live off by himself and have an apartment and deal with
5 some of these issues that would normally face adults?

6 A I would doubt that he would do it terribly well.

7 Q Doctor, I understand that in your professional life you
8 also have a tendency to do SSI evaluations?

9 A Yes.

10 Q Do you have an opinion as to whether Jessie would be
11 eligible for SSI benefits based on his mental capacities?

12 A Those are decisions made by administrative law judges. I
13 would not presume -- if I were doing an evaluation on him for
14 Social Security disability, I would recommend that he get
15 benefits.

16 Q Doctor, do you have -- in your professional opinion is
17 Jessie Misskelley mentally retarded as defined under the statute
18 that we've discussed?

19 A Yes.

20 Q Is there any doubt in your mind based on your evaluations?

21 A No.

22 MR. FOGLEMAN: Your Honor, I would ask for a
23 brief recess so I can have an opportunity to review
24 Doctor Wilkins' file that he used to form the basis of
25 his opinions.

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

3 THE COURT: Yes.

4 (THE FOLLOWING CONFERENCE TOOK PLACE AT THE
5 BENCH)

6 MR. STIDHAM: Your Honor, with regard to him
7 borrowing the doctor's file, I don't have any problem
8 with him looking at school records or previous mental
9 evaluations. Most of that stuff I got from him
10 anyway, but I do have a problem with him looking at
11 Doctor Wilkins' notes. He indicates that that's
12 confidential between he and Mr. Misskelley. I haven't
13 seen that stuff, and I would object to the prosecutor
14 being allowed to look at his personal notes. It's
15 obviously confidential. I don't have any problem with
16 him looking at his reports or asking him any questions
17 about a report or looking at the school records and
18 previous mental evaluations. As far as his notes from
19 interviews and things of that nature, I would have to
20 object to that. I think the doctor himself has
21 objections to that.

22 MR. FOGLEMAN: I've got two bases why that is not
23 a proper objection. Number one, the confidential
24 communications only applies if it's for treatment
25 purposes. This was not for treatment purposes.

Qm

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

STATE OF ARKANSAS

PLAINTIFF

VS.

NO. CR-93-47

JESSIE LLOYD MISSKELLEY, JR.

DEFENDANT

PRETRIAL AND TRIAL PROCEEDINGS

CORNING, ARKANSAS

VOLUME 3

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BEFORE THE HONORABLE:

DAVID BURNETT, CIRCUIT JUDGE

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94 MAY 26 10:42

FILED FOR RECORD
PAT WILLIAMS, CLERK
D.C.

1 Secondly, once the condition is put in issue,
2 there is no confidentiality. Your Honor, we submit
3 that we're entitled to review anything --

4 THE COURT: I'm going to let you review his
5 records.

6 MR. STIDHAM: Even his personal notes?

7 THE COURT: Yes.

8 MR. STIDHAM: My objections are noted for the
9 record?

10 THE REPORTER: Yes, sir.

11 (RECESS)

12 CROSS EXAMINATION

13 BY MR. FOGLEMAN:

14 Q Doctor Wilkins, how do you define the words, "adaptive
15 functioning" as used in this Arkansas law?

16 A I define the terms adaptive functioning as used under the
17 law -- is generally is -- is -- used is how -- how able is the
18 person to adapt themselves to comply with the everyday
19 functioning.

20 Q That is not dealing with how well they do in school or with
21 grades but how they adapt on the street?

22 A Ah, not necessarily on the street. It has to do with --
23 with -- I have a problem with the word "street." How well they
24 adapt in everyday life. I would be comfortable with that kind
25 of definition.

1 Q All right. How do you distinguish the concept of adaptive
2 functioning from adaptive behavior?

3 A I don't know as I would.

4 Q You don't distinguish between the two?

5 A I don't believe I would.

6 Q So if the Arkansas legislature made a distinction between
7 adaptive functioning and adaptive behavior, you have not taken
8 into consideration any distinction in giving your opinions here
9 today?

10 A I guess probably if we were going to press -- probably
11 adaptive functioning would have to deal more with the cognitive
12 ability and the adaptive behavior as that is demonstrated.

13 Q My question is, you first said to you there was no
14 distinction?

15 A Yes.

16 Q If at that point there was no distinction, then you did not
17 take into consideration any distinction in giving your opinion,
18 did you, Doctor Wilkins?

19 A I don't know whether I did or not. I never thought about
20 there being a major distinction between the two is all.

21 Q But you did read the law?

22 A Yes.

23 Q All right. On the IQ, I notice there was performance IQ
24 and a verbal IQ and a full scale IQ. Could you take each one of
25 those and explain what each test is to measure?

1 A Do you want me to go through each sub test of each of them?

2 Q No. Just the general categories.

3 A The WAIS -- the Wechsler series is designed to give you
4 performance ability and verbal ability. In performance ability
5 you are primarily measuring psychomotor skills, nonverbal
6 concept formation, nonverbal problem solving.

7 Q Okay.

8 A The verbal portion are -- as would be indicated -- are
9 primarily vocabulary, arithmetic ability, verbal problem
10 solving, verbal comprehension.

