

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

THE COURT: State versus Jessie Lloyd Misskelley, Junior.

MR. FOGLEMAN: At the suppression hearing on the motion to suppress evidence filed by the attorneys for Damien Echols the copy of the Search Warrant marked (938) State's Exhibit Two which purported to be the Search Warrant for Damien Echols' residence was introduced and after reviewing those exhibits it was determined that the actual Search Warrant introduced was the Search Warrant for Domini Teer's residence instead and we are -- with the agreement of Damien's counsel -- we are substituting the Search Warrant for Damien's residence as State's Exhibit Two for that of Domini Teer's residence.

MR. PRICE: That's correct.

THE COURT: I think both of them were circulated at that time and it was inadvertently placed in there but both Search Warrants were discussed and handled.

MR. PRICE: That's correct, your Honor.

THE COURT: Let's proceed with the motion to suppress.

MR. STIDHAM: Your Honor, prior to proceeding with the motion to suppress, I need to point out to the Court and receive a ruling with regard to a motion we filed, I believe it was last week, with regard to an amended motion to conduct the depositions of the interrogating officers. The Court has indicated to me in chambers that it would not rule in favor of me on that motion, that the Court was not going to allow me to conduct the deposition and further that the Court (939) would not mandate that the officers make themselves available to my experts.

THE COURT: That is totally and completely incorrect. From my recollection of the conversation -- and the prosecutor was present -- I had previously ordered that the officers make themselves available for your inquiry. I've been informed that the officers were there and you acknowledged that you were not there because of a plane schedule mix-up with some expert that you have employed. That is a totally different situation --

MR. CROW: One officer was there and the other two officers were not there.

THE COURT: Mr. Fogleman, were all of the officers available at the time and place provided?

MR. FOGLEMAN: Your Honor, I would have to inquire. I was informed that at the time Mr. Stidham and Mr. Crow went to the office, which was later that afternoon, that one of the officers was there -- I believe it was Inspector Gitchell --

MR. STIDHAM: That's correct.

MR. FOGLEMAN: And it is my understanding that he said he would be willing to talk to them but some of the officers didn't want to.

MR. STIDHAM: That's correct. (940)

THE COURT: All right, well, the record may so reflect. Of course I deviated from the normal and customary rules of criminal procedure in requiring even that the officers make themselves available for your questioning. There's no law -- and actually the discovery procedures -- that the officers unless they voluntarily choose to do so submit themselves for questioning.

MR. STIDHAM: We'd like the record to reflect that none of the officers agreed to talk to us or our expert except Officer Gitchell and would like the Court to acknowledge the fact that it denied our amended motion to conduct the deposition.

MR. FOGLEMAN: I don't recall getting an amended motion.

MR. STIDHAM: I sent you one. It was over the past weekend.

THE COURT: What is it you want to do?

MR. STIDHAM: Today we are before the Court to argue a motion to suppress the statements that were given by Mr. Misskelley on June the third. In a civil matter when you walk into a courtroom, you know what the witnesses are going to testify because of discovery. Unfortunately we don't have the luxury in this case and, therefore, we were not able to (941) prepare for what the officers might testify. That is why we thought it was important that the Court not only allow us to talk to the officers but to talk to the officers in the presence of our expert on police interrogation.

THE COURT: I ordered the officers to make themselves available at a specific time and place to discuss the case with you not in the nature of normal discovery but to make themselves available to talk to you about what they knew about the case. If they chose not to, they have the right to do so. Apparently they were available at the time and place designated and perhaps because of weather -- I don't know -- you were not there.

MR. STIDHAM: Our expert was detained in New York City because of snow. He did fly to Dallas and was available to come in but Officer Gitchell specifically told us that no one else would talk to us so there's no sense bringing him in.

THE COURT: The record has been made on it. I'm not going to do anything further on it.

MR. STIDHAM: One point further I would like to make since we have not had the

opportunity to discover what the officers are going to testify to -- obviously we are going to know after they testify -- Mr. Crow (942) and I have not had an opportunity to brief the law as to the facts because we don't know what the facts are. So we would like to ask the Court to take the motion under advisement after completion of the hearing and then give Mr. Crow and I at least 24 hours to submit a brief prior to you making your decision.

THE COURT: I'll consider that after I hear it. It may not be something I need a brief on. If I think I can rule with the evidence that is before me, that's what I'm going to do. I will listen and if I think I will need a brief on a point of law that might be raised --

MR. STIDHAM: We have prepared a brief with regard to legal issues, but we have not had an opportunity to argue the legal issues as they will apply to the facts that the officers will testify to.

THE COURT: Let's proceed. If it is necessary, I'll certainly consider that.

JERRY DRIVER

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

DIRECT EXAMINATION

BY MR. FOGLEMAN:

Q. Will you please state your name and occupation?

A. Jerry Driver. I'm the chief juvenile officer for (943) Crittenden County.

Q. In the course of your duties as the chief juvenile officer have you had occasion to come in contact with Jessie Misskelley, Junior?

A. Yes, sir, I have.

Q. Either right before or right after you were sworn, did you hand me this file?

A. Yes, I did.

Q. Does that file contain the juvenile matters that are relevant to Jessie Misskelley, Junior?

A. Yes, it does.

MR. STIDHAM: May I inquire as to the relevance of this?

MR FOGLEMAN: This is going to the number of times that Jessie Misskelley has been advised of his rights in the past.

THE COURT: I'm going to allow it.

BY MR. FOGLEMAN:

Q. I am going to refer specifically to March the 31st, 1993.

A. Yes, sir.

Q. On that occasion did you have an opportunity to come into contact with Jessie Misskelley?

A. Yes, I did.

Q. At that time did you advise Mr. Misskelley of his rights?

A. Yes, I did. (944)

Q. How did you advise him of his rights?

A. I read him a rights statement, asked him if he understood each one. Had him read him over, initial the rights and sign a statement that he wished to talk to me. Also his father signed.

Q. His father was present?

A. Yes, he was.

Q. I want to show you what appears to be a waiver of rights marked for identification as State's Exhibit One and ask if you can identify that?

A. (EXAMINING) Yes, sir, that is the rights form that was signed on 3-31-93.

Q. Is that a copy of the rights form that you used to advise Jessie Misskelley of his rights under the Constitution and laws of the State of Arkansas and the United States?

A. Yes, it is.

Q. I notice before each right there is a blank and it has got some initials. Who placed those initials there?

A. Mr. Misskelley.

THE COURT: Are you talking about the defendant or his dad?

THE WITNESS: The defendant.

BY MR. FOGLEMAN:

Q. Before the second right -- when did he put these initials there?

A. After I read the rights to him. (945)

Q. After you read, for instance, the first one -- he has the right to remain silent, what did you say?

A. I asked him if he understood that right.

Q. What did he indicate?

A. That he did.

Q. After he indicated that he did, what did you ask him to do?

A. To put his initials by that right.

Q. Did you do that same procedure for each right?

A. Yes.

Q. Following the advice of rights, is there a portion headed "waiver?"

A. Yes there is.

Q. What did you do in regard to this section?

A. We asked him as it states here, "Do you understand each of these rights as I have explained them to you?"

Q. What was his response?

A. His response was that he did and we had him place his initial in the box for yes.

Q. "Having these rights in mind, do you wish to talk to us now?"

A. Yes.

Q. What was his response?

A. That he did.

Q. Did you ask him if he would sign the form?

A. Yes. (946)

Q. Did he sign it?

A. Yes, he did and I also advised him to read it over again.

Q. Who put the date after his signature?

A. I don't recall.

Q. Then who signed besides Jessie Misskelley, Junior?

A. His father Jessie Misskelley, Senior and myself.

Q. Any forces, promises, threats or coercion used when you advised him of his rights?

A. No, sir.

MR. FOGLEMAN: We would offer State's Exhibit One.

MR. CROW: No objection.

(STATE'S EXHIBIT ONE IS RECEIVED IN EVIDENCE)

BY MR. FOGLEMAN:

Q. I want to refer your attention to -- it looks like October 28th, 1992. Do you know who advised him of his rights on that occasion?

A. I believe it was me.

MR. STIDHAM: That's not proper if he's not sure.

THE WITNESS: It was me.

BY MR. FOGLEMAN:

Q. How can you tell?

A. The rest of my paperwork has my signature on it.

Q. Is that paperwork done at the same time you gave him his rights? (947)

A. Yes, sir.

Q. Was this October 28th, 1992?

A. Yes, it was.

Q. Did you use the same type of form this time?

A. Yes.

Q. Did you follow the same procedure?

A. Yes.

Q. And did you use any force, promises, threats or coercion on this case?

A. No sir.

Q. Did you advise him of each right?

A. Yes, sir.

Q. Did he indicate that he understood each right?

A. He indicated that he did, and I once again indicated he should read it over before he sign it.

Q. Did he place his initials as before?

A. Yes, sir.

Q. Any force, promises, threats or coercion used on this occasion?

A. No, sir.

Q. Who else signed?

A. His father signed it and I don't believe I signed it. I don't see my name on there but it was with the other forms.

MR. STIDHAM: We object to this exhibit because I don't think it has been properly authenticated. This (948) witness doesn't know for sure he was present when this happened.

THE COURT: Overruled. You were present you prepared the paperwork?

THE WITNESS: Yes, sir, I just neglected to sign this particular form.

(STATE'S EXHIBIT TWO IS RECEIVED IN EVIDENCE)

THE COURT: You said you asked him to read it. Do you know whether or not he had the ability to read?

THE WITNESS: It appeared that he did. He read it over and signed it.

THE COURT: Did he ask any questions?

THE WITNESS: No, sir. I asked him several times if he had any questions.

THE COURT: Did his father have any questions?

THE WITNESS: No, sir.

THE COURT: Was he given an opportunity to read it in each case?

THE WITNESS: Yes, sir.

THE COURT: Did he attempt to do so or appear to do so?

THE WITNESS: Appeared to do so.

CROSS EXAMINATION

BY MR. STIDHAM:

Q. Would you take a look at Mr. Misskelley's signature on that (949) form?

A. Um-hum.

Q. Do you notice anything strange about his signature?

A. It's not in cursive.

Q. Does that bother you?

A. No, sir.

Q. How do you know he can read and write?

A. He indicated to me that he could.

Q. You just always accept that without question?

A. I asked him if he had any questions about this. We went over each one of them. He said he had no questions, that he understood it. I asked him to read it over. He took it, appeared to be reading it and then signed it.

Q. Isn't it true that he just signed it without looking at it and just summarily did it?

A. No, sir, that's not true.

Q. Is there a reason why Jessie Senior signed this form?

A. Yes, sir, we always have the parent sign.

Q. That's the law, is it not?

A. In intake, yes, sir.

(WITNESS EXCUSED)

GHERIC BRUCE

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

DIRECT EXAMINATION (950)

BY MR. FOGLEMAN:

Q. Will you please state your name and occupation?

A. Gheric Bruce and I am security officer for Federal Express.

Q. Mr. Bruce, back in 1988 what was your employment?

A. I was employed with East Arkansas Juvenile Services in Marion.

Q. What was your position?

A. Well, I was intake officer, probation officer, and parole officer so I would have had several different jobs.

Q. During your employment with the juvenile services office, did you have occasion to come in contact with Jessie Misskelley, Junior?

A. Yes.

Q. I want to show you what's been marked for identification as State's Exhibit Three and ask if you recognize that?

A. Yes, I do.

Q. During your employment and in regard to your contact with Jessie Misskelley, Junior, did you have occasion to advise him of his rights?

A. Yes, I did.

Q. How did you advise him of his rights?

A. Okay, I told him that he had the right to remain silent.

Q. Did you read the form to him?

A. Correct.

Q. After you read the form to him, did you ask him if he would (951) sign it?

A. Before I asked him to sign, I also asked if he understood.

Q. What did he say?

A. Yes.

Q. Did you then ask him to sign the form?

A. Yes.

Q. Did he sign the form?

A. Yes.

Q. Did you use any force, promises, threats or coercion to get him to sign the form?

A. No.

Q. Who else was present when you advised him of his rights?

A. His father.

Q. Anybody else?

A. No.

Q. I saw another name on that.

A. It says his mother. I remember his father.

Q. You didn't remember his mother being there?

A. No.

Q. Did you also sign the form?

A. Yes.

MR. FOGLEMAN: We would offer State's Exhibit Three.

MR. STIDHAM: My only concern would be -- it would appear Mr. Misskelley would have been eleven (952) years old at that time.

MR. CROW: What is the relevance of what he did back -- some -- 1988.

THE COURT: Are you saying he wasn't cognitive at eleven? I'm going to allow it. Overruled.

(STATE'S EXHIBIT THREE IS RECEIVED IN EVIDENCE)

(WITNESS EXCUSED)

JOHN MURRAY

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

DIRECT EXAMINATION

BY MR. FOGLEMAN:

Q. Will you please state your name and occupation?

A. John Murray. I'm an investigator with the Crittenden County Sheriff's Department.

Q. In the course of your duties have you had occasion to come in contact with Jessie Misskelley, Junior?

A. Yes, I have.

Q. When was that?

A. It was the tenth month, 23rd day of '92.

Q. Did you say the 23rd day?

A. Yes, sir.

Q. Would you --

A. 27th -- I'm sorry.

Q. When you had this contact with Mr. Misskelley, did you (953) advise him of his rights?

A. Yes, I did.

Q. How did you do that?

A. I read from a rights form each one of the rights to him as he read along with me and after reading each rights a response of the word "yes" and his initial was placed on that line.

Q. Did -- after you read the right to him, did he indicate to him whether or not he understood the right?

A. Yes, he did.

Q. How did he signify that understanding?

A. He put the word "yes" on the line and he stated that he did understand them.

Q. Did you do the same procedure for each of those five rights?

A. Yes, I did.

Q. Did he indicate that he understood all those rights?

A. Yes, he indicated to me that he did.

Q. Did you use any force, promises, threats or coercion to get him to place his initials on it?

A. No, I didn't.

Q. Did you then ask him if he was willing to make a statement?

A. Yes, I did.

Q. Did he sign the form?

A. Yes, he did.

Q. Did you use any force, promises, threats or coercion to get (954) him to sign the form?

A. No, I didn't.

Q. Did you sign as a witness?

A. Yes, I did.

Q. Who else was present?

A. William Wood, Junior, Union Pacific Railroad.

MR FOGLEMAN: We would offer State's Exhibit Four.

THE COURT: It can be received for the purpose of this hearing. I'm not ruling on their admissibility in the trial itself. In your motion on the eleven year old, I might reconsider that if it became necessary to introduce it at trial. So you can preserve any objection you have on admissibility for trial purposes on all exhibits that are received today, if it becomes necessary.

(STATE'S EXHIBIT FOUR IS RECEIVED IN EVIDENCE)

BY MR. FOGLEMAN:

Q. Did Mr. Misskelley appear to understand the rights?

A. Yes, sir, he advised me that he did understand his rights.

CROSS EXAMINATION

BY MR. STIDHAM:

Q. Are you familiar with Jessie?

A. Yes.

Q. You know that he's slow? (955)

A. Yes.

Q. Did you take any special precaution to be sure he understood his rights?

A. I asked him whether or not he understood each one of the rights. If he did not understand, I would explain them.

Q. If he's slow, how is he going to know if he understood them?

A. I asked him whether he did and he stated he did understand.

Q. You just assumed then that he did?

A. That was my opinion that he understood.

Q. Do you notice anything strange about Jessie's signature?

A. It is printed instead of handwritten.

Q. Doesn't that bother you?

A. No, sir. Each time I have talked to him in the past and whenever he has signed, he has printed.

Q. That's kind of unusual, isn't it?

A. We have quite a few juveniles that I have dealt with that print their name instead of writing it.

Q. He never made any attempt to invoke any of his constitutional rights?

A. No, sir.

REDIRECT EXAMINATION

BY MR. FOGLEMAN:

Q. In completing that form did you get a date of birth from him? (956)

A. Yes, I did.

Q. What was that?

A. 7-10-75.

MR. FOGLEMAN: Your Honor, he would have been thirteen at the time of the other rights, not eleven.

MR. STIDHAM: Did his father sign that?

THE WITNESS: No, sir.

(WITNESS EXCUSED)

MIKE ALLEN

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

DIRECT EXAMINATION

BY MR. FOGLEMAN:

Q. Will you please state your name and occupation?

A. Mike Allen. I'm a detective sergeant with the West Memphis Police Department.

Q. Detective Allen, I want to direct your attention to June 3rd of 1993. Did you have occasion to come into contact with the defendant Jessie Misskelley, Junior on that date?

A. Yes, I did.

Q. And how did you come to come in contact with him?

A. During our morning meeting I was advised by Inspector Gitchell -- we were discussing who we needed to contact that day (957) in reference to this investigation and his name was one of the names of -- many names that we needed to talk to and I told him that I knew Jessie Misskelley, Senior and I would attempt to contact Jessie Misskelley, Junior to bring him into

the station.

Q. Do you know what time you left the police department?

A. At 9:13 I checked in service leaving the police department.

Q. You know that from the radio log?

A. Yes.

Q. After you checked in service, where did you go?

A. I drove to Highland trailer park which is located north of West Memphis.

Q. When you got to Highland park, what did you do?

A. I went to the residence of Jessie Misskelley, Senior.

Q. Was the defendant there?

A. No, sir. I knocked on the door and a female -- I believe her name was Lee Rush -- came to the door and told me Jessie Misskelley, Junior was not there.

MR. STIDHAM: Your Honor, may I inquire of the witness if he can testify -- it is obvious he is using his notes to testify to. Might I inquire of him whether or not he has an independent recollection of these events?

THE COURT: Yes.

MR. STIDHAM: Officer Allen, do you have any independent recollection of -- (958)

THE WITNESS: I remember going out there that morning.

MR. STIDHAM: Is it possible for you to testify without using your notes that you made?

THE WITNESS: Yes, sir.

THE COURT: That doesn't mean that you cannot refer to your notes for specific time references and anything that might benefit your recollection. You may refer to them if you need to.

BY MR. FOGLEMAN:

Q. I think we were at the point where you had been to Jessie Misskelley, Senior's -- is it a trailer or house?

A. It is a trailer house.

Q. You were told by the lady of the house that Jessie Junior was not there?

A. Yes, sir.

Q. Did she give you some instruction of where to go?

A. She told me Jessie Misskelley, Senior was at work at Jim's Diesel Service, which is located as you would come into Highland Trailer Park.

Q. Did you go there?

A. Yes, sir.

Q. When you got there, what did you do?

A. I contacted Jessie Misskelley, Senior and asked him about the whereabouts of Jessie Misskelley, Junior. (959)

Q. In response to that conversation what happened?

A. He informed me that he knew where Jessie Misskelley was and he would go and get him and bring him back up to the diesel place.

Q. Did he do that?

A. Yes, sir, he did.

Q. After he got back up there, what happened?

A. I asked Jessie Misskelley, Junior if he would come with me to the police department. I needed to talk to him in reference to this case.

Q. Was his father there?

A. Yes, sir.

Q. What was the defendant's response?

A. The defendant's response was that -- sure, he would go.

Q. Did he accompany you to the police department?

A. Yes, sir.

Q. Was he handcuffed?

A. No.

Q. Was he in the front seat or backseat?

A. He was in the front seat.

Q. After the defendant got in the car, where did you go?

A. We went to the police department.

Q. After getting to the police department, what did you do?

A. We went upstairs to the detective division where I filled out a standard subject description form and basically talked (960) with him.

Q. Do you know what time you filled out the subject description form?

A. The subject description form was filled out around ten o'clock that morning.

MR. FOGLEMAN: (HANDING) Do you have any objection to that?

MR. STIDHAM: (EXAMINING) No.

THE COURT: It may be received.

(STATE'S EXHIBIT EIGHT IS RECEIVED IN EVIDENCE)

BY MR. FOGLEMAN:

Q. I want to hand you what has been introduced as Exhibit Eight. Can you identify that?

A. (EXAMINING) This is a copy of the subject description form that I filled out on Jessie Misskelley, Junior.

Q. Where did you get the information to complete the form?

A. From Jessie Misskelley, Junior.

Q. After you filled out the subject description form, did you have a conversation with Jessie Junior?

A. Yes, sir, I did.

Q. Who was present?

A. Detective Bryn Ridge.

Q. At this point did you advise him of his rights?

A. Not at this point. No, sir. Basically talking to him he -- (961)

Q. Was he a suspect at that time?

A. No, sir, he was not.

Q. And after you talked to him for a while -- do you know how long you talked to him before you advised him of his rights?

A. It was roughly about an hour.

Q. You may have already answered this, but who else was present?

A. Detective Bryn Ridge.

Q. Was he in there the whole time?

A. The -- I would say the majority of the time. He had went in and out a few times.

Q. Do you have the original of the advice of rights that you used?

A. Yes, I do.

MR. FOGLEMAN: (HANDING)

MR. STIDHAM: No objection.

THE COURT: It may be received.

(STATE'S EXHIBIT NINE IS RECEIVED IN EVIDENCE)

BY MR. FOGLEMAN:

Q. I want to show you what has been introduced as State's Exhibit Nine. Do you recognize that?

A. (EXAMINING) This is a rights form that is used by the West Memphis Police Department that was typed up by me that was read to Jessie Misskelley, Junior.

Q. How did you advise him of his rights? (962)

A. Verbally advised him of this -- went over this rights form with him, read this rights form to him and read each one of the rights to him.

Q. After you read each right to him, did he indicate whether or not he understood the right?

A. He stated he understood his rights.

Q. How did he indicate that understanding?

A. "You understand" -- for instance, "You understand you have the right to remain silent." He said, "Yes, I understand."

Q. Did you ask him to do something on the form?

A. He initialed each one of the rights and indicated verbally that he did understand each one of those rights.

Q. After you advised him of those rights, was something done about the waiver of rights portion?

A. He stated that he understood his rights, that he was willing to make a statement or answer questions and signed the bottom of the sheet.

Q. Did you see him sign it?

A. Yes, sir.

Q. Do you use force, promises, threats or coercion either to get him to place his initials by each right or sign the form?

