

Witness for the Defense

February 1, 1994

By STIDHAM:

Q: You please state your name for the Court?

A: Warren D. Holmes

Q: And where do you reside, Mr. Holmes?

A: Miami, Florida

Q: Okay. Can you tell us a little about your law enforcement background, your education and experience?

A: I was a Detective Sergeant with the Miami Police Department for 13 years....

Q: [interrupting] Have you...

A: [continuing] ...I left there to open my own business and I make my living, primarily, lecturing various law enforcement agencies throughout the United States including the FBI, the CIA, the Texas Rangers, I've lectured in Memphis, I've lectured in Little Rock, on the subject of criminal interrogation.

Q: Okay. I understand that you've also lectured to the Royal Canadian Mounted Police?

A: Yes, 10 years.

Q: I also understand that you worked on the assassination of John F. Kennedy?

A: I worked on the assassination of President Kennedy. I worked on the Martin Luther King murder. I worked on Watergate and more recently, I worked on the William Kennedy Smith case.

Q: Were you also involved in--in the Boston Strangler case and the Hampton case in Louisiana?

A: Yes.

Q: Mr. Holmes, have you ever been qualified as an expert on police interrogation techniques by any court in the country?

A: Yes.

Q: How many times would you say you've been qualified as an expert?

A: Oh, at least 50 to 100 times.

DAVIS: Judge, we'll stipulate that Mr. Holmes is qualified as an expert in the field of police interrogation techniques.

STIDHAM: Thank you.

THE COURT: All right, you may proceed.

By STIDHAM:

Q: Mr. Holmes, would you tell the jury approximately how many homicide cases that you've worked on in your career?

A: I have interrogated a little over 1200 people who have been accused of the act of murder.

Q: Have you ever taken a false confession from a suspect?

A: Several.

Q: And could you tell a jury what an interrogator would look for when they are taking a confession that might raise a red flag or be indicative that the person is giving them a false confession?

A: Well, the first thing that you look for is he's gotta tell you something that you don't already know and the second thing that you look for is that whatever he says does not conflict with the evidence or the crime scene analysis. The third thing, he should be able to lead you to the fruits of the crime or the crime weapon utilized. Now, in the initial part of the confession, it's always in narrative form where he suddenly just gets it off his chest and is a--an indication of relief that sets in and he tells you about it and you don't have to prompt him or lead him with questions. He just gets it all out at one time. Then, when he gets done telling you in the narrative form, that's when you start asking the questions. Also, what you look for is that when you do start questioning them to clarify certain points in his confession, if you're wrong in a supposition, he will tell you that. He'll tell you "No, that's not the way it happened." He will correct you. You don't have to correct him. And then, you always look for little incidental details and he'll say "Well, just at the time this was going down, we noticed a man walking a dog across this field," and later on, you verify that there was in fact, a man walking a dog across a field. So, any time they supply an incidental detail of an occurrence that took place simultaneously with the crime, it lends credibility to the confession. They will describe the behavior of themselves and of the victims. They will describe their feelings at the time. They will describe the conversations between the culprit and the victims. They will describe the conversations between the co-defendants. They will describe their feelings since the crime has committed. And, when they're confessing, you get the impression that their words match the emotion that you see, they're reliving the experience of the crime. Now, if you don't see that match and their manner is stilted,

it could be contrived and you could be getting false information but what you're always looking for when you take a confession is something that you can hang your hat on, something that corroborates a confession. One independent witness, one piece of physical evidence, a statement made by a co-defendant that confirms it but you're always looking for something beyond his word, just something to verify the validity of the confession. Most of what you see is that the suspect, once he confesses, he sounds and he looks like he's--he's telling the truth and, of course, after you get the confession, the litmus test--the best test is to take him out to the scene and let him walk you through the crime and see what happens. That's when you can assess whether or not he's telling you something based on memory or he's just fantasizing it, as he goes along.

Q: Mr. Holmes, is there a point, during an interrogation, that the interrogator has to be careful after the suspect has been in there for a while? Is there something that happens that you gotta watch for?

A: Most of your confessions, particularly in homicide cases, come in the 4th hour. There's a waning of resistance where the person becomes a victim of what I call a "captive audience syndrome," where he almost becomes mesmerized by the relationship between himself and the interrogators. Anything from 4 hours on is a diminishing resistance that can lend itself to a confession whether it be false or--or valid.

Q: Have you had an opportunity to examine the statements made by Jessie Misskelley Jr. that were given to the West Memphis Police department on June 3, 1993?

A: Yes.

Q: And have you had the opportunity to listen to the actual tape of the confession?

A: Yes.

Q: Mr. Holmes, have you identified any of the factors that you've just discussed in Mr. Misskelley's statement?

DAVIS: Your Honor, excuse me, this point if—I—I think before he can ask that question, he needs to also address whether or not he's familiar with the investigative file sufficiently enough that he can answer that question.

THE COURT: Is your objection to foundation?

FOGLEMAN: Yes, sir.

THE COURT: Lay a better foundation

By STIDHAM:

Q: Mr. Holmes, have you also been made aware of some of the aspects of—of a what was found at the crime scene and what--how the bo--bodies were bound and things of that nature?

FOGLEMEN: Your Honor, I would ask that that question---I would object to that question because when he says he was made aware, I don't know if Mr. Stidham told him a version or if he's examined actual documents and files and if he's going to lay a foundation for this man's opinion, he needs to explain to us what's it's [unintelligible].

STIDHAM: [interrupting] Your Honor, may counsel approach the bench?

THE COURT: Yes.

Bench Conference

STIDHAM: Judge [unintelligible] talked about the hearing in Marion, we asked specifically that this witness be allowed to stay in the courtroom and hear the testimony regarding the officers. They objected and the Court refused to allow the witness to stay in here.