11 Q More book type things?

12 A Ah --

13 Q That you would learn from books?

14 A More -- given the schools have gone mostly verbal, yes.
15 What you do is then you have one of each. You have a verbal
16 score and a performance score.

17 Q All right.

18 A What you then do for a full scale is there is a table you
19 go to, and that takes the two scores and combines them into one
20 full scale IQ.

21 Q If the -- you testified also that there is a range of -- a
22 confidence range from -- what was that confidence range?

23 A 67 to 77.

24 Q That is on a full scale IQ?

25 A Yes.

1 Q In regard to the performance IQ, did you come up with the
2 confidence level?

3 A No.

4 Q Would you check your notes?

5 A Maybe I did. Let me check. (EXAMINING) Okay. I did do
6 that part.

7 Q What is the confidence level of a performance IQ?

8 A Performance is between 70 to 80.

9 Q If I understood you correctly, you testified that the lower
10 the IQ the greater the potential for error as far as on the IQ
11 scores, as far as the scores, the range?

12 A As we get down to -- to -- ah -- ah -- severe profound,
13 yes.

14 Q Why is that?

15 A Ah, because your -- your -- the ability to ah -- ah --
16 communicate becomes less and less and so, therefore, it is more
17 difficult to -- to -- to -- to -- to -- to assess what is going
18 on.

19 Q When you're giving an IQ test to say a five or six-year-old
20 child, are there any particular difficulties in doing that
21 because of their age?

22 A No.

23 Q Why is that?

24 A Ah, there are -- there are intelligence tests designed for
25 children.

1 Q Do children design them?

2 A No.

3 Q Adults design them?

4 A Yes.

5 Q Isn't it true that adults and children communicate on
6 different levels?

7 A Yes.

8 Q Is it your testimony that an IQ test given a five or six-
9 year-old and then give the same -- not the same IQ test but an
10 appropriate IQ test to an eighteen-year-old -- that you would
11 expect to have the same score?

12 A Within the small -- small variation, yes.

13 Q For both there would be the same margin of error?

14 A Approximately, yes.

15 Q Isn't it true that there would be a greater margin of error
16 for the young child test?

17 A Um, I think error of measurement is slightly larger for the
18 WISC than it is for the WAIS.

19 Q So the test of a young child -- the margin of error would
20 be greater?

21 A Yes.

22 Q In 1983 -- was that the first IQ test that you have in your
23 files showing that one was given to the defendant Misskelley?

24 A (EXAMINING) Ah, yes.

25 Q What were his scores in 1983?

1 A They were -- ah, IQ of, ah, 67 full scale.
2 Q Full scale?
3 A Yes.
4 Q Okay. And then what was the next IQ score that you had for
5 him?
6 A 1989.
7 Q Don't you have a 1987?
8 A No.
9 Q You do not?
10 A No.
11 Q You don't have a report in your file?
12 A I have a report from 1987 but in that one they simply used
13 the score that was given in 1983.
14 Q What was the performance IQ score in '83?
15 A I don't have it on my written. I'm not sure that I know.
16 Q Why don't you find that report that would refer to it?
17 A I don't know if I have it with me.
18 Q I think if you look in there, you will find it.
19 A (EXAMINING) I have the one from 1987.
20 Q You just said there was not --
21 A I said there was a report. There was no new IQ test.
22 Q But they refer to the IQ test from '83?
23 A Right.
24 Q What was the performance IQ?
25 A Ah, 72.

1 Q After that test, what is the next test that you have?

2 A Ah, '89.

3 Q What were the scores?

4 A Ah, full scale 74, ah, verbal 67, performance 84.

5 Q What is the next one after that?

6 A Ah, 1992.

7 Q What are the scores there?

8 A Full scale 73, verbal 62, performance 88.

9 Q Performance 88?

10 A Yes.

11 Q And in 1993 -- the test that you gave -- what were the
12 scores?

13 A Ah --

14 THE COURT: 72, 70 and 75.

15 BY MR. FOGLEMAN:

16 Q Would that be accurate?

17 THE COURT: I'm looking at his report.

18 THE WITNESS: Okay.

19 BY MR. FOGLEMAN:

20 Q Doctor Wilkins, I want to go to another area. You said
21 that one of the items that you considered would be his ability
22 to function independently?

23 A Yes.

24 Q Through your examinations of Mr. Misskelley and conferences
25 with his family, describe his childhood for us.

1 A Childhood, um, it was a fairly dysfunctional family system.

2 Q What do you mean by that?

3 A Ah, marriages, divorces, separation -- ah -- ah -- ah --
4 fairly chaotic in terms of moving from place to place, ah,
5 abusive, ah, do you want --

6 Q Well, during his childhood, was there any description of
7 any abuse of alcohol or drugs?

8 A He used a lot of alcohol. He used a lot of drugs.

9 Q How about family members?

10 A Ah, father has a long term alcohol problem.

11 Q During the time when he was growing up as a child with all
12 of these problems, what kind of supervision did you find that he
13 had?

14 A His, ah, stepmother provided fair supervision.

15 MR. STIDHAM: I'm not sure that this is relevant
16 to the issues before the Court today. It sounds more
17 like mitigation to me than --

18 MR. FOGLEMAN: It goes to his ability to function
19 independently.

20 THE COURT: I'll overrule the objection. You may
21 proceed.

22 BY MR. FOGLEMAN:

23 Q Doctor Wilkins, at least at the time he was arrested --
24 when you say "his stepmother," are you referring to Shelby
25 Misskelley?