A. No, sir.

Q. After you advised him of his rights, did you talk to him anymore?

A. We talked to him about taking a polygraph exam. (963)

Q. Who else was present?

A. Detective Bryn Ridge.

Q. In regard to that examination what was his response?

THE COURT: Let me ask you. Did you say after you had talked to him and obtained a statement from him?

THE WITNESS: This was -- we just basically took notes about -- he wasn't a suspect at that time -- about -- we were talking to him about another individual that was a suspect at that time from the time we were talking to him. And then we advised him of his rights at 11:00 o'clock.

BY MR. FOGLEMAN:

Q. In what he said to you before you advised him of his rights -- well, what led you to advise him of his rights?

A. From talking to him, there were several things that he had said that indicated that he may not have been telling the truth.

Q. Was that based on prior information you had from other witnesses?

A. Yes, sir.

Q. After this conversation about the polygraph, what happened?

A. After we asked him if he would take a polygraph exam, he stated that he didn't have any problem with taking a polygraph exam. I then went and talked to Bill Durham who is the West Memphis polygraph examiner and asked him if he could give him a (964) polygraph exam.

Q. Did you find out that you had to do something else before you could do that?

A. Yes. He informed me that I needed to get permission -- the state requirements to give a polygraph exam -- if they are under 18 that you have to get permission from their father or parent or guardian for the person under 18 to take a polygraph exam.

Q. After finding this out, what did you do?

A. Myself and Jessie Misskelley, Junior went to we -- were on route to Jim's diesel to contact his father, Jessie Senior.

Q. He went with you?

A. Yes, sir, he did.

Q. Where did he ride in the car?

A. He rode in the front seat.

Q. Was he handcuffed?

A. No, sir.

Q. And where did you end up finding Jessie Senior? Do you know what time this was?

A. This would have been -- it would have been after 11:00 o'clock. I'm not real certain, ten minutes after eleven.

Q. Where did you run into Jessie Misskelley, Senior?

A. We were northbound and we observed -- Jessie junior said, "There's my dad," and he was in some kind of truck southbound and Jessie went to flag his father down and his father indicated like he was going up here. We turned around at (965) the McDonald's Exxon service station lot and went back to Chief Auto Parts on Missouri Street, and on the parking lot is where we talked to his father about Jessie taking a polygraph exam.

Q. Who talked to him?

A. I did.

Q. Was anybody else present?

A. Jessie Misskelley, Junior.

Q. Jessie Junior was there?

A. Yes, sir.

MR. FOGLEMAN: (HANDING)

MR. STIDHAM: Do you have the original?

THE WITNESS: I feel sure Officer Durham would have that.

MR. STIDHAM: I don't have an objection -- you took that form to get it signed?

THE WITNESS: Yes, sir.

MR. STIDHAM: Did you sign that form?

THE WITNESS: I would have to look at the form. I do not recall. I remember Jessie Senior signed the form like against the back of a truck or hood of a vehicle in the parking lot.

MR. STIDHAM: My concern is, Officer, your signature looks like a stamp.

THE WITNESS: That is my signature witnessed by me. (966)

MR. FOGLEMAN: We will get the original.

THE WITNESS: That is my signature.

BY MR. FOGLEMAN:

Q. Do you have a signature stamp?

A. No, sir.

Q. Referring to State's Exhibit Ten, and what did you do with that form?

A. I got permission from Jessie Misskelley, Senior to polygraph Jessie Misskelley, Junior.

Q. Did Jessie Senior sign the form?

A. Yes, he did.

Q. Did you use any force, promises, threats or coercion to get Mr. Misskelley Senior to sign the form?

A. No.

Q. Did you have the defendant sign the form or was that done some other time?

A. I do not recall witnessing him signing the form. I think that was explained by Examiner Durham.

MR. FOGLEMAN: We would offer this for identification at this time.

THE COURT: All right. It may be received.

MR. STIDHAM: Your Honor, to make this easier, I don't have any problem with this coming in through this witness. I was just concerned that it looked like a signature stamp. (967)

MR. FOGLEMAN: We'll offer it then.

THE COURT: It may be received without objection.

(STATE'S EXHIBIT TEN IS RECEIVED IN EVIDENCE)

CROSS EXAMINATION

BY MR. STIDHAM:

Q. Officer Allen, you testified that you were the one who went to pick up Jessie Junior that morning?

A. Yes, sir.

Q. You also testified that there was a detective's meeting that morning?

A. That's correct.

Q. Why was it decided -- first of all, who was present at that meeting?

A. Every detective at the West Memphis police department. We had morning meetings every morning to discuss what we were doing that particular day in regards to this investigation.

Q. Would that include Officer Durham?

A. Officer Durham would have been present in that meeting.

Q. What was the nature of your discussion with regard to Jessie Misskelley, Junior?

A. The discussion was that his name had come up as one person that we needed to talk to in regards to this.

Q. Why?

A. His name was brought in by a person that said that he was associated with another person that was a suspect, a Damien (968) Echols.

Q. So you learned from someone -- you or one of the other detectives -- that Jessie was an acquaintance or knew Damien Echols?

A. Yes, sir.

Q. That is your testimony?

A. Yes, sir.

Q. Was Damien Echols a suspect from the very beginning in this case?

A. Damien Echols was. Yes, sir.

Q. Is it true that on the day that the bodies were found that you had Mr. Echols in for questioning on that very day?

A. The day -- I do not recall what day it was that Damien Echols was brought into the police department. The day that the bodies were found I was at the crime scene basically all day long.

Q. You didn't question Damien Echols on that day?

A. I never questioned Damien Echols, period.

Q. Is it a fair statement that Damien Echols was the prime suspect from day one?

A. The prime suspect?

Q. He was a suspect from day one, was he not?

A. I don't have knowledge of day one. During the course of the investigation his name came up as a suspect.

Q. You don't know when the police first questioned him after (1969) the murders?

A. No, sir, I wasn't involved in that per se.

Q. It is fair to say on June third Mr. Echols was a suspect?

A. June third? Yes, sir.

Q. I want to be real careful about not putting words in your mouth but at the detective's meeting in which Officer Durham was present, it was discussed that Damien was a suspect and that you heard Jessie was an associate of him. Is that correct?

A. Yes, sir.

Q. What was the nature of their association?

A. I'm -- I'm -- I was advised that they were associates. I don't really know how tight they were if that's what you're asking me.

Q. I guess what I'm asking you is why -- what information did the detective bureau have that would put or link Jessie Misskelley to Damien Echols?

A. That they were all members of a satanic cult.

Q. At this point did you believe or did detectives in the West Memphis Police Department believe this was a satanic cult killing?

A. There was -- I don't really know how to answer what you just asked. Do I believe this was a satanic cult killing? I didn't know at that particular time. It had been brought up.

Q. I'm curious. You say that Damien and Jessie were allegedly members of this cult? (970)

A. Yes, sir.

Q. What does that have to do with the murders? What linked that -- what made you think Damien was a suspect?

A. I was advised by Inspector Gitchell to go and talk to -- we were assigned different people to talk to every day, and I was advised to go get Mr. Misskelley and find out if he had any knowledge about Damien Echols.

Q. There was nothing special about the fact that you had heard that they were in this cult that necessarily linked them to the murders, is there?

A. Just that he was -- that we had brought in so many different people during the time period and he was a name that came up that we needed to talk to in reference to Echols.

Q. You were bringing in everybody who had anything to do with Mr. Echols?

A. We were talking to as many people as we possibly could.

Q. You picked Jessie up -- you testified that you went to his trailer and he wasn't there, and you talked to his father at Jim's Repair Shop?

A. Yes, sir.

Q. And Jessie Senior went to pick up Jessie Junior?

A. Yes, sir.

Q. What was the nature of your discussion with Jessie Senior?

A. I advised him I needed to talk to Jessie Junior in regards to this homicide investigation about some so-called friends of (971) his that lived in the Lakeshore area.

Q. Did you use the word "Damien" at all?

A. I don't recall.

Q. You knew that a couple of weeks or maybe a week prior to June third that Jessie had given you some information about someone he thought might be involved in this?

A. I'm not sure of an exact date of it but he had made a statement about what he had heard.

Q. You're talking about Mr. Laxton, Tracey Laxton?

A. About the incident, yes, sir.

Q. So you were the officer that Mr. Misskelley talked to prior to June third that he thought Mr. Laxton was involved?

A. No, sir. That was just someone that -- I'm not real sure exactly how that all occurred.

Q. I will just go on because I don't want to talk about something you're not sure of. Was there anyone else present at Jim's Repair Shop when you got to the shop and asked to speak to Jessie Junior?

A. I would assume that another person that was there that was kind of trying to listen to what me and Jessie Senior were talking about would have been Jim but I don't know him.

Q. Would that be Jim McNeese?

A. I would assume that was Jim, the owner of the repair shop.

Q. You told Jessie Senior in the presence of Jim, the owner of the repair shop, that you wanted to talk to Jessie Junior about (972) some of his friends -- about this homicide. Is that correct?

A. As I remember it, Mr. McNeese was -- kept kind of scooting over there trying to hear what we were talking about. I don't know whether he overheard -- don't think so, but he may have, yes.

Q. Was there any mention about the thirty thousand dollar reward that was available leading to the conviction of the persons responsible for this homicide?

A. I don't remember that.

Q. Is it possible that you and Mr. McNeese and Mr. Misskelley Senior discussed that?

A. I don't recall. They -- I would just be assuming that maybe they asked me what the reward was up to.

Q. You don't deny --

A. I don't remember.

Q. Do you remember when you went to get Jessie Senior's signature on the polygraph release form at Chief's Auto Parts, do you remember talking to Jessie Senior about buying a new truck?

A. I don't -- that doesn't sound like it came up in the conversation. We were talking --

Q. You didn't tell Jessie Senior that, "If Jessie Junior tells us something about who did this" - there would be a lot of money and Jessie would get the money?

A. They may have asked me what the reward was or something to (973) that line, but I don't particularly remember that part of the conversation.

Q. You're not denying it then. You say you don't remember?

A. They may have asked me what the reward was and I may have told them, but I don't recall a new truck -- something being talked about a new truck.

Q. You don't recall Jessie Junior saying, "If I get that thirty thousand dollars, I'm going to buy my daddy a new truck"?

A. No, sir.

Q. Don't recall that?

A. (SHAKES HEAD)

Q. But you remember going to Chief's Auto Parts and getting Jessie Senior to sign it?

A. Yes, sir. That's why I went there was to get Jessie Senior's permission to polygraph Jessie

Junior.

Q. You testified that you did not read Jessie his rights until about an hour after you had questioned him at the police department?

A. Yes, sir. That was when -- that was -- I advised him of his rights prior to asking him whether or not he would take a polygraph exam.

Q. So when you went out to the repair shop and Jessie Senior brought Jessie Junior back to the repair shop, there was never a discussion about Jessie's rights?

A. At that time he was not a suspect. Just a possible witness (974) or someone that might have had some information.

Q. So what exactly did you tell Jessie Junior when he arrived at the shop?

A. I asked him if he would mind coming to the police department and answer questions about some boys that lived out at Lakeshore.

Q. You didn't talk about his rights at that point?

A. He was not a suspect at that time.

Q. My question was, did you talk to him about his rights, not whether he was a suspect.

A. No. He voluntarily agreed to accompany me to the police department.

Q. So that subject just never came up?

A. At that point, no.

Q. When you got him down to the police department, you began to ask him the questions regarding name, address -- State's Exhibit Eight. You talked to him about his name, his address, who his friends were -- those type of things?

A. Yes, sir.

Q. You got some friends listed on the back?

A. Um-hum. Asked him who his best friends were and he gave me a list of his best friends.

Q. You mentioned earlier that you knew Jessie Senior. Did you also know Jessie Junior?

A. No, sir, not -- I knew who he was when I saw him. I knew (975) Jessie Senior. I did not

know Jessie Junior.

Q. Did you know he was retarded?

MR. FOGLEMAN: I object to that. The proof has been that he is not retarded.

THE COURT: Sustained.

BY MR. STIDHAM:

Q. Did you know that he was slow or mentally deficient in any form or fashion?

A. In my opinion he was -- he could understand everything I was telling him and was responding back and didn't appear to be -- didn't appear to be slow, no.

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

(THE FOLLOWING CONFERENCE WAS HELD AT THE BENCH)

MR. STIDHAM: Your Honor, am I not allowed to use the word "mentally retarded" when describing the defendant in this case in spite of what Doctor Wilkins testified to?

MR. FOGLEMAN: Doctor Wilkins testified that he did not make a diagnosis that he was mentally retarded.

THE COURT: He testified completely opposite of what you are contending. He was he was borderline.

MR. STIDHAM: Your Honor, there's a clinical diagnosis and there's the State's definition with (976) regard to the death penalty. We submit that they are different. Doctor Wilkins did testify that Jessie has been diagnosed in the past as being mentally retarded and he had also diagnosed him --

THE COURT: You can talk about him in terms of him being borderline retarded and you can talk about if he had an opinion whether he was retarded. You can ask that kind of things, yes.

(RETURN TO OPEN COURT)

BY MR. STIDHAM:

Q. You testified that Officer Ridge was present during this question and answer session?

A. He came in probably while I was partially through with this subject description form.

Q. Looking at your notes -- first of all without looking at your notes, do you remember what time you began filling out the investigative report?

A. I had taken some notes during the course of talking to Mr. Misskelley.

Q. You filled out Exhibit Eight which is the subject description form?

A. Yes, sir.

Q. Then later you filled out an investigative report?

A. This is just some rough notes taken while I was highlighting some things while I was talking to him. (977)

Q. Do you remember what was contained in your notes and what questions you asked him without looking at your notes?

A. The questions -- as far as different questions I would have asked him, I would say I would have a memory of some of the things he told me.

Q. But you don't remember specifically what questions you asked him without referring to your notes?

A. I don't think in my notes I have got particular questions. It is highlights of what he told me while I was talking to him.

Q. Do you have a copy of this?

A. Yes, sir, I do.

Q. Those are your notes of what you talked about?

A. This is some highlighted things that I jotted down while I was talking to him.

Q. So you obviously asked him questions because how could he be telling you stuff if you didn't ask him questions?

A. Yeah, we asked him -- the bulk of this was his knowledge of Damien Echols.

Q. In your notes it says -- said something about Damien said something about Jason Baldwin, said something about Damien's girlfriend. In the middle of your notes what does he say about a Robert Burch?

A. It was about -- he had heard a rumor that -- he had heard a rumor that Damien and a

subject by the name of Robert Burch had did it. (978)

Q. So obviously you asked him, "Do you know about what happened to the boys?"

A. That would be more in the line of, "What have you heard? What do you know?"

Q. You asked him what did he know about the homicides? Is that what you asked him?

A. As far as him being a suspect even at this time when I was doing this, no, sir. It wasn't in the line of questioning, "Did you do it," or anything of that nature.

Q. According to your handwritten notes when Jessie told you in response to your question, "Do you know anything about the homicides," -- "I heard that Damien and Robert Burch did it." At this point he's not a suspect?

A. Something he heard is a rumor he had heard. There was a lot of people speculating and telling what they heard.

Q. He wasn't a suspect at this particular time?

A. At this particular time, no, we were still -- we were trying to find out some information about Damien Echols from him.

Q. What is the next entry in your notes?

A. This is -- the next entry in my notes after that is I asked him where he was at -- if he can remember the day that this happened.

Q. "This" being the homicide?

A. Yes, uh-huh. That he -- if he -- that line of questioning (979) would have more or less been if he can remember what day, if he had seen Damien that day or whatever.

Q. You were not accusing him of doing this because you asked him where he was that day. Is that what you are telling the Court?

A. We asked a lot of people where they were at that day to see if they remembered that day in regards to if they seen, heard or whatever.

Q. I'm a little bit confused because you're telling me you asked someone where they were on the day of the homicides, yet you didn't consider them a suspect?

A. That was a question that I asked probably everybody I had talked to up to that point and the other people -- there were a lot of people that I had talked to that were not considered

suspects and at this point in my opinion Jessie Misskelley was not a suspect up to this point.

Q. At 11:00 A.M. on 6-3-93 he was not a suspect?

A. At this point he was not -- at what time?

Q. It says in your notes 11:00 A.M. on 6-3-93.

A. This was written probably during the 10:30 time period. This -- these notes weren't all jotted down at 11:00 A.M. This is the time I wrote out here to the side and at the completion of this interview. It started between ten and eleven.

Q. Are you trying to confuse everyone by putting the wrong time in your notes? I'm confused, officer. It says 6-3-93 at (980) 11:00 A.M. and it looks like you asked him, "What do you know about Damien? When is the last time you seen Damien? Do you know who is responsible for these homicides?"

And Jessie replies he heard that Damien and Robert Burch did it. And then you ask him, "What were you doing on the day of the murders," and he tells you according to your notes, "Stated he was working with Ricky Deese roofing."

Why would you be asking someone if they are not a suspect what they were doing on the day of the homicides if in fact they weren't a suspect?

A. The question that I answered a while ago was that pretty much everybody I talked to I asked them if they could remember. You're talking about a month later when I'm talking to Mr. Misskelley. In my notes he thinks he worked that Tuesday, Wednesday and Thursday that week -- for Ricky Deese that week, trying to get him to remember around that time frame.

Q. You're asking everybody, not just Mr. Misskelley?

A. Yes. That is a question that we asked numerous people during this investigation.

Q. If I was at the West Memphis Police Department and I was sitting in your office and you're asking me what I did on May five, I would feel like a suspect --

MR. FOGLEMAN: Your Honor, is there a question in there?

THE COURT: I don't know. Go ahead. (981)

BY MR. STIDHAM:

Q. Would you feel like a suspect if you were in a police officer's office and he was asking you what you were doing on the date of the murders?

A. It would depend on how the questioning was given. I'm telling you at this time I was not questioning him in the line of a suspect but as that of a potential witness.

Q. I'm going to take your word.

MR. STIDHAM: Judge, Mr. Crow says he's hungry. Could we break for lunch?

THE COURT: Yes. We'll be in recess until 1:15.

(RECESS)

(RETURN TO OPEN COURT)

BY MR. STIDHAM:

Q. Before the lunch break, we were talking about the fact that you had went and picked up Jessie Misskelley on the morning of 6-3-93 and you said that at the detective's meeting that morning it was discussed among the detectives, which I assume would be yourself, Officer Durham, Officer Gitchell and Officer Ridge. Was there anybody else present?

A. At that point we had a team of about 13 or 14 investigators. At that particular morning I don't know how many were present.

Q. Tell the Court exactly what the nature of the discussion was in regard to Jessie and this cult. What made you want to go (982) pick him up?

A. His name came up. I was advised by Inspector Gitchell that I needed to go and pick him up. It was in reference to some information that we had gathered from another source that he was a friend or whatever of Damien's.

Q. You testified earlier that you had received information that he was in a cult with Damien?

A. Yes. That was part of that same information.

Q. What was the nature of that information? I want to be real specific about the cult.

A. That he had attended -- it is my understanding he had attended some kind of satanic ceremony with Damien.

Q. So that's the information the officers were dealing with that morning?

A. There may be more information but that's the information that I had at that point.

Q. So your assignment was to pick up Mr. Misskelley and question him about Damien and

this cult activity?

A. That was my assignment that particular morning -- to talk to Mr. Misskelley.

Q. You went and received Mr. Misskelley Senior's permission for the polygraph test?

A. Yes, sir.

Q. That was at Chief's Auto Parts?

A. Yes, sir. (983)

Q. Did you talk to Mr. Misskelley Senior about Jessie's constitutional rights, his rights to remain silent; in other words, the Miranda warning. Was that discussed with Jessie Senior?

A. No, sir.

Q. Why didn't you take a rights waiver form for Jessie Senior to sign while you were doing the polygraph?

A. I did not.

Q. Why didn't you?

A. We'd advised him of his rights.

Q. You knew he was under 18. That's why you had to get a polygraph release --

A. That is some kind of requirement required under Arkansas polygraph -- that was something that Bill Durham said under the Arkansas polygraph laws that he had to have to give a polygraph exam.

Q. Are you aware of the fact that Arkansas law requires a juvenile's parent to sign before they can waive their rights?

MR. FOGLEMAN: Your Honor, that is in Juvenile Court. The Arkansas Supreme Court addressed that issue and when they are tried as an adult, that did not apply.

THE COURT. That is my understanding.

MR. STIDHAM: Judge, they didn't know what was going on at this time. He said he wasn't a suspect. (984) He was questioning a juvenile. He didn't know what the prosecutor was going to file or where.

THE COURT: Go on. I hadn't said anything about you asking the questions. You're asking him about the status of the law, and it is contrary to what you just stated, to my knowledge.

MR. STIDHAM: May I get an answer out of him then, your Honor.

THE COURT: Sure. Do you know what the Arkansas law is on polygraph examinations of juveniles or other --

MR. STIDHAM: No, your Honor, it's specifically with regards to waiving your Miranda warnings -- your parent must sign in order for it to be valid.

THE COURT: All right.

BY MR. STIDHAM:

Q. Were you aware of that?

A. I have in the past talked to the prosecutor's office in regard to that subject and with the nature of this crime and him being 17 years old and me feeling that he fully understood his rights, I did not at that time obtain information from his father other than give me permission to talk to Jessie.

Q. So his Miranda warnings were not discussed with his father?

A. No, sir. The polygraph -- we told him we had talked to him and would like to give him a polygraph exam in regards to what (985) he told us as to whether it was true or untrue, and he gave his permission for us to do that.

Q. Did the prosecuting attorney tell you that you did not have to have Jessie Senior's signature that day -- or when was your discussion with the prosecuting attorney regarding --

A. This has been prior to this incident, over numerous other cases.

Q. Do you know when the Boyd decision came down from the Arkansas Supreme Court?

A. No, sir.

Q. Before lunch we were talking about your notes, specifically your investigative report that is dated 6-3-93 at 11:00 A.M. In your notes you indicated that you had asked Jessie where he was that day, on May 5th. Is that correct?

A. Don't know if exactly I asked him that particular question. We had referred to the -- this had been a month later and we were getting back to that time frame, and he said during the week of the murders -- during the conversation he had brought up an incident about seeing a

bicycle and I think what it was was that we were trying to get down to the day that he saw the bicycle. He saw a young boy on a bicycle, he said, and we were trying to find out what day that was on reference to the week of the homicide and he stated that he had worked that Tuesday, Wednesday and Thursday.

Q. On the second page of your handwritten notes indicates that (986) Jessie said he got off at 5:00 P.M. that Wednesday?

A. Stated that he had gotten off about 5:00 P.M. that Wednesday. That was the day he was referring to in reference to seeing what he thought was one of the little boys on a bicycle supposedly like hiding from the police or something around the 7th street overpass, maybe skipping school or something, he said.

Q. After you complete your notes here, you don't participate in the interrogation anymore, do you?

A. After these notes, no, sir.

MR. STIDHAM: We would offer these notes as an exhibit.

MR. FOGLEMAN: No objection.

THE COURT: It may be received for purposes of this hearing.

(DEFENDANT'S EXHIBIT ONE IS RECEIVED IN EVIDENCE)

BY MR. STIDHAM:

Q. On the last page in your notes it says that, "Jessie has never been to Robin Hood Hills." Is that correct?

A. He stated to me that he had never been to Robin Hood Hills.

Q. Would it be fair to say that up to this point -- up through your entire participation in this investigation, he was trying to be very helpful to you, offering you information, telling you things?

A. We were trying to get any information he had like any other (987) person that we brought in while we are working on this.

Q. You told John Fogleman earlier that you had reason to believe that he was being deceptive or not telling you the truth. What is it he's not telling you the truth about?

A. He had made a statement that there was some conflict from another person. We had the

information that he had been at some satanic worshipping ceremonies after the murders with Damien, and he claimed he wasn't in any such group.

Q. So you're saying you didn't believe him?

A. We set him up to see whether or not everything he had told us and the information he had given [sic] us was the truth.

Q. That's not answering my question. My question is did you feel that Jessie Misskelley was being dishonest with you when he told you he did not go to the devil worshipping meeting?

A. I questioned that.

Q. Was there anything else that you asked him that day that he told you about that you questioned?

A. Overall, the -- just the fact that he hadn't been involved in any satanic cults or anything of that nature and just -- we polygraphed lots of people after taking statements from them or talking to them to see if they were truthful.

Q. So what was the purpose of the polygraph test? Why did you want him to take the polygraph test?

A. To see if he was being truthful about everything that he had said. (988)

Q. Everything or just the part about the devil worshipping?

A. I'm not sure how he formulated -- Durham formulated his questions -- but his truthfulness in general.

Q. Did you talk to Durham about what questions to ask him?

A. Probably Detective Ridge had more talking to him about question to ask because Ridge was present during talking to Misskelley.

Q. So you didn't talk to Durham about the polygraph then?

A. We had had a conversation and had asked some points as far as if he had ever been to Robin Hood and whether or not he had ever attended any satanic worshipping.

Q. So you helped participate in what was going to be asked?

A. Yes, I had talked to Durham, yes.

Q. How come your notes don't reflect that you asked Jessie these questions?

A. I wrote down highlights of what -- during while I was taking notes, wrote down highlights of things that he said.

Q. Why don't your notes reflect that you asked him these particular questions?

A. I interviewed him and these are some notes that I took down during things which I felt were important about Damien Echols, which was the main subject that I was talking to him about at that time.

Q. Wasn't it important to you to write things in your notes that tended to show that Jessie didn't have anything to do with (989) this?

A. Up until --

Q. Let me rephrase that. You're saying you just wrote down things that you thought were important?

A. Yes, sir.

Q. You didn't write down everything?

A. No, sir.

Q. You seem to have trouble recalling exactly what you asked him. Would that be a fair statement?

A. Word for word I don't remember.

Q. Why didn't you record it?

A. We didn't -- he was not a suspect at that time and we were trying to find out if he had any knowledge of -- of -- of Damien or of this -- of this homicide.

Q. You do have the capability to record interrogations, do you not?

A. If it would have got to the point where he said, "I know all about it," I would have tape recorded it.

Q. But the stuff leading up to it, that's not important?

A. Would you ask that question again?

Q. The questions and answers and that part of the interrogation leading up to when the suspect finally breaks, that's not important to you?

A. He was not being interrogated as a suspect at that time. Those were points that I was trying to find out in reference to (990) another person.

Q. Were you present in the room when Officer Ridge told Jessie that he had seen him at a cult meeting with Damien?

A. If Detective Ridge told Jessie that he personally seen him at a cult meeting, I don't remember anything like that being said.

Q. Were you present when Detective Ridge told Jessie that he knew that Damien and Jason were having sex with each other?

A. I cannot honestly say that that was something that was said in my presence.

Q. Were you present when Detective Ridge told Jessie that he knew that Jessie was involved in the homicides?

A. No. Nothing like occurred to my knowledge. If that occurred, that would have to have occurred after the polygraph.

Q. Were you still at the station house when the polygraph was being conducted?

A. Yes, sir.

Q. And to make sure that I understand, you helped Detective Durham formulate the questions that were asked in the polygraph test?

A. I went to Detective Durham to ask him if he could set up the polygraph exam.

Q. So you were the officer who actually talked to him about it?

A. It was probably me, Detective Ridge and Inspector Gitchell (991) was in and out.

Q. When did Jessie ask to go home for the first time? Was it before or after the polygraph test?

A. I wouldn't know that. Jessie never asked to go home in my presence.

Q. Not in your presence?

A. No, sir.

Q. Where were you physically when the polygraph was being administered by Detective Durham?

A. Either in my office, which is on the other end of the building, or in Inspector Gitchell's office which was the main area where we had everything as far as the paperwork and was kind of like the command post.

Q. The war room? That's where you had all the evidence?

A. That's where we had our meetings.

Q. That is right across the hall from the polygraph office, is it not?

A. There is a hallway and then another office and a polygraph office so it is in the vicinity.

Q. Were you eavesdropping on what Detective Durham was asking him during the test?

A. I don't believe -- I -- no, sir.

Q. You weren't standing up against the door, your ear against the wall listening?

A. No, sir, I wasn't. (992)

Q. So that must mean that Detective Durham was screaming at Mr. Misskelley pretty loud to enable you to run in there and physically restrain Jessie during the test?

A. That never happened.

Q. You didn't enter the polygraph room and physically restrain Jessie?

A. That is my statement under oath that that never happened.

Q. Did you hear yelling or screaming during the polygraph test?

A. No, sir.

Q. You never entered the polygraph room at all?

A. No, sir.

Q. How about after the test was completed?

A. I don't think I had any contact with him after the polygraph test. We talked to Detective

Durham who came over but no, sir.

Q. Did you ever make an attempt on June third to verify any of the statements that Jessie was telling you about him roofing that week, working with Ricky Deese?

A. I know that Ricky Deese was interviewed in regard to that, didn't particularly interview Ricky Deese myself.

Q. That was long after the arrest, was it not -- and the interrogation on June third?

A. I don't know what day that that was done.

Q. You personally did not do anything to verify about where he (993) was that day on June third?

A. I went out and interviewed witnesses in regards to some of this that --

Q. You're not understanding my question. Mr. Misskelley's telling you, "I was with Ricky Deese that week, and I got off work at five that day." Did you make any attempt on June third to call Mr. Deese or verify the fact that he was working that day?

A. No, sir.

Q. Wouldn't that have been easier to do than do the polygraph test?

A. Repeat that question.

Q. You said that you wanted to check and make sure he wasn't telling you any lies about what he told you. Wouldn't it have been easier to make a couple of phone calls and ask where he was that day than to conduct a polygraph test?

A. It was checked on.

Q. That day?

A. It was not checked on that day.

REDIRECT EXAMINATION

BY MR. FOGLEMAN:

Q. You had already had a witness who said that Damien and Jessie had been at one of these -- some kind of strange meeting together?

A. That is the information that Inspector Gitchell had (994) related.

Q. Mr. Stidham was asking you about something about a reward, a new truck. Did you ever bring anything up either to the defendant or his father about a reward?

A. If it was asked of me --

Q. No. Did you bring it up?

A. No, sir.

Q. Mr. Stidham also focused on that Damien Echols was a suspect. Was he the only suspect?

A. No. There were numerous suspects.

RECROSS EXAMINATION

BY MR. STIDHAM:

Q. You stated when I asked you about the thirty thousand dollar reward -- you said that you were not sure and didn't remember whether it was discussed. Are you saying now after lunch that you remember that specifically?

A. He asked me if I brought anything up in that nature and I didn't bring anything up in that nature as far as the thirty thousand. I did not come out and say there is a thirty thousand dollar reward that day.

MR. FOGLEMAN: Your Honor, my understanding of the prior testimony was that Mr. Stidham asked "Did that come up," and Mike Allen said there may have been but he didn't remember it. My question was whether he brought it up. (995)

MR. STIDHAM: I thought I asked him the same question --

THE COURT: I don't know whether you did or not --

MR. STIDHAM: -- I want to know what the difference was before lunch and after lunch.

THE COURT: You can ask him that if you want. I don't know what you asked the first time.

BY MR. STIDHAM:

Q. Your testimony under your oath is that you did not bring up the thirty thousand dollar reward?

A. I did not bring a subject of that nature up.

Q. It seems to me that you're being a bit evasive. Is it possible that someone else might have brought it up with Jessie present that day?

A. During that time period -- you brought the subject up, did Mr. McNeese -- was there a conversation made --

Q. I said nothing about Mr. McNeese.

A. -- during your first talking to me about that, I do not know if that was discussed. I did not bring a topic of that nature up.

Q. You cannot say under your oath it was never discussed that day?

A. If someone would have asked me, I probably would have told them what the reward was. You mentioned something about a (996) truck. That doesn't ring a bell with me.

(WITNESS EXCUSED)

MR. FOGLEMAN: We would offer as State's Exhibits Five, Six and Seven certified copies of the docket sheets of the Juvenile Court Docket EJ-88-154, EJ-92-423, EJ-93-117. In each of those cases the defendant was represented by counsel in these cases.

MR. STIDHAM: Judge, I don't know what that has to do with anything.

MR. FOGLEMAN: Again, it goes to his experience with the system and his representation by counsel in the past and it goes to his sophistication, if you want to use that term, in this particular area of knowing his rights and being represented by counsel.

MR. STIDHAM: Whether or not you have sixteen lawyers doesn't make you able to understand your Miranda warnings. I don't see the relevancy of that, and I think it is improper in light of the fact that they are juvenile records. Even if it is relevant, there's no probative value.

MR. FOGLEMAN: I think those cases that deal with voluntariness, especially with juveniles, say that one of the factors is their prior experience in the system and representation.

MR. STIDHAM: He brought that out with the waiver (997) forms that were introduced.

MR. CROW: Your Honor, the records don't reflect also that he requested counsel. It's a matter of course in this district when you are a juvenile, you're appointed counsel whether you request it or not.

THE COURT: I'm going to overrule your objection. For the purposes of this hearing they will be received.

(STATE'S EXHIBITS FIVE, SIX AND SEVEN ARE RECEIVED IN EVIDENCE)

BILL DURHAM

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

DIRECT EXAMINATION

BY MR. FOGLEMAN:

Q. Will you please state your name and occupation?

A. Bill Durham, detective, West Memphis Arkansas Police Department.

Q. How long have you been employed in law enforcement?

A. All totaled, approximately twenty years.

Q. I want to direct your attention to June third, 1993. On that date did you have occasion to come into contact with the defendant Jessie Misskelley, Junior?

A. Yes, I did.

Q. Do you know the approximate time? (998)

A. Approximately 11:15 to 11:20 A.M.

Q. Did you have a conversation with him?

A. Yes, sir, I did.

Q. Prior to having a conversation with him, did you advise him of his rights?

A. Yes, sir, I did.

Q. How did you do that?

A. By means of an advice of rights form outlining his rights which I placed this so he could read as I read his rights to him to make certain there's no misunderstanding. I also explained what each of the rights meant. He initialed each of the rights individually and then signed the

waiver of rights.

Q. When you turned it toward him, did it appear that he was reading?

A. Yes, sir.

Q. I want to show you State's Exhibit Eleven for identification purposes and ask if you can identify that?

A. Yes, sir. This is a photocopy of the rights form signed by Jessie Misskelley on June 3, 1993, at 11:30 A.M. witnessed and signed by myself.

Q. In advising him of his rights I think I understood you to say that you read them to him?

A. Yes, I did.

Q. After you read each right, did you inquire whether he understood those rights? (999)

A. Yes, sir.

Q. Did he indicate that he understood them?

A. Yes, sir, he did.

Q. How did he indicate?

A. He said he understood.

Q. Did he also place his initials?

A. Yes, sir, he did.

Q. Did you use any force, promises, threats or coercion to get him to place his initials by each of his rights?

A. No.

Q. Did you also go over the waiver of rights portion?

A. Yes, I did.

Q. Did you ask him to sign the form?

A. Yes.

Q. What was his response?

A. He indicated he understood, and he did sign his name.

Q. Were you present?

A. Yes, sir.

Q. Did you see him sign his name?

A. Yes, sir.

Q. Was there anybody else present?

A. No, sir, not at that time.

Q. Did you use force, promises, threats or coercion to get Jessie Misskelley, Junior to sign this form or to talk to you?

A. No. (1000)

MR. FOGLEMAN: We would offer State's Exhibit Eleven.

MR. STIDHAM: No objection.

THE COURT: It may be received without objection.

(STATE'S EXHIBIT ELEVEN IS RECEIVED IN EVIDENCE)

BY MR. FOGLEMAN:

Q. I also want to show you State's Exhibit Ten and ask if you can identify that?

A. It's a polygraph examination release form signed by Jessie Misskelley, Junior.

Q. What involvement did you have with the polygraph release form?

A. The consent for the polygraph with Jessie Misskelley, Senior had already been signed, given consent by his father, and witnessed by Detective Allen. When I was given this form, Jessie Misskelley, Junior was with me. I again went over this, explained some of the words I thought he might have a problem with. He said he understood. He signed it in my presence, and I witnessed his signature.

Q. Did you use any force, promises, threats or coercion to get him to sign the form or to take a polygraph examination?

A. No.

Q. Do you know approximately how long the defendant was with you?

A. He was with me approximately an hour. (1001)

Q. From approximately when to when?

A. From approximately 11:15 until 12:15, 12:20 somewhere in that area.

Q. After the last chart you ran, did you make a notation of the time?

A. Yes, sir, I made a notation at the end of that particular chart.

Q. Do you know what time that was?

A. If memory serves me correctly, it was 12:11 P.M.

Q. During the course of your involvement with the defendant, was there any force, promises, threats or coercion at all during the course of your involvement with the defendant?

A. No.

Q. After you completed your polygraph examination, what did you do then?

A. I asked Jessie Misskelley to sign his polygraph sheet, which he did. I then advised Mr. Misskelley of the test results.

Q. And did you conduct a post test or try to conduct a post test interview?

A. I attempted to and he refused to answer any questions.

Q. When you say, "he refused," what do you mean?

A. He remained silent. When I told him the test results, he slumped down in the chair, turned his head toward the opposite wall, and refused to answer my questions, made no sound or (1002) responses whatsoever.

Q. When you say, "he refused," did he say, "I refuse"?

A. No, sir. He was silent.

Q. After he was silent, what did you do?

A. When I saw he was not going to respond, I left my office, leaving Misskelley sitting there, advised Gitchell and Ridge of the polygraph test results and explained to them that Misskelley would not talk to me and perhaps someone else should try to question him.

CROSS EXAMINATION

BY MR. STIDHAM:

Q. Officer, do you know why Detective Ridge's notes reflect that the polygraph examination lasted from 10:30 to 12:30?

A. You'd have to ask Detective Ridge that question.

MR. FOGLEMAN: Where are you referring to in his notes?

MR. STIDHAM: It is the typewritten notes.

BY MR. STIDHAM:

Q. Have you seen those notes before?

A. No. To the best of my recollection, I have not.

Q. You don't have any explanation as to why these notes would reflect that?

A. Those are not my notes.

Q. You don't have any reason to know why that reflects that?

A. No, I can't answer that question. (1003)

Q. It is your testimony that you had Mr. Misskelley for about an hour?

A. Yes, sir.

Q. There were three charts done on the polygraph test?

A. That's correct.

Q. Each of these charts last approximately three minutes?

A. No, sir.

Q. That's not correct?

A. No, sir. Did you say twenty minutes?

Q. No. I said three minutes per chart.

A. Approximately each chart would last approximately two minutes. I ask a series of ten questions. I must wait a minimum of ten seconds between the subject's answer before I ask the next question. In a ten question chart that's going to make the actual end test itself per chart to be approximately two minutes long.

Q. So we've got about Six minutes of charts?

A. Correct.

Q. What happened the other 54 minutes?

A. When Mr. Misskelley first came into my office, I did an information sheet which is part of my report. I went over the advice of rights with him. I spent at least twenty minutes explaining to him how the test works, the conduct of the test, what I expected him to do as far as cooperation with the test itself, what the attachments to the instrument did and the basis (1004) for the instrument.

We talked in terms that I felt he understood -- he indicated that he did -- as far as the central nervous system, the autonomic system, and various physiological responses of the human body. I also asked him questions dealing with the matter at hand.

I formulated a test question sheet. I reviewed the questions with him twice. Once while I was formulating the questions and then again prior to the end test itself.

I explained to him that these would be the questions which are all worded so he can answer yes or no. I reviewed the questions with him in advance and explained to him that these would be the questions, that they would be asked in the same order each and every time and there would be no deviation in the manner in which the questions were asked prior to the test itself.

Q. When did you first realize you were going to conduct a polygraph exam?

A. I will have to guess probably fifteen minutes prior to Misskelley coming into my office.

Q. It would have been about --

A. I think Detective Allen had said they wanted a polygraph test on Misskelley and, of course, I can't tell you what happened with Jessie Misskelley, Junior prior to him coming into my office. (1005)

Q. Were you present at the detective's meeting?

A. I was.

Q. You remember the detectives or the group of you all discussing the fact that you had information that Jessie was at a cult meeting with Damien?

A. Of my own memory I don't recall that.

Q. Was there any mention of a polygraph test made at that meeting that morning?

A. I can't recall that. There had been many instances where they were mentioning someone taking a polygraph test, but it wasn't always possible to schedule them on the day it was brought up. Had it been mentioned that morning, which I don't vividly recollect, that is not to say I would have done it on that particular day had he not been available.

Q. (HANDING) Do you recognize that photograph?

A. This appears to be the photograph that was taken in my office while I was out with the flu last week.

Q. Does it reflect the polygraph machine?

A. It shows the polygraph instrument mounted on the polygraph desk.

Q. Do all four of those photographs depict your office and the polygraph machine?

A. They show my polygraph and also the examiner's chair.

Q. Would these photographs be a fair and accurate depiction of your office where the polygraph machine is and where the (1006) polygraph tests are administered in West Memphis?

A. Not at the present time and not at the time I did these tests.

Q. What do you mean by that?

A. I can see there is a softball bat laying in the corner. I received that bat approximately the second week of December. It was given to me by another officer. And it was not in the office on the date that I conducted this polygraph test or any of the tests related to this case. It had been there since the middle of December and it is not in my office at the present time.

Q. So you're saying that the photographs in and of themselves are representative of your

office with the exception of the aluminum baseball bat propped up in the corner?

A. Let me look at them again.

Q. (HANDING)

A. There's one other change. You show a large chair. That chair was not there when I conducted any of these tests involving this matter. That chair was put there sometime later in the summer when we got a different conference table and chair in Inspector Gitchell's office and I inherited that chair because I didn't have enough seating in my office. So the chair was not there at the time I conducted the test. Neither was the softball bat. Everything else appears to be accurate.

Q. That baseball bat wasn't in there on June third when you (1007) gave the polygraph test to Mr. Misskelley?

A. No.

MR. FOGLEMAN: Subject to the limitations that Officer Durham has put on the contents of the room we don't have any objection. We do think it would be helpful for the record if it could be stated when the photographs were taken.

MR. STIDHAM: They are on the photographs themselves. January fourth, 1994.

THE COURT: Are you offering them?

MR. STIDHAM: Yes, your honor.

THE COURT: They may be received without objection.

(DEFENDANT'S EXHIBIT TWO A, B, C AND D ARE RECEIVED IN EVIDENCE)

BY MR. STIDHAM:

Q. Was there a point during the polygraph examination of Jessie Misskelley, Junior that Mr. Misskelley became angry?

A. No, sir, not in my presence.

Q. Did you ever get angry at him at any time during the test?

A. No.

Q. Why did Detective Allen have to come in the room and restrain Jessie?

A. He didn't come in my office and restrain Jessie in my presence. (1008)

Q. It didn't happen?

A. Not in my presence. I can't say it never happened. I'm saying I never saw that happen.

Q. What were the results of Jessie's polygraph test?

A. It was my opinion that he was deceptive to the relevant questions dealing with his involvement in this homicide.

Q. Those questions you asked him -- do you have those in front of you?

A. Yes.

Q. The first question was, "Have you ever taken a polygraph test before?"

A. That's correct. It is an irrelevant question.

Q. Does it matter?

A. No, it doesn't.

Q. Second question is, "In regard to the deaths of those three boys, are you going to tell the truth during this test?" Is that a relevant question?

A. It is a sympathetic relevant, weak relevant.

Q. Third question, "Have you ever been in Robin Hood Hills?"

A. Relevant question.

Q. Question four, "Do you smoke dope?"

A. That's a control question.

Q. "Have you ever took part in devil worship?"

A. That's a relevant question.

Q. Question six, "Have you ever sold any dope?" (1009)

A. That's a control question.

Q. "Have you ever attended a devil worship ceremony in the Turrell/Twist area?"

A. That's a relevant question.

Q. Eight, "Have you taken any drugs or medication today?"

A. That's an irrelevant question.

Q. Number nine, "Are you involved in the murder of those three boys?"

A. That's a relevant question.

Q. Ten, "Do you know who killed those three boys?"

A. That, too, is a relevant question.

Q. Which questions do you contend that Mr. Misskelley was being deceptive on?

A. My written report only reflects the relevant question dealing with the matter at hand, which of course would be 3, 5, 7, 9 and 10. The other questions are used for different purposes. They don't deal with the matter at hand per se.