- 1 A (NODS HEAD)
- 2 Q She was not living in the home?
- 3 A No.
- 4 Q How long had you found that she had not been living in the
5 home at the time of his arrest?
- 6 A As I recall, it was about eight months. I'm not sure.
- 7 Q During that period of time, isn't it true that he had
8 little or no supervision?
- 9 A Ah, yes.
- 10 Q And that he pretty much was his own guardian?
- 11 A Yes.
- 12 Q That he did what he wanted to, got up when he wanted to,
13 ate when he wanted to?
- 14 A Pretty much, yes.
- 15 Q And he functioned independently. Isn't that correct?
- 16 A Not very well.
- 17 Q There are a lot of people with IQ's much higher -- in the
18 90's -- that don't function very well, do they, Doctor?
- 19 A Ah, true.
- 20 Q Did you say untrue?
- 21 A No. True.
- 22 Q So your ability to function very well independently is not
23 a matter of IQ, is it?
- 24 A Surely.
- 25 Q Oh, it is?

1 A Surely.

2 Q Isn't it true that there are --

3 A That -- that has -- has a very direct bearing on it.

4 Q Isn't it true that there are people were very high IQ's
5 that do not function very well?

6 A Surely.

7 Q Now, in making a judgment on the defendant's ability to
8 function independently and to -- to his adaptive functioning,
9 wouldn't you agree that it would be important to consider his
10 work performance and the jobs that he had held?

11 A Yes.

12 Q Did you do that?

13 A Yes.

14 Q Where is it noted in your notes that you talked to any of
15 his employers?

16 A No, I didn't talk to any of his employers.

17 Q So isn't it true that you don't know how he functioned on
18 his job?

19 A I know that he didn't have one most of the time or just did
20 it randomly.

21 Q All right. Did you ever talk to any of the people he
22 worked for?

23 A No.

24 Q So you don't know how he functioned on the job?

25 A No.

1 Q The -- these intelligence classifications based on score,
2 below 70 is not considered -- or above 70 is not -- 70 and above
3 is not considered mentally retarded, is it?

4 A Technically, no.

5 Q In fact Mr. Stidham asked you about SSI. You're familiar
6 with the listing of impairments?

7 A Yes, sir.

8 Q In terms of the listing of impairments, you wouldn't be
9 entitled to Social Security disability because of mental
10 retardation unless you had an IQ of 59 or below, would you?

11 A No, that's not true.

12 Q On IQ alone?

13 A Oh, okay.

14 Q Fifty-nine or below. And if you have some other physical
15 or mental impairment besides your low IQ, it is 69 or below?

16 A Ah, usually. But I do have people who have IQ's above 70
17 who do get benefits.

18 Q But they have other problems?

19 A Yes. They have other problems.

20 Q Wouldn't you agree that the adaptive functioning -- a
21 person's ability and adaptive functioning -- would be measured
22 better by the performance IQ than verbal IQ?

23 A No.

24 Q You do not agree with that?

25 A No.

1 Q Isn't it true that the performance IQ deals with somebody's
2 ability to perform certain tasks?

3 A Yes.

4 Q Isn't that a function of the ability to adapt?

5 A It is the ability to perform certain psychomotor tasks.

6 Q Right.

7 A Ah, it has nothing to do with being able to -- to -- to --
8 to get to work every day on time. It has nothing to do with
9 being able to read the instructions once you are there. It has
10 nothing to do with being able to read your time card. All it
11 says is that I'm able to put puzzles together.

12 Q Reading has nothing to do with being able to adapt, does
13 it?

14 A I think it has something to do with being able to adapt.

15 Q Something. Isn't it true that what the performance IQ can
16 determine is somebody's ability to see something that has to be
17 accomplished and figure out in his mind without having to read
18 instructions how to accomplish the task?

19 A Only if it is a nonverbal task.

20 Q And in terms of nonverbal tasks, whether it is driving a
21 nail in a wall or figuring out how to do a nonverbal task, isn't
22 it true that Jessie's IQ scores are much higher and he has a
23 much higher ability to perform those tasks than verbal tasks?

24 A Yes.

25 Q Those are reflected in his scores?

1 A Yes.

2 Q And so in his ability to -- in adaptive functioning
3 involving nonverbal tasks, his ability does not meet the
4 definition set out in the law, does it?

5 A No, it does not.

6 Q You mentioned in your report about -- something about his
7 memory -- about he has marked deficits in both visual and verbal
8 recall according to some tests that you did?

9 A Yes.

10 Q What does that mean? What does that tell us about him?

11 A Ah, it tells us that, ah, that he has memory problems.

12 Q Well, I know but --

13 A I'm not sure what you're asking me.

14 Q You found it significant enough to put in your report.

15 A I made a comment on everything that I tested -- put a
16 comment in the report.

17 Q What types of things are you saying that he has trouble
18 remembering?

19 A I'm saying that, ah, for example, if I read Jessie a list
20 of twenty words over trial -- three or four or five times --
21 that we would expect normal people to -- to -- to -- to remember
22 more and more of them as we go along. Jessie doesn't do that as
23 we would expect someone normally to do.