Q. Did you ever tell Jessie Misskelley at any time that you knew he was lying because his brain was telling you that he was lying?

A. I not only did not make that statement, I have never made a statement like that.

Q. Did you explain to Jessie what a polygraph test was?

A. We covered that in the pre-test interview.

Q. So I assume you informed Jessie that he had flunked the (1010) test?

A. That's correct.

Q. Did he make any response to you?

A. At that particular point he slumped in his chair, turned to his right and faced the opposite wall and made no response.

Q. So for the record then you're saying that he was deceptive in question two?

A. I beg your pardon?

Q. Which questions was he being deceptive in your analysis? That would be questions two --

A. Mr. Counselor, questions 3, 5, 7, 9 and 10 are the relevant questions dealing with the matter at hand. The other questions are either control questions or separation questions. They are not part of the test per se other than for the sake of scoring.

Q. Are you contending then that he was being deceptive in 3, 5, 7, and 9?

A. And 10.

Q. And you didn't care about any of the other questions? Did you score them at all?

A. They are control questions. I looked at those questions. If you want to know the results, I'll certainly tell you. Yes, in my opinion that he was lying. He did not intend to tell the truth during this test and, yes, he had both smoked and sold dope, but that was not the issue at hand.

Q. So he flunked every one of them? (1011)

A. No, sir.

Q. Which one did he pass?

A. The very first question.

Q. Why did you think it was important to mix drug questions with homicide questions?

A. A control question is a control question. If a person responds to it, then of course it is a good control. If there is no response to that question, then it becomes an irrelevant question to the subject at hand. If you ask relevant questions directly in a row, then you're not running a zone of comparison polygraph test. You're doing a peak of tension type test, and that is not what this was.

It doesn't matter whether the question was related. At the time I ran this test, you must understand that Jessie Misskelley, Junior was not a suspect. He was at that time, I was told, that he was most probably a reluctant witness. The purpose of the test was to basically see if he had information that might be helpful to us in the investigation of this matter and questions dealing with his involvement or knowledge were questions to determine whether he was or whether he was not involved in the murder itself.

The questions dealing with does he know who -- if he had been a reluctant witness, he may have overheard conversations. Here again is one of the situations where we are searching for information. (1012)

Question number nine dealing with involvement in the murder themselves was a cover question to -- as I had -- to determine whether or not he was involved himself or not or

whether he might possibly have information that would benefit us in the investigation. Had he been a suspect at the time, I would have asked a different series of questions that would have been more specific and more direct. At the time I did the test on Jessie Misskelley, Junior, he was not a suspect.

Q. Officer Durham, you mean to tell me that you just dragged anybody and everybody off the streets of West Memphis and gave them this test and see if they were telling the truth or not?

A. I did not give everyone on the streets of West Memphis a polygraph test. Depending on the individuals and depending on what they had to say in the pretest would determine the type of questions or the wording of the questions that I would ask.

If he had said that he had been in Robin Hood Hills but hadn't been there in the last year, for instance, then I would have asked him had he been in Robin Hood Hills in the last year. But he said he had never been there, which in my opinion was not the truth.

Q. Let's assume for a minute that I'm not a lawyer and you're not a polygraph guy and the police pick you up, take you down to the station and ask you these ten questions. Would you feel like you were a suspect if you were asked these ten questions? (1013)

A. I'm glad you asked me personally because if I was a suspect in any manner -- and I have taken polygraph test myself -- I would gladly take a polygraph test at anytime for anybody at the present time if there is any question as to my honesty or integrity, Mr. Counselor.

Q. How long have you been administering polygraph tests?

A. I graduated from the Zahn Institute of Polygraph in Miami, Florida, in December of 1981. I became licensed in the state of Tennessee in early 1982 through the Memphis Police Department.

Q. Why didn't you do a peak of of tension test on Jessie Misskelley?

A. Following this test -- is that what you're asking?

Q. I mean, why didn't you do it in the first place?

A. A peak of tension test is generally a searching peak of tension. Such as an example where a person is -- is as -- I want to do it in a way that you can understand.

The last time -- this case out West where a person was linked to a crime, a murder, and he had buried the body and it was important to the investigators to find where the body was located. They had narrowed it down to a certain area and they drew the area off in certain graphs and numbered them one through seven and a question on the test was, "Is the body buried in zone one, zone two" so forth and so on, and through the unknown searching peak of tension they were able to isolate the area and later locate the body. That is the true purpose of (1014) doing a peak of tension.

As far as doing a peak of tension following this polygraph test --

Q. That's not my question. My question is, why didn't you do it to begin with?

A. Because I use a zone of comparison. I use a zone of comparison which to the best of my knowledge -- and I have read this in the AAPA journals -- is the only polygraph technique that is recognized in the American Association of Chiefs of Police.

Q. Had you determined that Mr. Misskelley had been telling the truth and was not being deceptive on the questions, you would have turned him loose, right?

A. It is not my place to turn someone loose or incarcerate them based on polygraph test results. If Mr. Misskelley had in my opinion been telling the truth, then I would have told the lead investigator that in my opinion Mr. Misskelley had told the truth in regard to the relevant questions.

Q. Do you ever yell at suspects when you're giving the polygraph test?

A. No.

Q. Do you ever yell at suspects when you're interrogating them?

A. No.

(WITNESS EXCUSED) (1015)

BRYN RIDGE

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

DIRECT EXAMINATION

BY MR. FOGLEMAN:

Q. Will you please state your name and occupation?

A. Detective Bryn Ridge of the West Memphis Police Department.

Q. I want to direct your attention to June third, 1993. Were you on duty on that day?

A. Yes, sir, I was.

Q. Were you present or did you have some contact with the defendant Jessie Misskelley,

Junior?

A. Yes, sir, I did.

Q. I want to show you State's Exhibit Nine and ask if you recognize that?

A. Yes, sir.

Q. Were you present when Detective Allen advised him of his rights?

A. Yes, sir, I was.

Q. Did you sign the form?

A. Yes, sir.

Q. During the advice of -- tell the judge how Detective Allen went about advising him of his rights?

A. Read the top of the form that it's a rights advisement sheet, "Your rights," the name of whoever you are reading the (1016) rights to, date of birth, education, including the place where the rights were read to him which was the detective division, the date and then time. The form would be read in its entirety starting at the first, "We are informing you we are Detective Allen and Detective Ridge, police officers of the West Memphis Police Department, conducting an investigation for the offense of capital felony murder which was committed on or about 5-5-93. Before we ask you any questions, you must know and understand your legal rights."

Q. I'm going to stop you there. After you read that part, do you go on and read each of the individual rights?

A. Yes, sir.

Q. As on the form?

A. Yes, sir.

Q. Is that what Detective Allen did in this case?

A. Yes, sir.

Q. Did the defendant Jessie Misskelley indicate whether or not he understood those rights?

A. Yes, he did.

Q. How did he indicate that understanding?

A. The right was read to him. He was asked if he understood that right. He said yes and he placed the initial on the line in front of the right.

Q. Any force, promises, threats or coercion to get him to (1017) place his initials by each of the rights?

A. No.

Q. After you go over each right, what do you do?

A. Read the waiver of rights portion of the form.

Q. Did Detective Allen do that in this case?

A. Yes, sir, he did.

Q. Did you see him sign the form?

A. Yes, sir, I did.

Q. Any force, promises, threats or coercion used to get him to sign the form?

A. No, sir.

Q. Had you been present prior to the defendant being advised of his rights?

A. Yes, sir.

Q. Who was present at that time?

A. Myself, the defendant and Sergeant Michael Allen.

Q. Were you there the entire time?

A. Not the entire time. No, sir.

Q. Could you estimate -- how was it -- what were the circumstances?

A. Ah, he had been asked to come to the police department for an interview --

Q. I'm talked about after he's there with you and Detective Allen.

A. I walked in as Detective Allen was completing a subject (1018) description form.

Q. From that point, were you in the room?

A. Yes, I think I was. I may have left for just a minute but I returned.

Q. During that initial interview before he was advised of his rights, was there any force, threats, promises or coercion used?

A. No, sir.

Q. What happened after he was advised of his rights?

A. It was determined that we would request a polygraph examination.

Q. And how did y'all go about doing that?

A. Sergeant Allen got Detective Durham to find out what would be involved in getting the defendant available for that polygraph examination.

Q. As far as the defendant was concerned, what contact did you have with the defendant at that time, if any?

A. I was still in the room with him and as Mike is attempting to get the information that would be necessary for the polygraph examination to be conducted, we are still talking.

Q. After Detective Allen returns, do you have any more involvement at that point?

A. Not until after the polygraph examination.

Q. After the polygraph examination -- do you know what time that was?

A. It was completed at about 12:30. I was back in the office (1019) at about that time, and a few minutes later we went back into the office where the interview continued.

Q. Who is "we?"

A. Myself and Inspector Gitchell.

Q. How long were you and Inspector Gitchell with the defendant?

A. From about say in the area of 12:40 P.M. until the statement wherein he says to me, or while we are there, that he received a phone call that seemed to be important to the case to

me. That is when I left the room.

Q. After you were -- how long were you out about?

A. I was out of the room maybe a minute.

Q. And did anything else happen before you went back in the room?

A. Inspector Gitchell came out of the room.

Q. Do you know what time that would have been?

A. Approximately 2:20.

Q. After Inspector Gitchell came out of the room, did you change the manner in which you were conducting the interview?

A. Yes, sir.

Q. What was the change?

A. From that time forward on after the information was passed on to me about the statement made to Inspector Gitchell, it was decided we would tape the entire conversation from that point forward. (1020)

Q. As far as your involvement, how much longer did it go? What time did the tape conclude?

A. The tape concluded at 3:18.

Q. During this entire time that you were present, were any force, promises, threats or coercion used to get the defendant to say anything or do anything?

A. No, sir.

Q. Was anybody else ever in the room besides the two of you?

A. No, sir.

Q. Do you know whether or not the defendant was offered any food?

A. Yes, he was.

Q. Do you know when that was?

A. When the tape was completed, I asked him if he wanted something to eat or something to drink and there are other items also.

Q. Was that before or after that?

A. After that.

Q. Did he have any response to that offer?

A. He refused anything to eat or drink but he wanted some cigarettes.

Q. Were those provided to him?

A. Yes, sir.

Q. Mr. Stidham asked a question about -- it looks like some typed notes here. Do you recognize that? (1021)

A. Yes, sir.

Q. I want to refer your attention specifically -- the reference here about Detective Durham and the interview -- it says, "About 10:30 A.M. and he concluded his last test about 12:30"?

A. Yes, sir.

Q. Is that correct?

A. No, sir.

Q. What's wrong with it?

A. It should have been 11:30 A.M.

Q. Which one should have been 11:30?

A. The first time, "At about 11:30 A.M. and he concluded the test at approximately 12:30 P.M."

CROSS EXAMINATION

BY MR. STIDHAM:

Q. Officer Ridge, were you aware of this time discrepancy prior to testifying today?

A. No, sir.

Q. About the polygraph test?

A. No, sir.

Q. Why did you put 10:30 to 12:30 if it was incorrect?

A. I'm not a typist. It is probably a typographical error.

Q. You typed this yourself?

A. Yes, sir, I did.

Q. You said something in your direct examination that (1022) interested me. You said that you left the room for about a minute and when Inspector Gitchell came out, he said, "Get the tape recorder," and you made a decision that you were going to tape record everything from that point on?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Everything?

A. Everything that dealt with the interview. Yes, sir, I did.

Q. You didn't tape record anything up to that point?

A. No, sir.

Q. Damien Echols was a suspect from the very beginning of this case, was he not?

A. From the very beginning? No, sir.

Q. No, sir? Isn't it true that Damien was brought in for questioning the days the bodies were found or the day after?

A. It was a few days after. Yes, sir.

Q. That's not the beginning?

A. How long of a beginning you want? The day of the murders? Is that a beginning? I didn't know that Damien Echols existed on that day.

Q. You attended a detective meeting on the morning on June third when it was decided Jessie would be brought in?

A. Yes, sir.

Q. What was the nature of the conversation between the (1023) detectives regarding Jessie?

A. His name had come up in the investigation as having been possibly an acquaintance of Damien Echols.

Q. Anything else?

A. He said he may be part of a satanic group.

Q. Anything else specific about being part of a satanic group?

A. No, sir.

Q. Wasn't discussed about some lady telling you that she had seen Damien and Jessie at a cult meeting in Turrell or Twist?

A. Yes, sir. I knew of that information.

Q. Did you discuss that with the other officers?

A. It had been discussed. I'm not saying it was that morning, but it has been discussed.

Q. Officer Ridge, were you ever able to confirm that this devil satanic meeting had actually taken place in Turrell or Twist?

A. A witness tells us, yes, it did occur.

Q. Other than this one witness, is there anything to confirm that?

A. Just this witness that I'm aware of.

Q. So this witness never said -- took you out to the spot and said, "There's where it happened"?

A. Yes, sir.

Q. She took you out there and showed you where it happened?

A. Yes, sir. (1024)

Q. And I suppose you found large artifacts and other things involving Satanism at that spot?

A. No, sir.

Q. You didn't?

A. (NO RESPONSE)

Q. Did this person identify anyone besides Jessie and Damien as being part of this cult?

A. Yes, sir.

Q. And I suppose you talked to those people?

A. Haven't been able to locate him.

Q. Just one person?

A. One person that's been named.

Q. Didn't she tell you there was a lot of people there at this meeting?

A. Yes, sir.

Q. She could only tell you the identity of one other person?

A. Yes, sir.

Q. I guess it is safe to assume on June third, 1993, you probably had a pretty good hunch that Jessie was involved in these homicides?

A. No, sir.

Q. No?

A. No, sir.

Q. You are saying he was not a suspect?

A. No, sir. (1025)

Q. You had no probable cause to pick him up and arrest him?

A. He wasn't picked up to be arrested.

Q. What happened that morning that made you or Inspector Gitchell send Detective Allen after Jessie Junior?

A. We had determined that he may have been an acquaintance of Damien Echols and may have been involved in satanic activities.

Q. So on June third you thought that Damien was involved?

A. Yes, sir.

Q. And you also thought these murders were satanic?

A. There was a possibility. Yes, sir.

Q. So the purpose of bringing Jessie down to the police station was to ask him about Damien?

A. About the occurrences on the day of or that time period around when the murders occurred.

Q. So he was brought in to find out what he knew about the murders and what he -- where he was on May the fifth?

A. To find out if he had any information, yes, sir.

Q. So he specifically wasn't brought in to talk about Damien. He was brought in to talk about where he was on that day?

A. To talk about any information he may have had available. Yes, sir.

Q. Did Jessie tell you and Detective Allen on that morning before the polygraph test was administered that he knew anything about the murders?

A. Before the polygraph, no, sir. (1026)

Q. Did he give you any indication that he knew anything of the homicides?

A. He indicated that he believed that Damien was responsible for it.

Q. Was that sort of unusual for West Memphis on June third, 1993? Wasn't there rumors

going around that Damien was involved?

A. Yes, sir.

Q. That wasn't unusual then, was it?

A. No, sir.

Q. Did that knowledge in and of itself make him a suspect?

A. No, sir.

Q. Did you ask him whether or not he had been to a devil worshiper's meeting?

A. Yes, sir.

Q. What was his response?

A. He said no.

Q. Did you believe him?

A. Did I believe him? No, sir.

Q. What was the purpose of the polygraph test?

A. It is just an investigative tool in order to help us make a determination as to whether or not an interview would continue.

Q. The polygraph would determine whether you would keep on questioning the suspect?

A. That is just one tool. Yes, sir. (1027)

Q. That morning before the polygraph Jessie also told you, did he not, that he was roofing the day that this happened?

A. Yes, sir.

Q. Did you believe him when he told you that?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. Did you make any efforts to verify that at all?

A. Yes, sir.

Q. Who did you call?

A. The person he said he was working for.

Q. You called him on June third?

A. No, sir.

Q. When did you call him?

A. I've been trying to get a hold of him for a long period of time.

Q. But you didn't call him on June third?

A. No.

Q. That was after the statement that Jessie gave you?

A. Yes, sir.

Q. So again, was the purpose of the polygraph to confirm his whereabouts on May fifth or was the purpose of the alibi -- the purpose of the polygraph to determine whether or not he was involved in a homicide?

A. The purpose of the polygraph was to determine whether he (1028) was telling us the truth when he was there at the station.

Q. About everything and anything?

A. Yes, sir.

Q. Wouldn't it have been easier to call the roofer and see if that's where he was that day than to hook him up to a polygraph test?

A. The roofer would have only been one aspect of that day. The polygraph would have given us a good idea of the rest of what he had to say.

Q. Did you help Officer Durham participate in the formulation of the questions?

A. The formulation of the questions?

Q. For the polygraph.

A. I informed him of some of the points of the interview that Jessie had told us of. He formulated the questions. I did not.

Q. Do you know anything about a bat being in the corner of Officer Durham's office?

A. I was told there was one there when somebody was taking pictures while you were at the office the other day.

Q. Do you know where it came from?

A. About two weeks prior to that date I understand that Detective Lieutenant Hester had given it to Durham.

Q. It wasn't there the day the polygraph was administered, was it?

A. Not that I'm aware of. (1029)

Q. So you're telling me that at the time it was determined that Jessie needed a polygraph, you didn't have any reason to suspect him?

A. No, sir.

Q. Your notes reflect that Officer Durham came out of the polygraph test and told you Jessie was lying his ass off. Is that correct?

A. That's my interpretation of what I heard.

Q. Did you hear Durham say that?

A. He said he was lying about everything, I'm sure, and that may have been what I wrote down when I'm writing those notes.

Q. You're aware of the fact that a juvenile can't waive his rights unless the parents sign the consent?

A. Yes, sir.

Q. Why didn't you try to get Jessie's parents to sign the consent?

A. Detective Allen went to the parents and got permission.

Q. He only got permission for the polygraph. Is that correct?

A. I'm not sure. I do know that he got permission for the polygraph.

Q. You just don't know then?

A. Whether or not the father consented, I'm not sure.

Q. But you do know that's the law.

MR. FOGLEMAN: Your Honor, I have got to object again. In all due respect to Detective Ridge, he's (1030) mistaken on that. The Supreme Court has ruled to the contrary and these questions about the law are not proper.

THE COURT: It is not important what he asked the officer about the law and the polygraph. I'm the only one who needs to worry about that anyway.

MR. STIDHAM: Judge, I'm not asking him about the laws on the polygraphs. I'm asking him whether or not a juvenile -- in order for a juvenile to waive his Miranda rights -- whether or not his parents have to consent and sign a waiver. He was he was aware of that.

THE COURT: They don't if it is a felony charge and they're between the ages of fourteen and eighteen.

MR. STIDHAM: With all due respect to the Court. How do you know what the crime is when you're talking to a juvenile?

THE COURT: If you are investigating a capital murder, I would think an investigator would know.

MR. STIDHAM: If I'm investigating a juvenile for throwing rocks --

THE COURT: It would be a good idea to get his mama to sign.

MR. STIDHAM: If I'm investigating a murder, I don't have to worry about that. (1031)

THE COURT: That basically is right. I think that has come up in a couple of other cases.

MR. FOGLEMAN: Your Honor, the one I'm referring to is Boyd versus State, 313 Arkansas 171.

THE COURT: There's also a statute that requires you to have a parental consent on the

fingerprints of a juvenile. We went through that same thing right here in this court on a similar case sometime ago.

MR. STIDHAM: Your Honor, it is our contention to interpret the statute as not requiring the parents' consent and written waiver in a felony case is a violation of equal protection. How can we afford juveniles the protection of this important safeguard when they are doing something not so bad, but when they do something bad, we don't worry about it?

THE COURT: Why don't you raise that was one of your arguments? It is not very persuasive with me.

BY MR. STIDHAM:

Q. So you determined that Jessie was lying his ass off and you decided that the interrogation was going to proceed?

A. Yes.

Q. Had Officer Durham come out there and said he was not being deceptive in the polygraph, I assume he would have been turned loose?

A. Not necessarily. (1032)

Q. What do you mean?

A. We have had several post polygraph examination interviews.

Q. If you determined he wasn't a suspect before the polygraph and assuming he would have passed it, there would have been no reason to hold him, would there?

A. I probably would have talked to him some more.

Q. According to your typewritten notes, you indicate that the polygraph was over about 12:00, 12:30. Is that correct?

A. Yes, sir. That is an estimate of the time.

Q. Then you say that you and Gitchell began the interview of Jessie Misskelley about 1:30 P.M.

A. That is also incorrect on the time because it was just a few minutes after I came back from lunch.

Q. Let's talk about what happened, Officer Ridge, from that point at approximately 12:40 up

until the time you left the room for a minute. What questions did you ask Jessie?

A. About his involvement in any satanic activities and other questions.

Q. What other questions?

A. How well he knew Damien, any activities he's had with Damien, if Damien or Jason had called him concerning the homicide or anything else that may have been information that we needed.

Q. That last question is in your notes but those other questions that you stated do not appear in your notes. Why not? (1033)

A. What questions?

Q. You asked him about Damien, you asked him about his involvement in satanic cult activity. Your notes don't reflect any of that.

A. My notes don't? I think my notes do. Are you looking at the typed report?

Q. Your handwritten notes dated June 3, 1993. At the top of the page it says, "Permission obtained for polygraph, Bill Durham reported to me he is lying his ass off," and then it says, "Me and Gary Gitchell."

A. I think my notes do reflect that he told us of some phone calls.

Q. That is in there.

A. Okay. The notes --

Q. But the other questions you talked about about general knowledge about Damien and about cult activity, they don't appear in your notes.

A. I will just have to find my notes.

THE COURT: Did you attempt to write down and preserve every question you asked and every answer that was given?

THE WITNESS: No, sir, I did not.

BY MR. STIDHAM:

Q. Did you find them?

A. Yes. (1034)

Q. His Honor asked you whether you made any attempt to preserve all of the questions.

A. All if the questions, no, sir. We are trying to carry on a conversation. You cannot write and talk at the same time. That is what is going on during this interview.

Q. So you and Officer Gitchell were asking questions at the same time?

A. At times, yes. If you will look at page two, it shows, "Has meeting of satanic cults. Will meet in different places." It is in my notes.

Q. You said you asked him that before you asked him about the phone call. Or you just don't remember?

A. I didn't say I asked him before that. I said that is one of the questions. There's several questions.

Q. It is very difficult for you to remember what you asked without looking at your notes, isn't it?

A. No, sir. That the questions was asked is there. The particular time the questions were asked would be difficult.

Q. Your notes don't reflect any of the things Jessie tells you that tend to show he has nothing to do with these murders. The only thing you write are things that you think is important?

A. Yes, sir.

Q. Is it not important when a -- I guess you still don't refer to him as a suspect at this point -- but as a potential witness when they tell you things that tends to reflect they are not (1035) involved in the crime, you don't write those down?

A. Yes, sir. I guess you would write them down.

Q. How come you didn't?

A. I'm not sure he didn't say he was involved in it or wasn't a witness to it at this point.

Q. After you leave the room and you come back in and you decide to record everything from that point on --

A. Yes, sir.

Q. -- there's nothing in your notes to indicate that Jessie told you he got to the woods with Jason and Damien and that the boys were killed at noon. How come that's not in your notes?

A. It is on the tape.

Q. That's the first time he's ever told you what time it happened?

A. What time it happened? Yes, sir.

Q. I guess you about fell out of your chair when you realized that this happened at 9:00 o'clock and that they were killed at noon. That kind of shocked you?

A. Yes, sir.

Q. How come you didn't question that? You just go on to the next question.

A. It was questioned.

Q. When?

A. By Inspector Gitchell.

Q. When did that occur? (1036)

A. During that statement, that tape session, but I know it occurred during the second tape session.

Q. So the time frames were not discussed with him prior to the tape recorder being turned on?

A. No, sir.

Q. The questions you asked him prior to the tape recording being turned on is stuff about receiving phone calls from Jason and cult meetings and briefcases?

A. Yes, sir.

Q. At this point doesn't he tell you who attends these meetings?

A. Yes, sir.

Q. Were you ever able to track any of these people down?

A. We tracked some of the down and talked to them.

Q. What did they tell you?

A. Most of them denied being members.

Q. One of these people was Tiffany Allen?

A. Yes.

Q. Didn't it surprise you that Tiffany Allen's name would be on this list?

A. I'm surprised at any of the names being on the list.

Q. Why?

A. They seem to be kids. I don't know who would be in the group. Anybody being in a group of that nature would surprise me. (1037)

Q. So you've never been able to confirm that any of these people are in this cult?

A. Sure hadn't.

Q. In his statement Jessie tells you that him and Damien and Jason walked to the woods at nine o'clock?

A. I will have to look at the statement but if that's what it says. (EXAMINING) Yes, sir.

Q. You know and I know -- I guess you could probably say everybody knows -- that is not what happened?

A. Yes, sir.

Q. The boys were in school that day, were they not?

A. Yes, sir.

Q. So the victims were accounted for in school up until about 2:45 or 3:00?

A. Yes, sir.

Q. So you had to know that this was incorrect?

A. Yes, sir.

Q. Did it ever occur to you at this point that you were getting a false confession?

A. No, sir.

Q. Didn't occur to you?

A. No, sir.

Q. Later on in the tape Jessie tells you that the boys skipped school. You knew that was wrong, didn't you?

A. Yes, sir. (1038)

Q. Did that scare you or alert you to the possibility that he might not be telling the truth?

A. It alerted me that something was wrong.

Q. You still didn't think this might be a false confession?

A. No, sir, not a false confession.

Q. Later on I believe in the statement he's telling you this stuff occurred at noon and then the next question you ask him is, "Tell me what else happened that night," and Jessie immediately says it happened at that.

Then on page 12 Jessie says, "My dad woke me up this morning," and you say, "Well, your time period may not be exactly right is what you're saying," and Jessie says, "Right."

Then you go on to say, "I have gotten some real confusion with the times you're telling me. Now this nine o'clock in the evening call you got."

Now Jessie says, "All this stuff happened that night."

A. He says, "that night." Yes, sir.

Q. What did you do to make him change his mind?

A. I didn't do anything.

Q. Didn't do anything?

A. Not to make him change his mind. He said that.

Q. You suggested to him it was at night, did you not?

A. I don't think I did. No, sir.

Q. Let's talk about for a moment when you left the room for a minute and it was decided the

interrogation would be tape (1039) recorded. What had happened?

A. That is when he said he had received a telephone call from Jason and he heard Damien in the background and I was leaving the room in order to take a break and relate that information to some of the other detectives.

Q. Was that before or after you showed him a photograph of one of the victims?

A. After.

Q. You left the room afterwards?

A. Yes, sir.

Q. Was that before or after you drew a diagram of the circle and putting him and Damien and Jason in the circle?

A. That was after.

Q. So the time sequences -- how did that happen? The photograph, the circle and then you get up and leave?

A. The diagram, then the photograph and I left.

Q. Diagram was first and then the photograph?

A. Yes, sir.

Q. Why did you leave?

A. I had received this information, and I needed a break.

Q. Were you upset by what you heard?

A. No, sir. I was sort of happy about what I had heard.

Q. Did you just -- from reading your notes it looks like you left the room and didn't know what was about to happen and you didn't know until Detective Gitchell came out and told you? (1040)

A. Yes, sir. That's right.

Q. So why did you show Jessie this photograph of one of the bodies?

A. That was Inspector Gitchell's presentation. He showed the photograph to him.

Q. What was Jessie's reaction?

A. He was fixated on this picture. He kept looking at it.

Q. Did it seem to frighten him or upset him?

A. It's just that he kept looking at it. We were asking him questions. He wasn't answering any questions, just looking at the photograph.

Q. This diagram that you described. It was a circle?

A. Yes, sir.

Q. There were three dots in the circle?

A. There were several dots all over the page. Inspector Gitchell did this.

Q. The three dots in the middle -- that was Damien and Jason and Jessie?

A. Not necessarily. That is not the way it was explained.

Q. Explain what the purpose of this diagram was.

A. It is like whoever committed this murder is inside this circle. "Are you going to be a witness or defendant or where are you going to be at in this circle. We want to know who was in the circle." It was never suggested that he was in the circle. That's the reason we didn't know if he was a suspect at (1041) that point. We were hoping he would give us some testimony or some kind of information that would lead to identifying who was the suspect.

Q. Who was on the outside?

A. People that were possibly witnesses, the police, whoever was not involved in the murder or may have had information.

Q. Was Jessie asked if he wanted to come outside the circle?

A. We were asking him what he wanted to be. What is he? We are asking where he is.

Q. So you asked him whether he was in the circle or outside the circle?

A. Yes, sir.

Q. Did you invite him to come outside the circle and join the police?

A. We didn't ask him to come anywhere. "What is it you have to say? Where do you stand in this situation?"

Q. This is a standard interrogation technique, is it not?

A. Inspector Gitchell used it. I didn't.

Q. Have you ever shown a suspect -- I guess he wasn't at this point. I guess he was just there. Have you ever done that before -- showed a picture of a body to someone?

A. I haven't.

Q. Are those standard techniques?

A. Inspector Gitchell did that. I didn't know.

Q. As soon as he did the diagram with Jessie, you walked out. (1042)

A. The diagram?

Q. The diagram and the photograph.

A. No, sir.

Q. I thought that is when you took your break.

A. I did take a break. But there was some more questions. This was a period of time.

Q. What questions were asked of Jessie after he was shown the photograph of the victim and was asked about this diagram? What questions were asked next?

A. Continuing questions. "What do you know about this? Do you know anything about this?" It just continued. "What about these phone calls?"

When he came up with the phone call that he gave a time for when Jason was on the phone with him and he heard Damien in the background. Shortly after that I left.

Q. Do you have your notes?

A. Yes, sir.

Q. Page five. It says -- let's go back to the end of page four. Your notes reflect that, "will take polygraph concerning new statement."

A. I asked him if he would take a polygraph concerning this additional information.

Q. What was his response?

A. He said he would have to think over what he told us so far.

Q. At the top of page five it says, "Show a picture of one (1043) victim in coroner's office."

A. Yes, sir.

Q. Is this where the circle comes in?

A. No, sir, it would have been before that.

Q. How come there's nothing in the notes reflecting that the diagram was shown to Jessie?

A. Everything is not written down in the notes. The notes are more to key me to write a report later.

Q. Halfway down the page there's -- I guess you call that an asterisk. It says, "I left the room at which time Jessie informed Gary Gitchell of him being present during the murders."

A. Yes, sir.

Q. That happened during the time of sixty seconds while you were outside the room?

A. It was a very short period of time. Yes, sir.

Q. Then you begin the taped statement and you were going to record everything after that?

A. Yes, sir.

Q. Did Jessie ever tell you at any time during your interview that he had seen some little boys on his way to work on May 5th?

A. I think he did. Not to work -- from work.

Q. Did Jessie ever ask to go home?

A. No, sir.

Q. Never asked you to call his father?

A. Not to me. (1044)

Q. Do you know of any other officers who tried to call his father?

A. His father was up there later on that afternoon.

Q. What time?

A. I'm not certain.

Q. Did you let him see his son?

A. I don't think so. No, sir.

Q. How come?

A. At that time he was a suspect.

Q. Suddenly he is a suspect?

A. Yes, sir.

Q. And you wasn't going to let him talk to his dad?

A. It wasn't my decision.

Q. Why wouldn't you want him to talk to his dad now that he is a suspect?

A. At this point I considered him under arrest when the confession was completed.

Q. Did you tell him he was under arrest?

A. I don't think he was told, not by me.

Q. Did Jessie ever tell you where the boys' clothes were laying at the crime scene?

A. I don't recall.

Q. You don't recall that for sure?

A. I'd have to read the statement to know for sure.

Q. Did he tell you where the boys' bodies were laying? (1045)

A. His statement included that the boys were placed in the water.

Q. Did he tell you where at the scene the bodies were found?

A. That the bodies were placed in the water.

Q. He didn't say by this particular object or this particular object. He just said in the water?

A. Sir, he says, "It is in the little ditch off of the big ditch," if that is what you're asking.

Q. Why isn't that in your notes?

A. It is in the transcript. I think it is.

Q. Can you find that for me?

A. On page 18 it refers to them being in the water but this is where the meeting were taking place. "Okay, the night you were in these woods had y'all been in the water?"

Q. Does it say anything about a big creek and a little creek?

A. I'm not certain. I'd just have to read further. I thought that he did describe the crime scene and refer to the small creek.

Q. Let's talk about Jessie's second statement. Do you remember that?

A. I wasn't there when the second statement was given but I'm aware that it occurred.

Q. When did it occur?

A. Later, after 3:18.

Q. Do you know when? (1046)

A. That afternoon. I was very busy.

Q. You just don't know.

A. The exact time, no, sir.

Q. Are you familiar with the fact that the transcript doesn't give a beginning time or end time?

A. Yes, sir.

Q. Why?

A. That's Inspector Gitchell. He is the one that took those tapes.

Q. What is your best estimate of when that statement took place?

A. I thought it was like 3:45 that afternoon. After conferring with Inspector Gitchell, I found out it was after that. I was busy doing other things when that interview occurred.

Q. So you didn't take part in that?

A. No, sir.

Q. At whose request was the second statement done?

A. All I know is Inspector Gitchell conducted the interview.

Q. Did John Fogleman ask anyone to do the second statement?

A. I'm not certain. You will have to ask Inspector Gitchell.

Q. You said something very interesting earlier that you wanted to turn the tape recorder on after Inspector Gitchell came out and said, "Jessie said he was at the scene when the murder took place." You said you wanted to record everything after that. (1047) Isn't it true that everything wasn't recorded after that?

A. Any interview I had with Jessie was taped.

Q. So every interview you had with him was taped?

A. Yes.

Q. Doesn't it seem strange that in the second statement there's no time frames given?

A. That's Inspector Gitchell.

Q. You knew at the end of the first tape that there was several very, very compelling factual impossibilities, the time frames, the nine o'clock, the noon, the fact that the boys skipped school. You knew that stuff was wrong?

A. Some of that information was wrong.

Q. Why didn't you try to clear this stuff up while the tape was on the first time?

A. There are times you take what you get. When you have got a person talking, you let them talk. When you start contradicting them, they stop talking.

Q. You would agree with me this is probably the biggest and most important investigation the West Memphis Police Department has ever had?

A. That I have been involved in. Yes, sir.

Q. You didn't think it was important to ask this now suspect, Mr. Misskelley, "These times aren't right." You didn't think that was important to do that while the tape was on?

A. The tape was on during the second interview. (1048)

Q. Why didn't you keep going on the first interview?

A. Again, sometimes you take what you can get. This is the information he came forward with. Portions of that information proved to be correct.

Q. So you were just happy with what you had and you didn't care about that other stuff. Is that what you're saying?

A. No, sir, I'm not saying that.

Q. What do you mean by "take what you can get?"

A. When somebody is talking in an interview, if he's talking, you keep him talking. When you start contradicting what he says. Then sometimes he shuts up and you don't get anything else. So we took what we could get and it did continue. That was the second interview.

Q. You have read the second interview?

A. Yes.

Q. It is obvious that someone talked to him prior to the tape recorder being turned on the second time because almost immediately Jessie is now saying that the murders took place at five or six and then seven and eight and in fact he even changes it again to almost dark. Who was questioning him up to the point the second time the tape recorder came on?

A. As far as I know, nobody was talking to him up until the time the tape recorder was turned on.

Q. You don't know what time frames we're talking about? (1049)

A. Inspector Gitchell knows more the time frame.

Q. You didn't talk to him anymore after the first tape?

A. No, I didn't.

Q. You obviously have tape recorders because you tape recorded the statement you were involved in?

A. Yes, sir.

Q. You even have video cameras there?

A. Yes, sir.

Q. Why didn't you videotape the interrogation?

A. At that point we were not capable.

Q. How come?

A. We didn't have the equipment set up.

Q. You know that Jessie is very limited in intelligence, right?

A. That's what you tell me.

Q. That's what I tell you?

A. Yes, sir.

Q. You didn't realize that when you were interrogating him on June the third?

A. He seems like any other seventeen year old in as far as my judgment.

Q. You believe that?

A. At that time, yes, sir.

Q. Can you explain to me why you had to explain to him what a penis was? (1050)

A. That is not a term that is normally used by everybody in the community.

Q. Everyone knows what that is, wouldn't you agree, at least every seventeen year old?

A. I would think so.

Q. Why did you have you point to your groin area to show him what a penis was?

A. Is this when he is -- what portion of the tape are you talking about?

Q. You're asking him, "What did Jason do with the knife?"

A. He is pointing at his bottom looking down. He's stated that the cuts were on the bottom.

Q. Didn't that alarm you when a seventeen year old doesn't know what a penis is?

A. I'm not saying that I am referring to him not knowing what a penis is.

Q. You had to point to it, didn't you?

A. He was pointing at his penis and saying he was cut on the bottom. So we were clarifying what it is he was talking about.

Q. He was doing the pointing?

A. Yes, sir, he was.

Q. You were not doing the pointing?

A. No, sir.

Q. Was Detective Gitchell doing the pointing?

A. No, sir, he was not. (1051)

Q. In the recorded statement you took part in, you mentioned would Jessie be willing to go to the crime scene and let him point things out to you.

A. Yes, sir.

Q. Why didn't you do that?

A. Time factor.

Q. Why didn't you give him a confirmation polygraph test?

A. I can't answer that question. We were so busy that night. We were busy up until -- I didn't

get home until almost seven o'clock the next morning.

Q. Were you too busy to try to go out and corroborate some of this stuff before you decide to go ahead and arrest two other kids?

A. I thought the time was very important to us to get arrests done and the searches done.

Q. You were not concerned at all that this might be false -- what he's telling you?

A. At that time I don't think any part of this confession is false.

Q. Do you think it's false now?

A. Portions of it. The time part.

Q. That is pretty important, isn't it?

A. You're asking me if that's important information but at the same time we are talking about a person that may be in error about the time. (1052)

Q. If my law partner ends up killed and we know that he was killed at 5:30 and you interrogate me and I tell you I did it at midnight, doesn't that tell you I probably don't know what I'm talking about?

A. Not if you don't know what time it was.

Q. Did you ever make any attempt on June third to look into Jessie's alibi about working that day?

A. No, sir, it was done later.

Q. You are a firm believer in alibis, aren't you? If someone has an alibi, they must have not done it?

A. No, sir.

Q. You don't believe in that?

A. No, sir.

Q. When Jason Baldwin's parents came to you on June fourth to talk to you about the case, you turned your tape recorder on and you told them in this statement, "All we want to do is talk to Jason and if he tells us where he was and his alibi checks out, he's a free man." Didn't you say that?

A. I told them we would check into the alibi and determine if it was true.

Q. If it was true, he's a free man?

A. We are looking for a place to start.

Q. You did not use the word, "free man?"

A. I may have. I'm not certain.

MR. STIDHAM: We would move to introduce Officer (1053) Ridge's handwritten notes.

MR. FOGLEMAN: No objection.

THE COURT: They may be received without objection.

(DEFENDANT'S EXHIBIT THREE IS RECEIVED IN EVIDENCE)

BY MR. STIDHAM:

Q. Are you familiar with the police officer's bill of rights?

A. In that the police officer has to be read his rights as any other citizen would.

Q. Yup. That is the one.

A. Yes, sir.

Q. Are you also familiar with the part of that statute that requires that anytime the police officer is interrogated that only one officer can interrogate him at one time?

A. No, sir.

Q. Are you aware of a provision in that same statute that says anytime a police officer is interrogated that the entire interrogation has to be recorded from beginning to end?

A. No, sir, I did not know that.

Q. You didn't realize that cops have special rights that we citizens --

MR. FOGLEMAN: Your Honor, I object --

THE COURT: What has that got to do with anything is what I want to know. (1054)

MR. FOGLEMAN: Even if that were applicable, it wouldn't make any difference, your Honor. That is a voluntary statute. That does not apply to every police officer. It depends upon whether the municipality or the law enforcement like the county government wants to adopt that or not.

MR. STIDHAM: Judge, it shows that police officers know enough to get a statute passed that protects themselves from each other and it those shows it is a violation of the equal protection clause of the United States Constitution that police officers have a right to have the entire interrogation process recorded.

MR. FOGLEMAN: Your Honor, it's -- there's no --

THE COURT: I don't want to hear anymore. It is totally inapplicable to this situation. You can argue that all you want. As far as eliciting testimony on it, it is totally and completely incompetent and irrelevant.

BY MR. STIDHAM:

Q. Do you remember when the polygraph test was administered that day?

A. I had gone to lunch.

Q. You weren't in the building?

A. No, sir. (1055)

MR. STIDHAM: We would like to offer the statement that Officer Ridge tape recorded involving Jason's parents the day after the arrest.

THE COURT: For what purpose?

MR. STIDHAM: To show that the officer believes in alibis. He made no effort to go out and check the validity of this statement. All he did was take this kid's word for the fact that these murders occurred at noon and he went out and arrested two other kids.

THE COURT: If you want to stick it in, stick it in.

MR. DAVIS: Judge, if you would note our objection to the relevance of knowing and intelligent and voluntary --

THE COURT: I don't think it's relevant myself, but if they want to introduce it, I will let them. I'm not going to give it much attention.

(DEFENDANT'S EXHIBIT FOUR IS RECEIVED IN EVIDENCE)

REDIRECT EXAMINATION

BY MR. FOGLEMAN:

Q. Detective Ridge, Mr. Stidham asked you questions about Jessie told you he worked until five o'clock that day?

A. Yes, sir.

Q. You did ultimately talk to the employer? (1056)

A. Yes, sir.

Q. Did you find out that Jessie was being untruthful when he told you that?

A. Yes, sir, I did.

Q. He also tried to suggest that you suggested that this thing happened at night?

A. Yes, sir.

Q. Earlier in the statement in the notes that have been introduced -- in regard to Defendant's Exhibit Three did he tell you about some calls -- phone calls that he had received from either Damien or Jason?

A. Yes, sir.

Q. How many calls did he tell you he got?

A. Three calls.

Q. When were those calls?

A. The day before the murders occurred, the morning of the murders and after dark.

Q. In this portion that Mr. Stidham was questioning about you suggesting that it happened at night, what did you say to him?

A. "It was like earlier in the day."
"But don't you know exactly what time?"

Q. You said, "Don't you know."

A. "But you don't know exactly what time okay 'cuz I have got some real confusion with the times you're telling me. But now this nine o'clock in the evening call you've got, explain that (1057) to me."

Q. What call are you talking about?

A. The call he had told us about in the prerecorded interview.

Q. After you asked him about the telephone call that night, what did he say?

A. He says, "Well, after all this stuff happened that night that they done it" --

MR. CROW: Your Honor, I'd ask that he read the complete answer.

BY MR. FOGLEMAN:

Q. Read the complete answer.

A. "I went home about noon. Then they called me at 9:00 o'clock that night. They called me."

Q. So obviously -- he says after they had done this that night, then he says, "I went home about noon." Then he says, "They called me that night"?

A. Yes, sir.

Q. Did you ask him during that taped interview what time it was?

A. Yes, sir.

Q. Did he have any ideas what time it was?

A. No, sir.

(WITNESS EXCUSED)

GARY GITCHELL (1058)

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

DIRECT EXAMINATION

BY MR. FOGLEMAN:

Q. Will you please state your name and occupation?

A. My name is Gary Gitchell. I'm the inspector for the West Memphis Police Department criminal investigation division.

Q. I want to direct your attention to June third, 1993. Did you have occasion to come in contact with Jessie Misskelley, Junior?