24 If I provide him with a series of numbers to memorize, he
25 doesn't do that as well.

1 If I have him look at, ah, some fairly simple pictures for
2 ten seconds and have him draw them from memory, he doesn't do
3 that terribly well -- or not as well as we would expect someone
4 who is eighteen to do.

5 Q Now, in your report I believe that I remember seeing you
6 say something to the effect of that during his early school
7 years he had some really severe discipline problems as far as
8 his behavior?

9 A Yes.

10 Q As he went through school, those lessened. Is that
11 correct?

12 A Yes. Until he got to the upper grades and he was doing a
13 lot of gas and stuff and he just didn't go. So the discipline
14 problem was --

15 Q So as he got older -- you're talking about when he was
16 huffing gasoline?

17 A Yes.

18 Q Which would be a different -- would be more of a
19 delinquency problem than related to just being able to behave in
20 school?

21 A Yes.

22 REDIRECT EXAMINATION

23 BY MR. STIDHAM:

24 Q Doctor, Mr. Fogleman seemed to ask you to differentiate
25 between verbal scores and performance scores, and he asked you

1 the difference between the two. As I understood your testimony,
2 you said that performance scale tests -- his ability to do
3 manual things, put puzzles together -- in other words they are
4 nonverbal?

5 A Yes.

6 Q My question to you is -- the reason those are put together
7 for a full scale score -- there is a reason for that, is there
8 not?

9 A Surely.

10 Q What is the reason for that?

11 A The reason for that is -- is that -- is that no matter how
12 well I might be able to put together puzzles, if I'm not able to
13 understand as to how to put the puzzles together, then -- then
14 -- then that scale is not too much worth.

15 Q You may be the best manual laborer in the world but if you
16 can't read instructions and understand verbal things, you're not
17 going to be very adaptive, are you?

18 A Ah -- ah -- examples of ah -- of ah -- severe cases of
19 autism, for example, people have reasonably low IQ's of 55 to 60
20 and are able to multiply and divide anything that you want to
21 give to them -- that would be the idiot savant concept.

22 Q So you cannot just look at one of the scores. You have to
23 look at the full scale scores as well?

24 A Yes.

25 Q Also, Mr. Fogleman asked you what the difference between

1 adaptive functioning and adaptive behavior was pursuant to the
2 statute, and you seemed to indicate there wasn't a difference?
3 Is there --

4 A Different -- different -- different -- different theories
5 in psychology perceive things in different ways. Ah -- ah -- ah
6 -- if I'm going to deal with being a strict behaviorist, then
7 for me behavioral adaptation is all there is to look at.

8 For those who are more cognitively oriented, they might
9 want to look at nonbehavioral ah -- ah -- ah -- issues.

10 Ah, I guess even in that case what we want to look at is if
11 the -- the -- the -- if we are going to have it as a split
12 concept, that the -- that the notion of adaptive functioning
13 would deal with mental abilities, mental cognitive goings-on and
14 that the adaptive behavior issue would be however it would be
15 translated into behavior patterns.

16 Obviously, if we don't have very many cognitive functions,
17 then your adaptive behaviors are fairly limited.

18 Q If I understand your testimony then, adaptive functioning
19 deals with your ability to function in society --

20 A No. It has to do with how well you think, how well you
21 read, how well it has to do with the -- with the -- with the --
22 what we typically call mental processing for lack of a better
23 word.

24 Q So if you compare that to adaptive behavior, behavior is
25 how you manifest --

1 A Right.

2 Q Okay. I think I understand. Mr. Fogleman asked you about
3 other problems that people might have that would inhibit their
4 ability to adapt or function in society. Isn't it true that
5 Jessie has other problems other than his low IQ?

6 A Yes.

7 Q Those other problems in your report inhibit his ability to
8 adapt?

9 A I don't have any -- what we need to look at is there are a
10 whole variety of issues. One is that Jessie has minimal
11 cognitive skills, has had minimal discipline in his life, has
12 had ah -- ah -- ah -- minimal ah -- ah -- responsibility, self-
13 responsibility, has some psychiatric problems -- mild, has some
14 ah -- ah -- real reading, writing, and arithmetic skill
15 problems, has a -- there's a whole variety of issues that come
16 together which interfere with Jessie being able to function
17 terribly well.

18 Q Let me try to sum this up for purposes of the statute.
19 Obviously if Jessie had an IQ of 120, we wouldn't be standing
20 here today. Is that pretty much a fair statement?

21 A Yes.

22 Q If he had an IQ of 20 and was profoundly retarded, chances
23 are Mr. Fogleman would have raised the white flag and we
24 wouldn't be standing here either.

25 A Right.

1 Q But we are dealing with someone who has a full scale IQ of
2 72.

3 A Right.

4 Q And a 90 percent confidence level of 67 to 77 so that kind
5 of puts it on the borderline?

6 A Yes.

7 Q Now with the statute, are you familiar with the presumption
8 in the statute with the IQ of 65?

9 A Yes.

10 Q Basically, that means if his IQ was 65 or below, it is
11 presumed that he is mentally retarded?

12 A Right.

13 Q We don't have that in this case, do we, Doctor.

14 A Right.

15 Q What we have is a full scale IQ of 72 and a 90 percent
16 confidence level of 67 to 77 so we have to look at other things
17 besides IQ scores?

18 A Yes.

19 Q Is that what you're testifying to?

20 A Yes.

21 Q Again, Doctor, in your professional opinion based on the
22 hours that you spent with Mr. Misskelley and your evaluation, do
23 you believe that he fits the statutory definition promulgated by
24 the Arkansas legislature?

25 A Yes, I do.

1 Q So you think he is mentally retarded for purposes of this
2 statute?

3 A Yes.

4 RECROSS EXAMINATION

5 BY MR. FOGLEMAN:

6 Q Just a couple of questions. You did not diagnose him as
7 mentally retarded, did you?

8 A No.

9 Q You indicated that one of the problems -- he had had
10 minimal discipline?

11 A True.

12 Q Isn't it true that in fact discipline went overboard?

13 A I guess when I use the term minimal, I think it went both
14 ways from being overboard to being non. When I use the term
15 minimal, I probably mean inconsistent.

16 Q Isn't it true that as a matter of fact, whether he lived in
17 a home with a parent for the last approximately a year, he has
18 lived pretty much independently?

19 A No, he has not. He has not paid his own rent. He has not
20 supported himself. He has not had a job. He has not paid his
21 light bills. He does not have a car. He does not have a
22 license. He does not function what we call independently. As
23 long as someone else is paying his bills and providing food and
24 shelter for him, he functions independently in your definition
25 but not what we think about in the world as independent.

1 Q Well, we're talking about functioning independently and
2 paying bills, how long did he work at the last job that he had?

3 A Well, on the -- on the -- I don't think he ever worked
4 seriously --

5 Q You don't know, do you?

6 A He worked randomly at the job.

7 Q All right. Doctor, do you know that he worked part of the
8 day on the day that this incident occurred?

9 A Yes.

10 Q Do you know how long he had been working for this person?

11 A He had worked for him on -- on -- I think for the past
12 seven or eight months off and on.

13 Q Have you talked to the employer?

14 A No.

15 Q So you really don't know.

16 A I know what Jessie told me and what his parents have told
17 me.

18 Q All right. But you testified that his father is an
19 alcoholic?

20 A Yes.

21 Q And his stepmother wasn't there.

22 A I didn't testify that he was an alcoholic. I testified
23 that he had an alcohol problem, and his stepmother was not there
24 the last eight months, yes.

25 (WITNESS EXCUSED)

1 MR. STIDHAM: Your Honor, I have no further
2 witnesses, but I would like to make a brief statement.

3 THE COURT: All right.

4 MR. STIDHAM: I guess I should inquire if the
5 State has anything further --

6 MR. FOGLEMAN: No, I don't.

7 MR. STIDHAM: May it please the Court, we are
8 here today to decide whether or not the State of
9 Arkansas can impose the death penalty on my client,
10 Jessie Misskelley.

11 The Arkansas legislature has chosen to enact a
12 statute in March of this year which prohibits the use
13 of the death penalty for mentally retarded
14 individuals. There is a reason for that. They
15 obviously got together and decided that the State
16 should not impose the death penalty on someone for a
17 specific reason and, of course, that reason is mental
18 retardation.

19 There's been a lot of back and forth about
20 whether he is technically retarded by the IQ scores or
21 whether or not he fits the definition in the statute.
22 I would submit to the Court that your Honor should not
23 consider what the technical definition of mental
24 retardation is. The Court should look at what the
25 statutory definition of mental retardation is. And

1 that is the definition that Doctor Wilkins went over
2 step by step. And all four of those steps, your
3 Honor, Doctor Wilkins testified that Jessie Misskelley
4 fits that definition. That he does exhibit these
5 problems, that he does have a low IQ, that he has
6 problems in adaptive functioning, and all these things
7 manifested themselves prior to age 18, obviously,
8 because we are dealing with an eighteen-year-old.

9 Your Honor, Jessie Misskelley does fit the
10 statutory definition and, therefore, the State should
11 not be allowed to impose the death penalty against him
12 -- assuming -- of course, we are assuming that he's
13 going to be convicted and we are not ready to concede
14 that point. But obviously the statute says we can
15 raise this issue prior to trial and if the Court
16 determines that he is mentally retarded, if he fits
17 this statutory definition -- not the definition from a
18 technical standpoint that appears in the DSM -- but
19 the definition promulgated by the Arkansas
20 legislature.

21 Judge, if they wanted to say anybody with an IQ
22 of 65 or below is automatically retarded, they could
23 have done that, but they didn't. There is a
24 presumption, and that's all that 65 is. It doesn't
25 mean that somebody with 70 or 71 or 72 can't be

1 mentally retarded. You have to plug in all of the
2 variables, and Doctor Wilkins has testified there's no
3 doubt in his professional opinion that Jessie
4 Misskelley is mentally retarded for purposes of the
5 statute, and we would ask that you rule that the State
6 not be allowed to use the death penalty against him in
7 the event that he is convicted. Thank you.