A. Yes.

Q. What time was it?

A. Myself at approximately 12:40.

Q. For what purpose did you come in contact with him?

A. Myself and Detective Ridge to interview him.

Q. Did you participate in an interview with him?

A. Yes, I did.

Q. During any of the interviews that you participated in, was any force, promises, threats or coercion used to get the defendant to do anything or make any statement?

A. No, sir.

Q. In the -- when you first came in contact with him and began the interview with Detective Ridge, was this portion taped?

A. When we first started talking to him, no.

Q. Did you later tape it? (1059)

A. Yes.

Q. Why didn't you tape the first part?

A. We didn't know what type of substance that would be done during this interview. The reason for us bringing him in in the first place was we thought he could give us some assistance in the case.

Q. During the -- before the tape -- your interview before you began to tape, at some point during that time did the defendant become a suspect?

A. Yes, sir.

Q. When did that occur? What happened?

A. I showed Mr. Misskelley a picture of one of the victims.

Q. I want to show you what is marked for identification as State's Exhibit Twelve and ask if you can identify that?

A. (EXAMINING) Yes, sir, this is the photograph. It has the number 107 on the back and it has number three on the front.

Q. And again, what did you do with this Exhibit Twelve?

A. During the course of the interview with Jessie Misskelley, myself and Ridge were present in the room. I walked out of the room for a moment to get this picture and along with a small cassette recorder and a tape that I put into the recorder. I first wanted to show him this picture just to see what kind of response I would get from that.

MR. FOGLEMAN: We would offer State's Exhibit Twelve. (1060)

MR. STIDHAM: No objection.

THE COURT: It may be received.

(STATE'S EXHIBIT TWELVE IS RECEIVED IN EVIDENCE)

BY MR. FOGLEMAN:

Q. After you showed him the picture, did you get some kind of response?

A. Yes, I did.

Q. What kind of response did you get?

A. He immediately went back into the chair, and he just grasped the picture and kept holding it. As a matter of fact, he wouldn't let go of the picture. He would not take his eyes off the picture, and I even had to take the picture from his hand and lay it on the desk.

Q. How long had you been interviewing him? I mean you and Detective Ridge. Not total but you and Detective Ridge.

A. How long?

Q. Uh-huh.

A. Gosh, I don't know. I'd have to guess. Maybe an hour and a half, two hours. I don't know.

Q. You mentioned something about a tape?

A. Yes, sir. And I do have the tape with me.

(THE FOLLOWING CONFERENCE WAS HELD AT THE BENCH)

MR. FOGLEMAN: Gary says he played a real short portion -- I mean real short portion of this tape for the defendant. It is of Aaron. We would prefer that (1061) he not be named at this time as far as who it is making the statements.

MR. STIDHAM: Statement of what?

MR. FOGLEMAN: You know, the part of the statement Aaron made. There's a real short portion of that tape that Gary played for Jessie to hear. Probably not over five seconds. I want to play it, but I don't want Aaron -- I don't want this person referred to by name because it has been reported to us that they are receiving threats at this point, and I don't want to make it any worse.

MR. STIDHAM: You're saying that this tape was played to Jessie on June third?

MR. FOGLEMAN: Um-hum.

MR. CROW: First we've heard of that.

MR. FOGLEMAN: It's just like a few seconds.

(RETURN TO OPEN COURT)

THE COURT: All right. Let's proceed.

BY MR. FOGLEMAN:

Q. After you showed him the picture, you did what?

A. I placed this tape in. I had previously found the spot that I had in mind to play and I placed the tape into the recorder, first showed him the picture and after he looked at the picture for several minutes, I took the picture from him and placed it on the desk, and I said, "I want you

to listen to (1062) something."

MR. STIDHAM: Your Honor, could we approach the bench again?

(THE FOLLOWING CONFERENCE WAS HELD AT THE BENCH)

MR. STIDHAM: I'm concerned about why we didn't get a copy of this in the discovery or any reference to it.

MR. FOGLEMAN: Well, as far as a copy of it, you have got a transcript of the tape.

MR. STIDHAM: Transcript of the tape?

MR. FOGLEMAN: Of the whole tape.

THE WITNESS: I have a date.

MR. FOGLEMAN: Which date?

THE WITNESS: It is the 27th.

(RETURN TO OPEN COURT)

BY MR. FOGLEMAN:

Q. Play for the Court the portion that you played?

A. (TAPE BEING PLAYED)

Q. Play that again. The speed doesn't sound right.

A. It may be I've held it too close to the mike.

(TAPE BEING PLAYED)

Q. I couldn't understand a thing on there.

A. He says, "Nobody knows what happened but me."

THE COURT: Let him take it over to the counsel table. (1063)

(TAPE BEING PLAYED)

MR. FOGLEMAN: I could hear it now.

THE COURT: It was the microphone.

BY MR. FOGLEMAN:

Q. After you played that portion of the tape, and it was limited to what words?

A. "Nobody knows what happened but me."

Q. Did the defendant react at all to that?

A. Yes, sir.

Q. What was his reaction?

A. He immediately said, "I want out. I want to tell you everything."

Q. When was it that Detective Ridge left the room?

A. He left I believe shortly after that.

Q. Then was something else said after Detective Ridge left the room?

A. Yes, sir, he left the room after Jessie made that statement. Naturally it is like, "Well, it worked." So he goes in to get a recording device. Jessie begins to tell me -- and I am trying to think of the exact words. He mentions that he was there. He went to the woods. He mentioned that he started crying in the woods.

Q. When was this he is talking about -- that day?

A. This is a couple of weeks afterwards, and I tell him, "Just wait a minute. I want to get all this on tape." (1064)

I get up, I walk out. And I'll be quite honest with you we are all fairly jubilant at that point.

Q. Does he say anything at that point about whether or not he was there or not?

A. Yes. He says he was there.

Q. When the murders occurred?

A. Yes.

Q. Again I have asked you this before -- were any force, promises, threats or coercion ever used?

A. No sir. None whatsoever.

Q. From that point on, after he said that he was there, what did you do?

A. Short time after that I left the room also to make sure someone is getting this recorder so that we can start and record everything. He is saying he's going to tell us everything, and so we want to get it on tape. If he's going to tell everything, we want to get it on tape.

Q. After you start talking to Jessie again, what did you do to preserve that after you got the recorder?

A. I guess you have lost me.

Q. Did you tape record your interviews with him from then on?

A. We advised him of his rights a third time.

Q. Is this on tape?

A. Yes. We advised him of his rights a third time and went all through the rights form. Detective Ridge was the actual (1065) person advising him of the rights. I was present during the time.

Q. When you advised him of his rights the third time, any force, promise, threats or coercion used to get him to waive his rights?

A. No, sir.

Q. Do you know what time the tape part ended?

A. 3:18 P.M.

Q. Did you subsequently go back and have some further conversations with the defendant?

A. Yes, sir, I did.

Q. Do you know what time that was?

A. I'm going to have to guess and say it was about -- around 5:00 P.M.

Q. I want to show you and ask if you recognize this -- whose writing this is?

A. Yes, that's my writing.

Q. Are those some notes you made?

A. Yes, sir, during the second interview, the one that was just myself. I really don't want to call it an interview. I was going back and forth to clear up some questions from the original interview.

Q. Did you ask him whether he wanted something to eat?

A. I think the first time he said he didn't want anything. Then the second time he did finally eat. As a matter of fact, (1066) he had a Central Park hamburger, all of us did.

Q. In the subsequent conversations that you had with the defendant, was there any force, promises, threats or coercion used?

A. No, sir.

Q. The subsequent conversations you had related to the case --

A. Right.

Q. -- were those all taped?

A. Yes, sir. The interview that I did with him later.

Q. What was going on between the time that the initial tape session ended at 3:18 and when you started asking him some more questions?

A. What was going on in our office?

Q. What was going on as far as -- what was Jessie doing?

A. Jessie was sitting by himself in the office that we were doing the interview in.

Q. Do you have the tape, the confession itself?

A. Yes.

MR. FOGLEMAN: We would ask permission to play the tape and we will offer a transcript as an exhibit.

THE COURT: All right.

MR. STIDHAM: May we approach the bench?

(THE FOLLOWING CONFERENCE WAS HELD AT THE BENCH)

MR. STIDHAM: Do you feel the need to --

MR. FOGLEMAN: Y'all alleged somehow this was an (1067) involuntary statement, it was coercive in some way, and I think it's important for the judge to hear the demeanor of Mr. Misskelley.

MR. STIDHAM: I would be willing to waive the Court listening to the tape if he wants to look at the transcript.

MR. FOGLEMAN: I think it's important, especially in this case, where they are arguing a false confession and that somehow the police conduct that led to it, that the demeanor of everybody involved be heard.

MR. STIDHAM: Would the Court consider doing it in-camera?

THE COURT: What difference does that make?

MR. PRICE: Judge, on behalf of my client, Mr. Echols, I object to the tape being played because the only reason the Court severed the charges was because the tape is detrimental to my client, and we object to it being heard today plus being heard at the trial itself.

MR. DAVIS: Judge, this is a novel approach where defense attorneys for two defendants not on trial object to evidence coming in at a suppression hearing regarding a third.

THE COURT: I'm going to listen to the first part (1068) of it where the advice of rights is given, and then I will listen to the rest of it later.

MR. FORD: I would like the record to reflect that I join with the remarks of Mr. Price.

(RETURN TO OPEN COURT)

(TAPE BEING PLAYED)

THE COURT: I have heard enough of that. Let's hear the beginning of the other one. That's the one I've read previously.

MR. FOGLEMAN: The other one isn't that long.

THE COURT: How long is that?

THE WITNESS: Probably ten minutes.

THE COURT: All right. Play it.

MR. FORD: Your Honor, same objection.

THE COURT: Mr. Ford, you're not in this case. Your case has been severed. What is the objection?

MR. PRICE: Because of his alleged confession, your Honor. We object to either statement being played at this time.

THE COURT: Overruled.

(TAPE BEING PLAYED)

MR. STIDHAM: Can we stop the tape at this time? May I voir dire the witness about why there is a gap in the tape?

THE WITNESS: No, there's not a gap. That tape (1069) was -- I turned it off. I said, "Just a minute." I turned it off and walked out of the room. I had this tape recorder with me. This is when I walked back and forth in the room because I was conferring with the prosecutor.

MR. STIDHAM: Okay, that's what I wanted to know.

THE COURT: Go ahead.

(TAPE BEING PLAYED)

MR. FOGLEMAN: What was he doing right there?

THE WITNESS: He was yawning.

(TAPE BEING PLAYED)

MR. STIDHAM: Your Honor, may I inquire, is that another yawn?

THE WITNESS: Yes, sir.

(TAPE BEING PLAYED)

MR. STIDHAM: I need to inquire, it sounds like the tape was turned off again.

THE WITNESS: I turned the tape off. I left the room to confer with Mr. Fogleman and then returned.

MR. STIDHAM: How long were you outside the room?

THE WITNESS: Probably just minutes.

(TAPE BEING PLAYED)

MR. STIDHAM: That's another time?

THE WITNESS: Yes, I walked out of the room. I got Jessie and myself a Coke. (1070)

MR. STIDHAM: How long were you gone?

THE WITNESS: At the most maybe four or five minutes.

(TAPE BEING PLAYED)

MR. FOGLEMAN: What was he showing you there?

THE WITNESS: He was referring to holding him by the ears.

(TAPE BEING PLAYED)

THE WITNESS: That's all of it.

(STATE'S EXHIBIT THIRTEEN IS RECEIVED IN EVIDENCE)

CROSS EXAMINATION

BY MR. STIDHAM:

Q. Officer Gitchell, you obviously have training in interrogation tactics?

A. Yes, sir.

Q. Where did you learn those tactics?

A. Well, most of that is with nineteen and a half years' experience.

Q. The photograph that you showed Jessie -- that was the photograph that was introduced into evidence?

A. That is the photograph.

Q. Did you show him any other photograph?

A. No, sir.

Q. You stated that it was just a guess that this was about (1071) 5:00 P.M. You're not sure?

A. I'm not positive.

Q. What happened between 3:18 when the first tape was concluded and 5:00 P.M.?

A. Between 3:18 and 5:00 we did order out food during that time. All my officers were fed including myself and including Jessie was also fed. We took a break for that.

Q. Did you or any of the other officers interrogate Jessie between 3:18 and 5:00 P.M.?

A. The only person who talked to Jessie after Detective Ridge and I talked to him was myself.

Q. What questions did you ask him between the two tapes?

A. You're talking about the tape I just played?

Q. Between the first tape you and Ridge did and the time you started the second tape at approximately 5:00 P.M.

A. I didn't talk with him. From the time we did the first tape -- Ridge and I -- from that point I didn't talk with him until I went back to ask some specific questions after conferring with the prosecutor. That is the only time I went back to talk to him. After those questions were answered, I never went back and talked to him again.

Q. Sometime after 3:18 you had a meeting with John Fogleman?

A. Sometime after that, yes, sir. It probably would have been later on, yes, sir.

Q. So sometime between 3:18 and 5:00 P.M. you met with John (1072) Fogleman?

A. I'm not sure of the time. I was back and forth during this interview.

Q. Sometime before the start of the second tape you had a discussion with John Fogleman?

A. I believe so, yes, sir.

Q. You believe so? If you don't know --

A. You have to understand what was going on during that time. It was a real busy office at that time.

Q. What I'm curious about is you just suddenly turn on the tape recorder at approximately 5:00 P.M. and you started asking Jessie, "What time did this happen?" You didn't talk to him about any of that before you turned on the tape recorder the second time?

A. No, sir.

Q. Why does the tape that we just heard -- the second tape -- say, "You told me earlier this happened about 7:00?"

A. You didn't hear all of the first tape. You've got transcripts of it. If we had played the whole tape, you would have heard what I was referring to.

Q. You said that in the first tape?

A. What we were talking about earlier is what I'm referring to.

Q. So basically what you were saying is there were no questions asked of Jessie prior to you turning on the second (1073) tape?

A. Right. I didn't talk with him. No, sir.

Q. Did any of the other officers talk to him?

A. Not to my knowledge.

Q. Did you talk to John Fogleman prior to turning on the tape the second time, or did that occur during breaks in the tape?

A. Well, each time that I turned it off I went back to talk to Mr. Fogleman.

Q. Was he standing in the hall?

A. No, sir, he was -- you're familiar with my office so he would have been in my office and then where you took some photographs is where I was at talking with Jessie.

Q. In the polygraph room?

A. No, sir, in Lieutenant Hester's office.

Q. Kind of to the right?

A. West of my office.

Q. Lieutenant Hester is the female officer?

A. Yes.

Q. So John Fogleman was in your office and you were talking to Jessie. Did he tell you what questions to go in and start with at 5:00 P.M.?

A. He may have said, "There are some questions that we need to get cleared."

Q. This was about 5:00?

A. That's an estimate, yes, sir. (1074)

Q. There was at least two -- I think I counted three gaps -- where you went out and talked to Mr. Fogleman and came back?

A. I believe there was three.

Q. And each time you went back in with specific questions. I assume Mr. Fogleman asked you to ask those questions?

A. Right.

Q. I guess that you were really shocked when Jessie told you that the boys were tied up with a brown rope?

A. Not really.

Q. Why?

A. That's the way we found them -- tied with shoestrings. I don't know what happened before that other than what Jessie Misskelley was telling. So they could have been tied any way.

Q. You didn't find the bodies tied with brown rope?

A. No.

Q. That didn't alarm you when Jessie told you something different than the way you found them?

A. It did bother me. But I don't know how they -- they could have been tied another way before they were tied that way. It would be only a guess on my part.

Q. When you asked him what they were tied up with and he said, "A rope," and you said, "What color?" He said, "Brown." I didn't sense any concern in your voice. You just kind of went on with the questioning, kind of glossed over it like it was no big deal. (1075)

A. Right.

Q. You were not too shocked?

A. I don't portray that, no.

Q. In Lieutenant Hester's office on the wall was there not a picture of the victims with their names underneath the photographs?

A. It was either on the wall or on her desk. As a matter of fact, I have that right here -- the very picture. We had those pretty much all over the office.

Q. Did Jessie use this to tell you names or faces?

A. He pointed out which ones he was referring to and when he would point out which ones he was referring to, that is my writing on the top. Then during that interrogation that Detective Ridge and I did -- which you didn't hear that -- but I know you've read it in your transcript -- Detective Ridge does read the bottom of that heading.

Q. That looks like the photograph that appeared in the West Memphis Evening Times?

A. I don't know which paper it was in. It could have been the Evening Times or the Commercial?

MR. STIDHAM: Your Honor, we would offer that.

MR. FOGLEMAN: No objection.

THE COURT: It may be received.

(DEFENDANT'S EXHIBIT FIVE IS RECEIVED IN EVIDENCE) (1076)

BY MR. STIDHAM:

Q. I notice you didn't take any notes yourself during the first taped interrogation?

A. No, sir, I don't believe I did.

Q. Why not?

A. Because I wanted to concentrate on what Jessie was doing or saying. If you will notice, I didn't say much during the interview.

Q. You said that when you played that tape where the little boy says, "I'm the only one who knows what happened" --

A. That's correct.

Q. Did you play that while Detective Ridge was in the room?

A. Yes, sir.

Q. And was that before or after you drew the diagram for Jessie showing the circle with the dots?

A. The circle with the dots -- I may have done that first, I think. I'm not sure but it may have been done first.

Q. So you think the sequence was the diagram, then the picture of the body and then the tape?

A. Right.

Q. That's pretty much when you said that he said -- Jessie -- "I want out and I want to tell you everything"?

A. Right.

Q. What did he want out of?

A. I don't know. Your guess is as good as mine. (1077)

Q. Was it the circle?

A. No. I don't know. I took it as he wanted to tell us.

Q. Tell the Court about the circle. I guess that is an interrogation technique?

A. I have used just a straight line before. You've heard the saying of people straddling the fence?

Q. Um-hum.

A. (DRAWING) I have done this before. Say this is the person. "Which side of the fence are you going to be on, this side or this side?"

(INDICATING) A circle with people here and police out here. "Whose side you want to be on? You want to be on the police side or this side?"

Q. Is that when Jessie said, "I want out. I want to tell you."

A. It could have been. I don't recall the sequence of that.

Q. What is the purpose of that particular tactic? Is that to give them an opportunity --

A. I couldn't explain. It is just something I thought of to do.

Q. Doesn't appear in any manuals?

A. No, sir.

Q. Do you recall specifically whether or not there was three dots in the middle of the circle and how many were on the outside? (1078)

A. I don't know. I just was doing it pretty much as I showed you. How many were in there then?

Q. You have got six or seven.

A. I was just -- I didn't count them.

Q. You didn't put three in the circle and say, "This is you and Damien and Jason"?

A. No, sir, I don't believe I did.

Q. You could have though?

A. I could have done anything but I don't recall doing that, no.

Q. Then you made these dots on the outside of the circle which would indicate police officers?

A. Um-hum.

Q. Then you asked him what he wanted to do?

A. Um-hum.

Q. Then you think that is when he said, "I want out. I want to tell you everything."

A. I don't know if it is that sequence, now. I don't believe it's in that sequence, no.

Q. But it could have been?

A. I'd hate to say that it could have been. I'm not sure.

Q. It was all that general time area? That is what Officer Ridge's notes reflect.

A. I just couldn't really be sure.

MR. STIDHAM: Your Honor, we'd like to offer that (1079) diagram into evidence.

THE COURT: All right. It can be received.

(DEFENDANT'S EXHIBIT SIX IS RECEIVED IN EVIDENCE)

BY MR. STIDHAM:

Q. Are you familiar with Ridge's notes?

A. Let me see. I may have a copy with me.

Q. Officer Ridge's notes indicate that, "I left the room at which time Jessie informed Gary Gitchell of his being present during the scene of the murders"?

A. Um-hum.

Q. You think that is when the diagram and the tape and the photograph of the body -- that was about the same time as --

A. No. Ridge was present during the photograph and during the tape. He was present.

Q. So right up above there where it says, "I left the room." It says that, "Jessie stated that he didn't want to be a part of this and that Damien and Jason killed. He did not." Do you think that is when he was talking about the diagram?

A. I don't recall. That could be possible but I don't recall.

Q. I notice in the second tape Jessie was yawning a lot. Was he tired?

A. I think he was bored.

Q. Bored?

A. Yes, sir.

Q. Do you usually yawn when you are bored? (1080)

A. Well, when we were through, I imagine -- I don't know. It would just be a guess on my part, and I probably shouldn't inject my own personal opinion.

Q. When Jessie finally broke down and told you he was present when the murders took place, it was an emotional time?

A. Yes.

Q. Were you crying and Officer Ridge crying?

A. Not in the room with Jessie, but yes. I shed some tears myself.

Q. Was Jessie crying?

A. Yes, sir.

Q. When did he begin crying?

A. Basically, I'm trying to remember when that happened. It was during the time that we were talking to him before we -- gosh, I can't recall exactly which point that was.

Q. Did Jessie seem upset by the tape or the diagram or the photograph of the body?

A. No, sir.

Q. He didn't seem upset? That didn't frighten him or anything?

A. No, sir.

MR. STIDHAM: I know this is going to take some time, your Honor, but I want to ask Officer Gitchell the question again. I asked him whether Jessie told him earlier that this happened at seven or eight. (1081) That's the way the second taped statement starts out. Officer Gitchell says, "You told me earlier that this happened at seven or eight," and Jessie goes, "Yeah, seven or eight."

BY MR. STIDHAM:

Q. Where did he tell you that?

A. That would be in the -- if I recall right, that would have been during the interview of Ridge and I.

Q. The first taped statement?

A. I believe so.

Q. That would also be the statement he told you it happened at noon?

A. Right.

Q. So you are saying that later on he cleared up the seven or eight?

A. No, I don't believe he cleared it up.

Q. You said, "Earlier you talked about this and you told me seven or eight."

A. Right. He was very mixed up with his times, and that is why I went in with the cassette recorder to try to clarify those times. There's been so many times back and forth to be quite honest with you, it is confusing even to me.

Q. Again, Officer Gitchell, I need you to answer my question. When earlier did he tell you seven or eight because you specifically say that in the second tape.

A. Right. (1082)

Q. I need to know when he told you that.

A. I don't know exactly when that was. It was earlier, but I don't know if it was the point in time -- I was thinking it was during the time we interviewed him. Evidently you've looked through, and it's not there so it may have been the time that we were talking with him beforehand.

Q. Between 3:18 and 5:00 P.M.?

A. When Ridge and I were talking to him?

Q. Well, if it doesn't appear in the transcript of the first interview --

A. Then it must have been prior to --

Q. The second tape?

A. No, it must have been prior to the taped statement that Ridge and I did. It was either at that point -- you know, when you're talking to an individual, you are recording him. If he elects to put a time down that I feel is incorrect, if I try to stop him, the only thing I can ask is, are you sure.

Q. He told you this prior to the first tape recording?

A. I don't know. I don't know how to better answer you.

Q. But you are definite for sure that it didn't happen between the 3:18 and the time the second tape recorded statement started?

A. To answer that honestly, I'm not sure.

THE COURT: Is it in the first tape? I know (1083) there's a twelve o'clock time on the first tape. Seems to me when I read the first tape, I was confused about the times, too. And the second tape seemed to clear that up.

MR. STIDHAM: He says it happened at noon --

THE COURT: Later in that statement he said something about six or seven o'clock, and I hadn't read it in six months, but I remember something to that effect.

MR. FOGLEMAN: I haven't been able to read the whole thing. At one point it said -- when he's asking him about the call, Jessie says something about the stuff happening that night and then he talks about getting called at nine o'clock.

MR. STIDHAM: I don't want to mislead the Court, but I do not recall Jessie ever saying --

THE WITNESS: I don't want to mislead the Court either. I'm just not sure because of all the different times that were given.

BY MR. STIDHAM:

Q. So your testimony would have to be it occurred probably -- occurred most likely before the start of the first taped statement?

A. No, sir. I'm saying I'm not sure.

Q. It could be you actually talked to Jessie about this prior (1084) to turning on your tape recorder the second time after talking to Mr. Fogleman?

A. I think my answer to your question is going to be I'm not sure exactly when it was.

Q. Did you rehearse with Jessie the times prior to turning on the tape recorder the second time?

A. No, sir.

Q. You are sure about that?

A. I'm positive about that. I don't deal that way.

Q. Why didn't you take Jessie out to the crime scene?

A. I was afraid the news media may see him and he's told us that Jason and Damien were involved in this and if they knew he was with us, we wouldn't have any hopes of trying to obtain any evidence whatsoever so it was a security risk to us.

Q. Did it ever occur to you at any time during the first taped statement, the second taped statement, your conversations with Mr. Fogleman or anytime during the day that what Jessie Misskelley might be telling you was false?

A. No, sir. I didn't feel like it was false because what things he told us only somebody right there could have known. The damage to the left side of the face of one young boy, another young boy that was castrated, only someone there would have known it.

Q. Why didn't you just leave the tape recorder on the first time and clear up those inconsistencies that you felt were a (1085) problem at the end of the first tape?

A. Didn't think to do that.

Q. Why not?

A. Just didn't.

Q. It wasn't until you talked to Mr. Fogleman --

A. Right.

Q. -- that you realized you need to clear up some things?

A. Right.

Q. Why wasn't there a confirmation test?

A. Sir, I'm not a polygraph examiner. I don't know anything of how they work.

(WITNESS EXCUSED)

MR. STIDHAM: Your Honor, we'd ask the Court to suppress the statement based on the testimony of the officers and feel that the State has not met its burden in establishing that this was a voluntary statement. There was testimony by Officer Allen that he could not remember for sure about whether or not a thirty thousand dollar reward was given. There was -- your Honor, the polygraph test apparently frightened Mr. Misskelley. Showing him a picture of a body obviously frightened him. Playing a tape that he did not know what it was obviously frightened him. Showing him this diagram and asking him to come out of the circle obviously was an offer of reward or (1086) leniency. And we submit that the State hasn't met its burden of proof.

THE COURT: Denied.

JOHN FOGLEMAN

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

DIRECT EXAMINATION

BY MR. STIDHAM:

Q. Will you please state your name?

A. John Fogleman.

Q. You were present in the courtroom and heard Officer Gitchell testify that he had consulted with you on the evening of June the third?

A. That's correct.

Q. Do you remember what time it was you got there and what time you discussed this matter with Detective Gitchell?

A. I really don't. I was involved in a murder trial here. It was -- Brenda East's son was the victim and the jury -- when the jury went out, I got a phone call asking me to come down there. Mr. Davis was here. I went down there probably somewhere between five, six o'clock. I really don't remember.

I was down there for a period of time. I don't remember how long I was there. I guess I've answered your question.

Q. You were telling him what questions to go in and ask Mr. Misskelley? (1087)

A. Well, I wasn't specifically telling him what questions to ask. There were some areas that I wanted to explore further.

Q. Why did you want him to explore these areas further?

A. For instance, there was a question about a belt or clothing, and it led around to a belt that one of them was allegedly wearing. There was some information that possibly a belt buckle had caused one of the marks on one of the kids, and we were interested in that, and then I was interested in some more specific information about some of the sexual acts.

Q. What prompted your interest in exploring the sexual acts further?

A. There was some particular evidence in regard to one of the little boys that I was interested in and about how it had occurred.

Q. What are you referring to?

A. The bruising on one of the little boy's penis.

Q. This is information you received from the autopsy?

A. Right.

Q. What about the time question. Did that bother you?

A. I probably asked him to ask about that although -- I'm not even sure that -- I don't remember whether I was aware of what times he said because obviously they didn't have a transcript, and they were typing on a transcript while I was there. I don't remember -- I probably did but I don't remember. The other things I knew about from talking to the Medical Examiner. I'd (1088) ask him, "Did he say anything about this," and I told him I wanted to explore those further.

(WITNESS EXCUSED)

MR. STIDHAM: Warren Holmes.

MR. DAVIS: Your Honor, could we approach the bench?

(THE FOLLOWING CONFERENCE TOOK PLACE AT THE BENCH)

MR. DAVIS: If they are putting the polygraph expert on to go through in terms of reviewing charts and rendering an opinion as to what the charts show and -- this man is also, as I understand it, at least theoretically an expert in the field of interrogation -- I don't know it that's the reason they're putting him on. But if they are putting him on to say, "These charts

indicate this," we would be objecting --

THE COURT: I'm not going to allow a witness to speculate on whether or not the machine was correct or the interpretation of the readings were incorrect. That's just not in issue, it's not admissible --

MR. STIDHAM: Your Honor, it is in issue.

THE COURT: No, it's not.

MR. STIDHAM: Have you had an opportunity to review our brief in this regard?

THE COURT: Yeah, sure have. And it is going to (1089) be my finding on that that I'm not going to allow anyone to speculate on the machine's results or whether or not it applies to guilt or innocence or whether or not the person was truthful or deceitful. I will, however, allow testimony about the polygraph and whether or not that polygraph could have induced a person to make a statement that they would not have otherwise made. But to allow one expert to refute another one on whether or not the results of the polygraph were accurate or how they interpret them when the results themselves aren't admissible under any circumstances --

MR. STIDHAM: We are talking about the voluntariness of the confession, and the issue is not so much -- our argument is twofold: A, that it should be offered for any purposes because it goes to the totality of the circumstances. In other words the witness, assuming that he is going to testify to this, that there's no indication of deception on any of the charts. He should be allowed to testify to that so the Court can determine the totality of the circumstances regarding this confession. Tanner versus State, the ALR citation, your Honor, sets that forth very, very clearly. And when you analyze that (1090) with Patrick versus State and Rock versus Arkansas, it becomes clear that any evidence tending to show the innocence of the accused is admissible not only at the suppression hearing but also at the trial itself. Your Honor, we would submit that this testimony is of vital importance to determine whether or not this statement as given by Mr. Misskelley -- both statements -- are voluntary and therefore admissible. To exclude those, in my opinion with all due respect to the Court, I believe that we may end up having to retry that issue.

THE COURT: Tell me real short and in a concise sentence what it is you expect this expert to testify to.

MR. STIDHAM: Your Honor, I expect him to testify pursuant to his report which indicates that after review of the polygraph charts, there were no indications of deceptions whatsoever.

THE COURT: In other words you want him to testify in his opinion that the accused was not showing deception.

MR. STIDHAM: That's one of the things --

(MR. STIDHAM, MR. CROW, AND MR. DAVIS SPEAKING AT THE SAME TIME - UNINTELLIGIBLE)

THE COURT: -- that's totally and completely (1091) irrelevant and inadmissible.

MR. DAVIS: He says that the Tanner case is the basis of this -- and he also says it is the number one authority. In the Tanner case there was no polygraph exam even given. The appellant appealed saying that it was error to have allowed the State to mention that they were preparing him for a polygraph test when he confessed. Number one, there was no polygraph given and the key thing is there were no results which could have been thrown in the hopper that could have confused the issue.

THE COURT: My ruling is that the results of the polygraph test are not admissible evidence and, therefore, no expert -- state or defense -- is going to be able to testify to the veracity of the polygraph machine because it's not accepted in this state as credible evidence and I'm not --

(MR. STIDHAM, MR., CROW AND MR. DAVIS SPEAKING AT THE SAME TIME - UNINTELLIGIBLE)

THE COURT: I won't accept it one way or the other. I don't care whether he says he was telling the truth or whether he says he was lying.

MR. STIDHAM: We would like to make an offer of proof regarding this and also for economy reasons we'd (1092) like to make an offer of proof as to what he would testify at the actual trial itself and submit a transcript of that --

THE COURT: I'm not barring his testimony. He may have something --

(THE COURT AND MR. STIDHAM SPEAKING AT THE SAME TIME - UNINTELLIGIBLE)

MR. STIDHAM: -- that will be barred.

MR. CROW: As to our arguments I would request that the Court make my brief I wrote as part of the record.

THE COURT: It is part of the file.

MR. CROW: All those issues were raised, and I don't want to waive any issues that may have been argued in this brief exchange.

(RETURN TO OPEN COURT)

THE COURT: Let's proceed.

WARREN HOLMES

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

DIRECT EXAMINATION BY MR. STIDHAM:

Q. Mr. Holmes, will you please state your name?

A. Warren D. Holmes. H-O-L-M-E-S.

Q. What is your occupation? (1093)

A. Polygraph examiner, commonly known as a lie detector expert.

Q. Can you tell us about your background?

A. I'm a graduate of the Keeler Polygraph Institute in Chicago, graduated there in 1955. I was with the Miami Police Department from 1950 to 1963. I left as a detective sergeant in charge of the Lie Detection Bureau to open up my own business. I'm a charter and life member of the American Polygraph Association, a charter and life member of the Florida polygraph Association. I'm a former president of the Florida Polygraph Association, former president of the Academy of Scientific Interrogation, which is the predecessor name to the American Polygraph Association. I was consultant to the United States Senate on assassinations. I lecture putting on interrogational seminars for the F.B.I., the C.I.A. and other government agencies. I have lectured ten years at the Canadian Police College on homicide interrogations and investigations. I lecture each year at the Department of Public Safety of Texas, the Texas rangers, primarily, and I conduct interrogational seminars throughout the United States -- ten to fifteen a year.

Q. I understand you conducted the polygraph examinations on the John F. Kennedy assassination?

A. Yes.

Q. And the Doctor Martin Luther King assassination? (1094)

A. Yes.

Q. Watergate?

A. Yes.

Q. You also worked on the William Kennedy Smith case?

A. Yes.

Q. Have you been qualified as an expert in the area of polygraph examinations in any other states in the country?

A. (NO RESPONSE)

Q. Let me rephrase that. Have you been qualified as an expert by any courts?

A. Yes.

Q. How many times have you been qualified on the subject of polygraph examinations?

A. Many times primarily in the State of Florida.

Q. Have you ever been qualified in the area of interrogation techniques or police interrogation techniques?

A. Yes. Many times.

Q. Have you ever worked on a case involving a false Confession?

A. Many.

Q. How many homicide cases have you worked on, or do you know?

A. I have administered polygraph examinations to a little over twelve hundred people who were suspected of the act of murder. I have taken hundreds of murder confessions.

Q. Have you ever taken a false confession? (1095)

A. Yes. Several.

Q. What would an interrogator look for when they were receiving a confession that might tend to point out that this is a false confession?

A. As I illustrated to you in our conversation previously, there are about eleven different things that you look --

Q. Let me stop you for a minute.

MR. STIDHAM: Your Honor, I ask that the witness be qualified as an expert in interrogation tactics and techniques. He obviously has over forty years --I should say thirty-eight years of experience in various police agencies. He is obviously an expert in that area.

MR. DAVIS: Your Honor, may I voir dire him just a second?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. DAVIS:

Q. Mr. Holmes, did you at one time -- I realize this is a long time ago -- would you have conducted an in-service training program for the Memphis P.D. --

A. Yes.

Q. -- back in 1981?

A. Yes.

Q. Could you kind of glance through this for me to see if that (1096) would -- (HANDING) if I am correct in assuming that that is the booklet you provided them regarding interrogation techniques?

A. (EXAMINING) Yes.

Q. And so have there -- is your opinion -- have you had any training in addition to what you had at that point in 1981 that gives you superior qualifications now or greater insight into the field of interrogation than you had back in 1981?

A. My entire career is empirical in nature. It is one case after another for thirty-nine years. It's all empirical in nature.

Q. Are there any dramatic changes that have occurred in the tactics for interrogation since back in 1981?

A. No.

MR. STIDHAM: Again we'd ask that he be qualified as an expert in the field of interrogation.

THE COURT: Go ahead.

CONTINUED DIRECT EXAMINATION BY MR. STIDHAM:

Q. You started to testify earlier -- and I rudely interrupted you -- about things that the interrogator would look for when receiving a confession from a suspect that might indicate it is a false confession. What are those factors?

A. Number one, they don't tell you anything you don't already know.

Number two, what they do say doesn't jibe with the crime (1097) scene analysis or the physical evidence or any investigation that has been done up to that point.

Number three, if they don't relate it in a narrative form, you have to be suspicious because what happens just preceding a confession is a factor of resignation that comes over the individual. And he just then expunges all of these thoughts from his head, and he enters into an emotional release in a narrative form. You don't have to question him because he wants to get it off his chest. What you see is that relief and remorse at the moment of the confession and their emotions match their words. They relive some of the sensations at the time of the crime, and what they do say -- they can lead you to the fruits of the crime or they can lead you to the weapons. And, ah, if the confession is really valid, they will offer some incidental detail which lends credibility to their story.

Maybe they'll say, "At the time we were doing this some man was walking his dog off in the distance," or, "Just at the precise moment I was doing this there was an automobile accident," and later you will find out that actually occurred.

You look for those incidental details they can offer. Ah, if it is a valid confession and you make a supposition and you're wrong, they will tell you're wrong. They'll answer every question directly. You don't have to correct them if there is a contradiction in what they have to say.

Ah, you don't have to lead them in any way and they'll (1098) spontaneously offer information that you didn't even know about. If you were wrong in a supposition, they'll tell you that you were wrong, but mostly they just sound and look like they are telling the truth and what they say makes sense. So an experienced interrogator looks for all those factors to see if they are present. If they are not there, you have to have serious misgivings as to the validity of his confession.

Q. Are there things that can be done by a police interrogator while taking a confession to help limit the possibility of a false confession, or is that basically what you just told me?

A. Well, what happens is a waning of resistance primarily in about the fourth hour, and you have got to be very careful that the person just doesn't enter into this resignation and just say anything at all to get out of there. You have got to be careful of that. Obviously you cannot be telling him the key details of the crime. When he finally does confess, you have got to be able to weigh whether or not what he tells you is commensurate with the case facts as you know them.

Q. You're talking about corroboration?

A. Yeah. You have got to have something you can hang your hat on that only the guilty person would know outside the investigators.

Q. Have you had an opportunity to examine the statements of Jessie Misskelley, Junior to the West Memphis Police Department (1099) on June third?

A. Yes, I have.

Q. Have you identified any of those factors or anything in the transcripts that raise concern in your opinion?

A. Yeah, I'm concerned that he's wrong on two major points, the time factor, but primarily what the young boys were tied up with. He's done one of two things. Either he's uttered a totally false confession, or he's contrived a confession with false information that he intends to recant at a later time. I don't have any evidence that he's doing that because from what I understand about his IQ level, I'm not sure that he's that duplicitous in nature. What I don't like about his confession is he doesn't attribute any conversation during the crime to the boys. I don't like it that he doesn't express any feelings about the crime, how he felt at the time, how he feels now. I don't like the fact that he's giving wrong information about the ligature which should absolutely stand out in his mind, and I don't like the time factor. It would seem to me that despite his IQ level, he should know the difference between 9:00 in the morning and 5:00 P.M. and he somehow should know the difference between a rope and shoelaces, and those things bother me a lot.

Q. Can a polygraph examination contribute to a false confession? (1100)

A. Unfortunately it can.

Q. How is that?

A. Because with some people it is a last hope. They think, "Okay, if I take this test and I pass it, you're going to get off my back," and then when they are told that the test indicates they are lying, that's the straw that breaks the camel's back, and then their will is beaten to a pulp, and then they just give in.

Q. So it is very important that the polygraph be conducted properly?

A. Yeah, it is, particularly with certain personality structures. You get somebody of low IQ and highly susceptible in personality structure who is concerned only with the immediate situation of getting home rather than the long term consequences of what he has to say. They always think they can straighten it out at a later date. They don't realize that they give the police a sword that they're going to stick in 'em, and they become an agent of their own victimization.

MR. STIDHAM: Your Honor, at this time I would like to ask again that Mr. Holmes be allowed to be qualified as an expert in the area of polygraph examinations and he be allowed to testify with regard to his conclusions about the test that was given to Jessie Misskelley by Officer Durham. If the Court is not going to allow us to --- if (1101) the Court is not going to consider that in the totality of circumstances with regard --

THE COURT: I'm going to let him testify in this hearing, but unless my mind is drastically changed by something other than what I've seen or heard so far, the results of the polygraph are not admissible by a witness for the defense or a witness for the State. It is simply not credible evidence. The device is extremely fallible, particularly with people who are of borderline mentality as to whether or not they may even be able to completely lie or they may be completely truthful. The machine is just simply not that sophisticated, and it depends on an individual's interpretation. No court that I know of other than under special circumstances has allowed the results in court as far as the truthfulness of the subject. They may be admissible for other reasons but certainly not as to the validity of the test.

MR. STIDHAM: Your Honor, again our argument was two-pronged. We thought it would be admissible for the truth of the matter asserted.

THE COURT: Well, no, your whole theory is you can find some guy to come up and say that the test was deceptive and, therefore, if the test was deceptive, that the tactics used were misleading and that it (1102) induced a false confession. I understand your theory. it's a pretty good one, I guess. I'm going to allow you to go ahead for this hearing.

MR. STIDHAM: For purposes of the suppression hearing, you're going to allow him to testify about the results?

THE COURT: Yes.

MR. DAVIS: Your Honor, we strenuously object to that because of the fact that it's inadmissible and the reasons for which it is inadmissible -- that it is not scientific in nature, that it's not reliable and if this is presented at this hearing --

THE COURT: I'm sure these newspaper and cameras are going to be blaring it all over the place. Of course, it has already been blared in the paper anyway.

MR. DAVIS: So far all they have is Mr. Stidham's version of that. If we proceed at the hearing, we are going to -- with tainted evidence -- we are going to proceed to present what comes under the veil of someone with authority but not admissible evidence that could easily taint the jury panel.

MR. STIDHAM: Your Honor, at the very, very least it is admissible to go towards the totality or the of circumstances. (1103)

THE COURT: I'm going to hear it in this hearing. Let 's go.

BY MR. STIDHAM:

Q. Mr. Holmes, you have had an opportunity to examine the polygraph test that was performed on Jessie Lloyd Misskelley, Junior on June third?

A. Yes.

Q. Can you tell us what your findings were?

A. Well, they were different from the other examiner. He indicated he thought there was deception at the points in the graphs where the pertinent test questions were asked. I evaluated the charts, and I have come up with just the contrary opinion. I didn't feel that at the point where the pertinent test questions were asked that the defendant was deceptive in nature.

Q. What -- in your report you list some factors that trouble you. Could you explain those to the Court?

A. Well, this was an ideal case or what we call a peak of tension test where you set up a series of questions where one is the key detail , and in this case there should have been a peak of tension test regarding whether or not the boys were tied up with plastic tape or wire or shoelaces. And the theory being -- of the seven listed it the examinee reacts to the key one, he definitely has pertinent information with regard to the crime in question. (1104)

So you keep taking that key detail and you shift it around in a series of different tests, and statistically it he reacts each and every time to the key detail, there's a large probability that he has intimate knowledge of the crime.

Also, a peak of tension test could have been conducted regarding the location of the clothes. Among experienced examiners -- particularly in murder cases -- peak of tension tests are held in the highest esteem and both the Israelis and the Japanese -- that is the only kind of test they run are peak of tension tests because they believe it has the highest degree of validity.

And in this case the shoelaces provided a real good opportunity to conduct a peak of tension test. Unfortunately that wasn't done and had the defendant reacted each and every time to shoelaces, then we'd be looking at him with a fish eye saying he's probably involved in this. But there are other things beside that that bother me. When you conduct a polygraph examination and utilize control questions, you keep the control questions in the same category.

When he introduced a control question of drug use, in my opinion he introduced a variable that could have created a degree of anxiety in the defendant at the time of the tests.

An ideal control question would have been within the same crime category. For example, "Prior to May 5th, 1993, have you (1105) ever hit anybody that you didn't tell me about?"