8 MR. FOGLEMAN: Your Honor, the law does provide a
9 presumption that somebody is mentally retarded when
10 they have an IQ of 65 or below. In this case the
11 defendant's own witness testified that he did not
12 diagnose this defendant as being mentally retarded and
13 even considering only the verbal IQ's, where Jessie
14 scores the lowest, Doctor Wilkins himself puts him as
15 having a 70 IQ.

16 Now, when you take into consideration the
17 definition provided by the legislature which provides
18 that it means "significantly sub-average general
19 intellectual functioning," your Honor, I submit that
20 that part of the definition goes to what I would call
21 book smarts, your ability to read and write and that
22 sort of thing. But it goes on and then says,
23 "accompanied by significant deficits or impairments in
24 adaptive functioning manifest in a developmental
25 period no later than age eighteen and deficits in

225

1 adaptive behavior."

2 Doctor Wilkins testified that the performance IQ
3 measures nonverbal tasks. Jessie's ability to
4 complete and to perform nonverbal tasks, to solve
5 problems nonverbally and on those scores, he scores in
6 1992 -- on one test he scored as high as 88 and on
7 Doctor Wilkins' test he scored 75 and he gave a range
8 of all the way up to 80.

9 This defendant has lived pretty much on his own.
10 There's no testimony about how he functioned at his
11 work. Doctor Wilkins does not know whether he
12 functioned wonderfully on the job or poorly on the
13 job. He just does not know that. He did not talk to
14 his employer. He does not know how he did. He does
15 know that he had a job and testified that way.

16 Your Honor, we submit that in this case the
17 defense has failed to carry their burden of proof by a
18 preponderance of evidence showing that the defendant,
19 Jessie Misskelley, Junior, meets the definition of
20 mental retardation, and we should be allowed to
21 proceed.

22 THE COURT: Anything else?

23 MR. STIDHAM: No, your Honor.

24 THE COURT: It would be the Court's finding that
25 Jessie Misskelley does not fall into the definition,

1 "significantly sub-average general intellectual
2 functioning accompanied by significant deficits or
3 impairments in adaptive functioning."

4 In fact, quite the contrary is brought out by
5 Doctor Wilkins' own testimony. His rather lengthy
6 report indicates that he made a finding using the
7 guidelines of the DSM 3 on axis two, "borderline
8 intellectual functioning." His own testimony on both
9 direct and cross examination was quote, "Technically,
10 he doesn't fall into that category."

11 The whole nature of psychology and the field and
12 area itself deals in an individual's interpretation of
13 standardized tests, and apparently that has been done
14 by several different psychologists or psychiatrists
15 through the years and has been fairly accurate in
16 defining Mr. Misskelley in the borderline range, which
17 means he is not mentally retarded. He is borderline.
18 He is at that level right above the criteria that the
19 psychiatric profession has determined to be one where
20 one can function above the retardation level.

21 The whole concept of the DSM 3 and the current
22 adaptation of it -- I think it's DSM3-R -- was
23 designed to establish a scale for persons in Doctor
24 Wilkins' profession to more or less mold the opinions
25 of all in that profession into some system of

1 uniformity. His testimony and his lengthy report
2 clearly establishes that Jessie Misskelley is
3 functioning at a level of borderline or above the
4 mental retardation level, and that will be my finding.
5 So your motion is denied.

6 Gentlemen, that does bring up one issue. I don't
7 know whether the State intends to seek the death
8 penalty. Do you plan to do so? I normally ask that
9 at the beginning of the trial.

10 MR. FOGLEMAN: Your Honor, at this point the
11 State does.

12 THE COURT: That brings into issue the next step,
13 Mr. Stidham --

14 MR. FOGLEMAN: Your Honor, could I add something?
15 Just for the record purposes, we would note that the
16 Act in question did not come into effect until after
17 the murders in question.

18 MR. STIDHAM: That is not correct.

19 THE COURT: That's another issue. Whether it is
20 a procedural or substantive change in the law. I'm
21 aware of when it came into effect and in fact I
22 suggested to Mr. Stidham that he read it because I
23 wanted to have a hearing on that matter and to bring
24 these things into consideration.

25 MR. STIDHAM: Judge, the Governor signed this

1 bill in March of '93.

2 MR. FOGLEMAN: There's no emergency clause on
3 that though.

4 THE COURT: I'm well aware of that, gentlemen. I
5 wanted that to be brought out by both of you and to
6 conduct a hearing of this nature. I'm satisfied that
7 Mr. Misskelley was not functioning as a significantly
8 sub-average mentally retarded person, and those are
9 synonymous definitions according to the Arkansas
10 statute because it defines mental retardation to mean
11 significantly sub-average general intellectual
12 functioning.

13 I'm simply finding from the evidence presented to
14 me that Mr. Misskelley operated on an intellectual
15 level above that of a mentally retarded person.

16 But it does bring into play at the time of the
17 trial whether or not the jury will again have an
18 opportunity to decide this as a special consideration
19 of mitigation. In fact this statute provides that
20 there will be a separate verdict form to be given to
21 the jury in the punishment phase of the trial -- the
22 mitigation aspect of it -- should it arise. If it
23 comes to that, you need to have prepared a separate
24 verdict form on that, and the jury can consider all
25 these issues again and the jury can makes its finding.

1 We are dealing in educated opinion as to one's
2 ability to function in society correctly and that is
3 what the DSM-3 kind of gives us is a general guideline
4 for court purposes and for purposes of defining those
5 areas to the general public.

6 In any event that is my finding. The jury can
7 decide it however the jury chooses to. Just be
8 prepared to present that to the jury, if necessary.
9 Of course, I don't know whether it will be necessary.
10 Anything else?

11 MR. STIDHAM: Your Honor, I anticipate this issue
12 arising again prior to trial in light of the Barry
13 Fairchild opinion that was rendered in September. I
14 didn't feel it appropriate -- the issues are different
15 today -- but that will become an issue. Also some
16 sort of equal protection argument with regard to the
17 levels of retardation.

18 THE COURT: I'm familiar with the Barry Fairchild
19 case. That's the one that Judge Eisele heard within
20 the last two or three months in Federal Court and I
21 guess that was on a habeas from finding in State
22 Court. So what are you talking about?

23 MR. STIDHAM: Your Honor, it deals with intent
24 and whether or not the State can impose the death
25 penalty on someone who didn't intend a homicidal act.

1 Obviously it is not appropriate to raise that issue at
2 this point, but that is something I anticipate arguing
3 later on.

4 THE COURT: I anticipate giving an instruction on
5 capital murder and first degree murder which does
6 involve premeditation and in that instance intention
7 would be an issue, sure. But that's a matter of
8 proof. Feel free to raise whatever issue you want to,
9 but intent is always an issue in murder. I'm not sure
10 it's an issue in capital murder. It certainly is in
11 first degree murder.

12 MR. FOGLEMAN: Your Honor, it will be in this one
13 because in the information we filed it as
14 premeditation and deliberation.

15 THE COURT: Did you? All right. I don't think
16 I've read the information. Maybe I did at the
17 original arraignment. I might have read it then, but
18 I'd forgotten what you alleged.

19 I guess if you're saying that since he was
20 borderline mentally retarded, he couldn't formulate
21 the intent?

22 MR. STIDHAM: No, your Honor. I'm simply stating
23 that I feel like the State's going to have a very
24 difficult time proving that Mr. Misskelley had any
25 intent to commit a homicidal act. Obviously that is a

1 matter of proof, and this is inappropriate to argue at
2 this point, but I'll be raising that issue again at
3 the appropriate time.

4 THE COURT: I guess the time to do that would be
5 for a directed verdict. Whenever you feel like you
6 want to raise it, I'll listen to it, okay?

7 MR. STIDHAM: Thank you, your Honor. The next
8 hearing is January 13th in Marion?

9 THE COURT: Yes. I want the defendant present at
10 that hearing.

11 MR. STIDHAM: Certainly, your Honor.

12 MR. FOGLEMAN: Your Honor, may Mr. Price and I
13 approach the bench? Well, everybody can.

14 (THE FOLLOWING CONFERENCE TOOK PLACE AT THE
15 BENCH)

16 MR. FOGLEMAN: I don't know -- I can't even
17 explain how so I'm not going to try. Somehow, we
18 introduced the search warrant -- Damien's search
19 warrant. It ended up being the search warrant to
20 search Domini's trailer. I discussed it with Mr.
21 Price -- and I meant to bring it with me today but I
22 don't have it. I have a certified copy of Damien's
23 search warrant.

24 THE COURT: You mean you gave me the wrong one?

25 MR. FOGLEMAN: Right. Mr. Price has said he

1 doesn't have any objection to us substituting
2 Damien's. Is that right?

3 MR. PRICE: That's correct. As a matter of fact,
4 John sent me a stipulation that I received in the
5 mail.

6 THE COURT: Does that affect in any way the
7 hearing?

8 MR. PRICE: No.

9 MR. FOGLEMAN: No.

10 MR. STIDHAM: There's an issue I need to discuss.
11 I anticipated it being in chambers, but it needs to be
12 on the record. Are we on the record?

13 THE REPORTER: Yes, sir. Be sure to get in front
14 of the microphone so I can hear you.

15 MR. STIDHAM: Back in September at the September
16 27th hearing in Marion the Court will recall we raised
17 an issue by motion, written motion, that we wanted to
18 have the assistance of an expert to conduct DNA
19 testing on a tee shirt that was found in Mr.
20 Misskelley's home.

21 At that point in open Court -- and I believe Mr.
22 Ford and Mr. Price will remember this -- I was told by
23 the prosecutors that that was not necessary, that
24 issue was moot because they had no intention of using
25 that piece of evidence at trial. Therefore, I

1 withdrew my motion.

2 Yesterday in discussing this case with Mr.
3 Fogleman he informed me that he intends to use that
4 piece of evidence in trial, and now we are four weeks
5 away, and now suddenly I'm going to have to have an
6 independent DNA test.

7 I don't think the evidence is relevant, and also
8 with regard to its probative value, it is
9 inconclusive. It has no probative value. It is
10 simply nothing but pure, unadulterated, prejudicial
11 impact on the jury regarding this blood that they
12 can't do anything with other than to say it is the
13 same as victim's. It's the same as Mr. Misskelley's.