The other thing that bothered me about the test is that the primary pertinent question was too generalized in nature. "Are you involved in any way in the deaths of these boys?" To me, to

delineate his specific role in the crime, he should have been asked, "Were you present when the three little boys were killed? Did you kill any of these three boys yourself? Did you do anything to cause the deaths of any of these boys? Did you tie up any of these boys? Did you do anything to hurt any of these boys? Have you lied about where you were at the time of the killings?"

Once they got this alleged confession and it was obvious to them that there were some details not quite right, particularly the time factor and whether the ligature was rope or shoelaces, then they should have brought him back in for another test -- a confirmation test -- to see if he had made it up or he was just giving them a piece of the cake.

They could have ascertained by a subsequent test whether or not he was still withholding pertinent information or he had just crafted and contrived this confession.

THE COURT: Is it too late to do that now?

THE WITNESS: Not really. It might be a good idea if you got somebody that is independent. I have lost my objectivity in the case, and I'm sure Examiner Durham has, too. If you brought in an independent (1106) examiner, not connected with either the prosecution or the defense, I think he could sort it out.

BY MR. STIDHAM:

Q. Is it true that if an examiner didn't interpret the test results properly, that that might cause the interrogator to become more assertive and produce a false confession?

A. It's a catalyst. If the examiner goes out and says this guy is deceptive, he's involved, that's all those interrogators have to hear. That gives them the enthusiasm to be more assertive in their accusatory format. Sure. It is a catalyst.

Q. In your opinion did Mr. Durham fail to properly interpret these results?

A. Yes.

Q. Did he also fail to properly perform the test?

A. Yes.

THE COURT: Those questions are totally and completely improper. Go ahead. He can give his opinion as to what his findings were. Of course, he didn't even do the test. He just analyzed somebody else's test.

MR. STIDHAM: Your Honor, it is a test -- analyzing someone else's work.

THE COURT: Go ahead.

BY MR. STIDHAM

Q. Is it important when you're trying to corroborate a (1107) confession that you find things independent of the confession linking the suspect to the crime?

A. Absolutely. That is what you strive for when you take the confession, something that only the killer would know, some piece of physical evidence, some witness that he has that knows that he did it or confessed to. You're always looking for that corroboration. That's one of the things that disturbs me about the defendant's confession in this case. There's nothing you can hang your hat on.

Q. Does it bother you that they didn't take him to the crime scene?

A. That's the first thing you do. When you get a guy to so-to-speak verbally crap out what he did, you take him right to that crime scene. In this case there was some dispute as to what side of the creek he was on, where was he standing, where the banks were. That could have been resolved if he had been taken to the crime scene.

MR. STIDHAM: Your Honor. I would like to submit the report of Mr. Holmes into evidence.

THE COURT: It may be received for purposes of this hearing.

(DEFENDANT'S EXHIBIT SEVEN IS RECEIVED IN EVIDENCE)

MR. DAVIS: Your Honor, of course we would object (1108) to that on the same basis that we would object to any of his opinions regarding the polygraph results which is basically what that report contains.

THE COURT: I'm going to receive it just for the record.

CROSS EXAMINATION BY MR. DAVIS:

Q. Mr. Holmes, as I understand it, did I hear you say that you had lost your objectivity in regard to this case?

A. Yeah, I think-- I don't think the boy-- based on that confession is involved--

Q. That's not what I asked you--

MR. STIDHAM: Your Honor, if he would permit him to answer the question. He asked him why he lost his objectivity and now he doesn't want to hear the answer.

MR. DAVIS: No, he --

THE COURT: All right. I don't want any argument. Ask your question -- I'll sustain your objection. Rephrase your question.

BY MR. DAVIS:

Q. Did I understand you correctly to say that you had lost your objectivity in this case?

A. I had a feeling that your judge was going to ask me if I wanted to test this guy, and I was going to say I have already (1109) lost my objectivity. That's what I meant by that.

Q. But that was your statement?

A. Right.

MR. STIDHAM: May he be permitted to finish the answer he had begun'? Were you through?

THE WITNESS: I don't feel it would be proper for me to test the defendant because I've lost my objectivity regarding the polygraph.

BY MR. DAVIS:

Q. You gave a list of a number of items that you said were indicators of maybe an incorrect confession. Is that correct'?

A. Yes.

Q. Then you stated the most important thing in determining the truth of a confession and you said, "The most important thing of all is if they sound and look like they are telling the truth, then you can tell." That was your testimony?

A. Yes.

Q. And the person that is in the best position to determine if they sound like they are telling the truth, if they look like they are telling the truth is the person taking the confession. Would you agree with that?

A. Yes.

Q. You were not there when this confession was given?

A. No.

Q. So basically what you have done is listen to the officers (1110) testify?

A. I haven't heard the officers testify.

Q. Have you seen their investigative reports?

A. I have received -- yes. some reports from attorney Stidham.

Q. Have you seen the original polygraph charts? Yes.

Q. The original --

A. Not the originals. Copies. Excuse me.

Q. And what else besides the copy of the polygraph charts and reports that Mr. Stidham sent you have you used in formulating your opinion'?

A. The confession.

Q. Have you heard the tape of the confession --

A. No.

Q. -- where you can hear the defendant's voice?

No.

MR. STIDHAM: Your Honor, are they trying to impeach him on the fact that the Court wouldn't permit him to stay in the courtroom and listen to the testimony?

THE COURT: I don't know. Do you have an objection?

MR. STIDHAM: I asked for permission for the experts to be allowed to remain in the courtroom, and Mr. Ofshe was the only one who was allowed to remain (1111) in the courtroom. Now they're trying to impeach him on that.

THE COURT: Do you have an objection?

MR. STIDHAM: Yes. your Honor. I think it is an improper question.

THE COURT: Overruled.

BY MR. DAVIS:

Q. Basically what your opinion is based on your review of the polygraph charts and reports

provided to you by Mr. Stidham?

A. True.

Q. And all a polygraph does is measure physiological responses, correct?

A. To stimuli.

Q. It does not tell you definitively who is telling the truth and who is not, correct?

A. We measure a symptom of the act of lying, but the existence of the symptom is the best evidence of lying.

Q. Sometimes.

A. Sometimes.

Q. And sometimes lying occurs when there's no physiological response, correct?

A. Correct.

Q. What we have here is your opinion versus the opinion of Mr. Durham?

A. True. (1112)

Q. And Mr. Durham is the one who gave the exam and was there present to observe the defendant when he made certain statements?

A. No, he denies that in his report. He says the defendant confessed to investigators later on, that he wasn't present when the defendant confessed --- in his report.

Q. You refer to the peak of tension test as what should have been conducted, that that is the test that Officer Durham should have used?

A. Yes, sir.

Q. Were you aware at the time that Officer Durham conducted his test that at that point this defendant was not a suspect?

A. The case facts were known. He wasn't a suspect when they brought him in for the polygraph test?

Q. Yes, sir.

A. He had to be a suspect or there would be no reason to give the test. Why would he be asked do you know who did it and did you do it if he wasn't a suspect?

Q. Let me ask you this: Are you assuming in saying that the peak of tension test was the one that should have been given in saying that are you assuming that he was a suspect at the time he was polygraphed?

A. Certainly he was a suspect. He was asked questions that clearly infer that whether or not he ever attended devil worshipping -- (1113)

Q. I'm not asking you was he a suspect. I'm asking you were you assuming that as a fact when you said that it would be the preferred or customary operation to give him a peak of tension--

A. I would assume that he was a suspect.

Q. If he were not a suspect, would that change? If you were going to polygraph someone who is not a suspect to determine

A. I can't think of a situation where you would test anybody who wasn't a suspect unless he was a witness and you were trying to corroborate the validity of his testimony. You just don't go around picking up people off the sidewalk and giving them polygraph tests. If he was brought in on a homicide case, he has to be a suspect.

Q. All right. Well, let me ask you this: You indicated that witnesses are polygraphed to determine if you can corroborate their testimony?

A. Right.

Q. Is it not conceivable that you bring in witnesses in a homicide case, question them and then put them on the polygraph to corroborate their testimony?

A. True.

Q. If that happened in this instance, then he wouldn't have been a suspect, would he?

A. My understanding he hadn't given any incriminating information up to that point, either as a witness or as a suspect. (1114)

Q. Well, if he had been brought in as a witness and put on the polygraph test in order to determine if they could corroborate his statements, he would not have been a suspect under those circumstances --

A. What would they test him on? He hadn't given any information.

MR. DAVIS: Your Honor, could the witness be instructed to answer the question'?

THE COURT: Answer yes or no and then you can explain your answer.

BY THE WITNESS:

A. What you're trying to argue is at the time he was given this test, he was not a suspect. I disagree with that wholeheartedly.

Q. How was it that you determined that he was a suspect at the time the test was given?

A. The nature of the test questions.

Q. You indicated that a confirmation test would be the normal procedure after the confession?

A. Yes.

Q. You also indicated that you would expect an extremely emotional reaction once he spilled his guts, so to speak.

A. An emotional relief, yes.

Q. We've heard -- if officers have testified that at the time he spilled his guts that he started crying and indicated some (1115) emotion, would that emotional release and the emotions of that moment -- would that affect and interfere with a valid polygraph exam?

A. Possibly.

Q. So under those circumstances it wouldn't be a good idea to give the polygraph exam if you wanted a valid result.

A. Yeah, but that's not the emotion they would have seen if it was a valid confession, in a valid confession they would see relief, not anxiety or frustration. When a person confesses and they get it off their chest, they go into a serenity that they haven't experienced in a long time. They're just glad it's over with and there's tranquillity and peacefulness to their demeanor that would not have precluded conducting a second polygraph examination.

Q. So it's your testimony under oath that in nearly every instance of a confession to a serious homicide, that the defendant after confessing becomes tranquil and serene?

A. There is a certain anxiety about the consequences of what they just did, but by the same token, you always see that relief if it is a genuine confession.

Q. You used the words tranquillity and serenity" about the defendant after they give a confession.

A. (NODS HEAD)

Q. That would be one of the indicators to you -- because this defendant didn't exhibit tranquillity and serenity -- that would (1116) indicate this statement might not be accurate?

A. True.

REDIRECT EXAMINATION BY MR. STIDHAM:

Q. Is there a mystical, magical moment that every interrogator finally wakes up and realizes during the interrogation process that he can finally say, "Hey, you are a suspect"?

A. Well, what you do is you start off interviewing. Then you make a transition from non accusatory to accusatory interrogation. And you make that transition when you evaluate the suspect's story and you see some things that are disturbing to you. His story doesn't make sense and so you become more accusatory in nature.

Q. Is there any doubt in your mind that based on the questions you've seen in the interrogation that Mr. Misskelley was a suspect when he was brought down to the department?

A. No, none. Primarily, the two questions that were asked on the polygraph about whether or not he participated in devil worshipping. That presupposes that he was in that kind of cult.

Q. Is there any reason for the polygraph examiner to participate, or have pretest knowledge about facts regarding the subject, or should the polygraph examiner be objective and out of the loop, so to speak?

A. No, he's got to get input from the investigators because he's got to know what questions will cover the waterfront and do (1117) the job.

Q. If I were to tell you that Mr. Misskelley was shown a photograph of one of the young victims in this case, would that be a factor in your analysis?

A. Depends upon when it was shown to him. Are you talking about right prior to the polygraph test?

Q. No. Subsequent to the polygraph test but prior to his breaking down as you've described it.

A. Well, the breaking down comes on the basis of a cumulative effect on the psyche and he reaches a point of resignation and that is when he confesses.

Q. Is it sometimes difficult to determine whether or not it is relief or I'm glad to get these guys off my back. Is it hard to tell the difference sometimes?

A. Yeah, it is sometimes.

(WITNESS EXCUSED)

MR. STIDHAM: Your Honor, assuming from the court's ruling that there's a possibility that you will not allow him to testify at the jury trial which begins next week --

THE COURT: You need to listen carefully to what I'm saying. He can certainly testify to a great deal about what he testified to here today. The only problem I have is with the results, either affirmative or negative, of a polygraph exam being introduced; (1118) that is, whether he passed or failed.

All you have got here is two people who have differing opinions on the test that was given, that have differing opinions on the test questions on a device that is not very reliable in the first place and not very scientific.

Mr. STIDHAM: Will I be permitted to make a proffer?

THE COURT: You just did make a proffer. But the thing is, there's a number of things -- I think he could probably qualify on investigations and that part of his testimony about -- certainly his experience.

That might be useful, relevant testimony. I'm more concerned about two experts getting up and saying, "This is what I found," particularly in an area that most courts view as very unscientific in the first place.

So the results I'm not going to allow, but a great deal of his testimony is interesting and perhaps beneficial to you, and I would allow it so you just have to make a decision whether you need him at the trial, which I will allow his expertise with regard to the investigative questioning techniques that were employed.

JESSIE MISSKELLEY, SENIOR (1119)

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

DIRECT EXAMINATION

BY MR. STIDHAM:

Q. Will you please state your name?

A. Jessie Lloyd Misskelley, Senior.

Q. You are the defendant's father?

A. Yes, sir.

Q. Do you remember on June third coming into contact with Detective Allen?

A. Yes, sir.

Q. Can you tell the Court what happened and how that went down?

A. Well, I was at work down at the shop, and Mike Allen came up there, and my boss met him at the door -- Jim McNease -- and Mike Allen wanted to see me so he called me over there. Mike Allen told me he wanted to ask Jessie some questions about Damien Echols. I said, "If he is not at home, he's at Vicki's house," and he said, "He's not at home because I just came from there."

So I went down to Vicki's house, and I got him, carried him home, and he put some shoes on, and I carried him back to the shop. And he got in the car with Mike Allen and they left.

Q. Did Officer Allen explain to Jessie what his rights were?

A. No, sir. He said he just wanted to ask him some questions. (1120) That's all.

Q. Do you remember discussing with Detective Allen anything about a thirty thousand dollar reward?

A. I don't remember at the shop about it, but my boss said he did, but I don't remember it. I left the shop after they left. I was in the wrecker going home after some parts and they pulled up beside me going down Missouri Street. Mike Allen said he had been trying to find me. I said, "I'm going here to Chief's Auto Parts to get some parts."

They pulled in there beside of me, and they both got out of the car, laughing and joking.

Q. When you say "they," do you mean --

A. Jessie and Mike Allen.

Q. And then he said he wanted Jessie to take a polygraph test, said he wanted to take it. He said if he gets a conviction out of this, Jessie will get the forty thousand dollars. He said forty thousand. He said he's going to buy him a new truck. And Jessie said, "No, I'm going to buy daddy a truck and I am going to take his old one."

And that's all that was said about it. I signed the waiver for him to take the polygraph test and

they left.

(WITNESS EXCUSED)

JAMES McNEASE

having been first duly sworn to speak the truth, the whole truth and nothing but the truth, then testified as follows: (1121)

DIRECT EXAMINATION

BY MR. STIDHAM:

Q. Will you please state your name for the Court?

A. James McNease.

Q. Where are you employed?

A. I own my own business here in Marion, and also I'm employed with the UP Railroad.

Q. Do you remember being at your place of employment or your business on June third of this year?

A. Yes, sir, I do.

Q. Why do you remember that day?

A. That is the day that Mike Allen came to my shop, and I met him at the door. He asked to speak to Jessie Misskelley.

Q. Jessie Senior?

A. Yes, sir.

Q. Do you remember Mike Allen saying anything about a reward?

A. I did. I said -- I told Jessie when -- I called Jessie over, and when he came over, I said, "Hey, if he testifies maybe he will get the thirty thousand. Wouldn't that be something." And we all laughed about it.

Q. When you say, "we" who is we?

A. Mike Allen, Jessie and myself.

CROSS EXAMINATION

BY MR. DAVIS:

Q. Did I understand you to say that you are the one who made (1122) that statement?

A. Yes, sir.

Q. That wasn't Officer Allen making a statement?

A. He smiled about it and kind of nodded.

Q. But you are the one who brought up a reward?

A. Yes, I am.

Q. Do you remember the police coming out -- as a matter of fact, I think it was Bill Durham who came out to talk to you back about June 11th last year-- to take a statement from you?

A. There was an officer came out, yes.

Q. Do you remember what you told the officer then when he came out to take a statement from you?

A. I don't remember what you're referring to.

Q. You didn't give him the statement, right?

A. I gave him the statement.

Q. You told him Mr. Stidham told you not to talk with him, correct?

A. Do what now?

Q. When Officer Durham came out there on June 11th, 1993, and contacted you -- or contacted you by phone and asked you --

MR. CROW: Your Honor, I'm going to object to this. This was discussed in pretrial back months and months ago. We explained that we never told anybody not to speak to anybody and we informed them that we would then instruct everybody to speak to anybody if (1123) they wanted to. That's been covered on the record, I believe, months and months ago.

THE COURT: I remember something about it back in chambers.

BY MR. DAVIS:

Q. If Officer Durham indicates that back in June of '93 when he tried to contact you to take a statement from you, did you tell him then that you had been told by Mr. Stidham not to talk to him?

MR. STIDHAM: Judge, I don't believe that's a proper question to impeach a witness on, especially in light of the fact that we discussed this at a prior proceeding --

THE COURT: I don't think it's that important. He said he is the one that raised the question of a reward.

MR. DAVIS: I don't have anything further.

(WITNESS EXCUSED)

MR. STIDHAM: Your Honor, at this time we would like to rest in regard to our motion to suppress. Again we would submit that since we were not able to determine the facts of the case today until we have had an opportunity to discuss this with the officers under oath, we would like to have an opportunity to brief the facts as they apply to the law and submit (1124) that to you by letter or fax or Federal Express and ask you to withhold your opinion with regard to the motion to suppress and the amended motion to suppress until we can get that to you in the next twenty-four hours. That would also give the State an opportunity to brief the law in that regard if they so choose and we've been at a disadvantage with regard to knowing --

THE COURT: I thought you had another expert.

MR. STIDHAM: That's all we're going to put on today.

MR. DAVIS: Judge, it is the State's position there's no need for briefs. It may be a serious case but as far as the issues are concerned, they are like any other confession case, whether he intelligently and knowingly waived his rights and whether it is a voluntary statement. It is the State's position that the evidence is abundantly clear that in fact it was a knowing and intelligent waiver and voluntary statement.

MR. STIDHAM: Judge, my client's life is at stake. We'd like to have an opportunity to argue the facts as they pertain to the law in this case.

MR. DAVIS: Judge, we've been putting off this suppression hearing for six months now.

MR. STIDHAM. What prejudice would the State have (1125) by giving us twenty-four hours to submit a brief by fax?

THE COURT: You are wanting to do a brief on the facts?

MR. STIDHAM: We prepared a brief with regard to the law regarding --

THE COURT: -- I saw that --

MR. STIDHAM: But we haven't --

MR. CROW: Your Honor, there is a separate brief that has not been filed yet that deals with the issues that we thought would be coming out today. As it turned out, some of the issues did not come out today. I need to modify my brief before I can file it. In no event did I apply the facts to the law as I briefed it because I did not have the facts. I didn't know what facts would come out.

MR. STIDHAM: There's no way we could --

THE COURT: I'm more interested in a brief that would apply the facts to the law in regard to the admissibility of the results of the polygraph. That would be more beneficial to me. I can rule on this right now.

MR. CROW: Judge, there's one issue if you're going to rule right now, there's one argument I would like to make. (1126)

THE COURT: Okay.

MR. STIDHAM: You won't give us an opportunity to fax that to you, your Honor?

THE COURT: I'm not ruling you I won't. I'm prepared to make my ruling now. If you think you can brief it and change my mind, I'll change my mind. I'm not --

(THE COURT AND MR. STIDHAM SPEAKING AT THE SAME TIME - UNINTELLIGIBLE)

MR. STIDHAM: -- we'd like you to consider it --

THE COURT: --in granite.

MR. STIDHAM: If you're going to make your ruling now --

(MR. STIDHAM, MR. CROW AND THE COURT SPEAKING AT THE SAME TIME - UNINTELLIGIBLE)

THE COURT: -- if either one of you want to make a short argument.

MR. FOGLEMAN: The record should reflect -- this is for future reference -- that in regard to this suppression hearing, that the defense did have here a psychologist and another expert Mr. Ofshe, who they have chosen not to call for whatever reason but for the record purposes, as far as anything in the future as far as -- whether there's any ineffective (1127) assistance -- they had those experts here.

THE COURT: I tried to make it clear that I'm going to hear all of your experts in this hearing for these purposes.

MR. STIDHAM: Judge, I really appreciate the prosecutor's concern about me, but I think I'm big enough to handle my own case.

MR. FOGLEMAN: Your Honor, I don't want to have to try this case again, and I think an appellate court might -- they might want to know that those things --

THE COURT: The record is clear now.

MR. STIDHAM: Your Honor, you heard testimony from Doctor Wilkins about the low IQ and all we're asking for is an opportunity to submit a brief that will argue the law with regard to admissibility of confessions the way the facts came out today. I don't know see how the State would be prejudiced by us submitting a brief to that effect.

THE COURT: I will give you until tomorrow afternoon to have the brief submitted to me.

MR. CROW: Your Honor, I would expect an objection -- I would ask the Court to take judicial notice of the IQ and mental capabilities of our client due to the previous testimony.

THE COURT: I'm well aware of that. I have had (1128) several hearings on it.

MR. DAVIS: We did advise them -- they asked us whether we would stipulate as to what Doctor Wilkins has previously testified to --

MR. CROW: I didn't ask you to stipulate to what he already testified to --

THE COURT: I've already heard his testimony.

MR. DAVIS: There were some things that pertain specifically to the voluntariness of the confession that had he taken the stand we wanted to go into, so we indicated we couldn't agree to his testimony being considered for purposes of this hearing unless he took the stand because there were certain things we needed to inquire --

THE COURT: I recall his testimony. He testified rather clearly that he was not mentally retarded, that he was borderline.

MR. CROW: He testified to his diminished mental capacity, your Honor.

THE COURT: Yes. I'm aware of that and I can't throw it out of my mind when I make a decision so in this regard I will certainly consider his mental capacity which I've already ruled on.

(PROCEEDINGS CONCLUDED) (1129)