14 To allow the State to use it at this late date
15 would be error. Also, I feel if the Court is inclined
16 to allow that evidence at trial, I need to have an
17 opportunity to have it independently evaluated. I
18 made that request months ago, and I was told months
19 ago that that evidence wouldn't be used.

20 THE COURT: Let me hear what you have to say.

21 MR. FOGLEMAN: If I said what Mr. Stidham said I
22 said, I would -- I agree with him. I did not think
23 that I said we would not use it. I thought that I
24 said it would not be necessary because the results
25 came back that it was not only the same as one of the

1 victims but it was also the same as Misskelley's. So
2 I didn't think it needed to be tested. I don't
3 remember what I said.

4 MR. STIDHAM: Judge, the transcript would tell --

5 MR. FOGLEMAN: It would if it was on the record.

6 MR. STIDHAM: Judge, I'm prepared to make a 403
7 argument if necessary to rule, but my hope would be
8 that the Court would not allow its use. This isn't
9 something I brought up yesterday or last week. This
10 is something I brought up to the Court months ago --

11 THE COURT: I'm having trouble figuring out why
12 there would be any need to have a DNA test done on a
13 garment. I assume it's got to have some relevancy to
14 the trial, or it wouldn't be admissible under any
15 circumstance.

16 MR. STIDHAM: Judge, basically what we have here
17 is a speck of blood that was found on a tee shirt in
18 my client's home when it was searched. They did the
19 blood testing type -- correct me if I'm wrong, John --
20 but they did a type testing in Little Rock and it was
21 the same type of blood as Mr. Moore's --

22 MR. FOGLEMAN: Well, no. Basically it was sent
23 to Genetic Design in North Carolina first. It was
24 sent and the victim's was sent -- ah, the three
25 victims' blood was sent because we didn't have a

1 suspect and the lab says -- well, no, I take it back.
2 We did have a suspect. First they tested the
3 victim's. They said that the victim's PCR, whatever
4 that means, is four comma four and then they sent us a
5 later report. We told Mr. Stidham, "This blood off of
6 Misskelley's shirt matches the victim's."

7 Then they sent us a later report after they had
8 tested Misskelley's blood and said Misskelley also has
9 four comma four, and I would not say it is rare, but
10 they said it was in like seven percent or six point
11 seven percent of the Caucasian American population or
12 something like that.

13 And so according to Genetic Design it matches
14 both the victim and the defendant.

15 MR. STIDHAM: Judge, that doesn't tell anything
16 other than what their blood types are.

17 THE COURT: So?

18 MR. STIDHAM: So I mean it shouldn't be allowed
19 into evidence because --

20 THE COURT: Oh, bull.

21 MR. STIDHAM: Judge, the jury will sit there and
22 infer, here we've got this super scientific evidence
23 --

24 THE COURT: It doesn't say anything but there was
25 a shirt found with spots of blood on it.

1 MR. STIDHAM: If it doesn't say anything, why
2 should the State be allowed to introduce this? Its
3 probative value does not exceed any prejudice to the
4 defendant --

5 THE COURT: We will have to have a hearing on
6 that because I'm not going to exclude it if he wants
7 to offer it. The point I want you to state for me is
8 what benefit would there be in having an outside
9 expert examine something where the expert has already
10 said it can be either one or all three.

11 MR. STIDHAM: People make mistakes. And before
12 the State of Arkansas --

13 THE COURT: Are you willing to take the risk that
14 another report would come back adverse to you?

15 MR. STIDHAM: Judge, I don't feel like I have any
16 choice. The State of Arkansas is trying to execute my
17 client, and I need to have an opportunity -- and I
18 asked for this opportunity months ago. And for the
19 State to be allowed to step in four weeks before trial
20 and say they're going to use this, I just don't think
21 that is fair. It is not constitutional in that my
22 client is entitled to a fair trial, and the State told
23 me they weren't going to use that --

24 MR. FOGLEMAN: Your Honor, if I did tell him we
25 were not going to use that, we won't offer it. I

1 agree, if the record shows that I said that. I did
2 not think that's what I said.

3 THE COURT: I don't remember what you said, but
4 there was some conversation about it not being
5 necessary because I was going to order an independent
6 examination.

7 MR. STIDHAM: That's exactly correct, Judge.

8 MR. FOGLEMAN: I recall that, and I thought I
9 said it's not necessary because --

10 THE COURT: Check the transcript and see and then
11 if you said you were not going to use it at all, then
12 I will withhold it.

13 MR. STIDHAM: He said it is not necessary because
14 we are not going to use it.

15 MR. FOGLEMAN: If I said that, I agree, your
16 Honor. If I said that, we wouldn't offer it anyway
17 because we don't do that, but I didn't think that I
18 said that, but if I did, I'll stand corrected.

19 (PROCEEDINGS CONCLUDED)

20 MARION, ARKANSAS, JANUARY 13, 1994, AT 11:00 A.M.

21 THE COURT: State versus Jessie Lloyd Misskelley,
22 Junior.

23 MR. FOGLEMAN: At the suppression hearing on the
24 motion to suppress evidence filed by the attorneys for
25 Damien Echols the copy of the Search Warrant marked