FOGLEMEN: He's got a transcript of the statement [unintelligible].

CROW: Yes, your Honor, but he was part of the rule. We couldn't give it to him.

STIDHAM: Well, he has examined a—a--newspaper articles, he's examined parts of the files...

THE COURT: [interrupting] Well, then just ask him what he's examined, then.

DAVIS: That's all we wanted was to ask specifically ask ...

THE COURT: [interrupting] Well, ask him what he's examined.

End Bench Conference

By STIDHAM:

Q: Mr. Holmes, can you tell the Court what--what other items you have examined in this case, documents or ...?

A: [interrupting] Well, I—I examined his 2 confessions and I examined all of the material that you--you sent me and the investigative reports and, of course, I've listened extensively to the tape itself. Now, are you asking me for a description of what a false confession is, ordinarily?

Q: Well, my question is have you identified any of the factors that you've discussed in Mr. Misskelley's statements to the police?

A: Not in the quantity that I would want to see, no.

Q: Well, can you elaborate on that?

A: Well, the 2 obvious points that bother me is the mistake on the time. You know, he's saying 9 o'clock and then he's saying he went home at 12:00. I--I just don't understand, if he was, in fact, involved in this crime how he made a mistake on the time factor and the thing that really bothers me is the ligature, what was used to tie up the—the victims. Now, he certainly knows the difference between shoelaces and a rope. Those are the two most prominent things but there's a multitude of questions, in my opinion, that he should have been asked to ascertain the validity of his confession and the first time that a—that he came out with the wrong time factor, that should have been a signal that something was radically wrong. That's when the questions should have been more probing to determine whether or not he was making it up or giving a valid confession.

Q: What type of questions were the officers using to elicit the statement from the defendant?

A: Well, first of all you don't ask any questions in the initial part of the confession. You just let him spill it and get it out, where you just sit there and you listen, a non-directive approach.

Q: Is that what you're referring to in the narrative?

A: [interrupting] ...in the narrative, that's the way most confessions come. All of a sudden, the suspect goes belly up or resignation sets in, they want to get it off their chest and they just blurt it out and there's a tremendous emotional relief. You just sit there quietly and you listen. Then, when they get done discussing what happened, then the points that you want to cover, you start asking the questions. And what I didn't like about this confession is that most of it emanated from que—que--questions right off the bat, without--without any narrative of any--any length at all, without any descriptions about feelings or conversations or anything. It's all in response to questions. When it appears that it wasn't on the money, then they change it around and say well, in effect "could it have been this way?" And particularly disturbing...

FOGLEMAN: [interrupting] Your Honor, I object to that statement unless he can point to a specific place in there where the officer said "could it have been this way."

STIDHAM: Your Honor, I think it's throughout the entire statement itself.

THE COURT: I'm going to sustain the objection. If he's going to refer it and if we're going to continue along those lines, I--I need him to be more specific in the area of the statement that he's referring to. I'll sustain the objection, in that regard.

By STIDHAM:

Q: Can you mention a specific...?

A: [interrupting] Well, both of them at one time mentioned that they were disturbed by what they were hearing. One said "I'm disturbed by this time factor" and another one came right out and said, I think that--I don't remember which one, that he didn't think he was telling all of the

truth. So, either he's totally innocent and just made it up and doesn't know the case facts or two, he was so doped up he doesn't remember what happened or three, he's psychologically impaired which the ramifications are of faulty memory or he wanted to get somebody off his back and he decided "well, I'll just give them a bunch of baloney, wrong case facts and then, recant later." You know, there's no doubt in my mind that there's false information in the confession. The whole question is why? Is it because he's innocent or because he's duplicitous and cunning and decided to offer a false confession and retract it later on?

Q: Are you aware of any literature with regard to personality traits of people who are likely to falsely confess?

A: Well, from reading and from my own experience, yes.

Q: What are those?

DAVIS: Your Honor—your Honor, at this point in time, when we start talking about personality traits, they--they've got a psychologist here [unintelligible] I anticipate he will be. This man is a 13-year law enforcement officer...

STIDHAM: [interrupting] 39 years, your Honor.

DAVIS: 13 years working for law-enforcement agency. And your Honor, his qualifications as to expertise as to personality traits--we do not agree that he is an expert in that area. We agree that he is an expert in the area of interrogation.

THE COURT: Sustained.

By STIDHAM:

Q: Mr. Holmes, is it important when you are corroborating a confession that are independent of the confession that link the suspect to the crime?

A: It's the whole quest of your questioning after he comes out with a narrative form of the confession, is to get something you can hang your hat on independent of what he's telling you. One other human being who can verify it, one piece of physical evidence, one piece of documentation where you know it's irrefutable corroboration of what he tells you because what you're concerned about is he may recant it later on so you want to have something that he just can't lie around. That's why you look for some irrefutable piece of evidence to corroborate the confession and when you don't have that, you're in trouble.

STIDHAM: Pass the witness.

By DAVIS:

Q: Mr. Holmes, my name is Brent Davis. I met you, previously, at another hearing. If I ask you any questions that you don't understand, please ask me to rephrase them and I will be glad to do so.

A: All right, sir.

Q: And it's my understanding that, primarily, what you do now is lecture to police agencies, law-enforcement agencies on interrogation tactics, is that correct?

A: True.

Q: Okay. And would it be fair to say that you're basically training officers on how to conduct an interrogation?

A: True.

Q: Okay. And would it be accurate to say that when you train officers to conduct interrogations that you tell them that, at a minimum, in an important case, that you want them to go 4 hours, uninterrupted, with a suspect?

A: True.

Q: Okay. So, in this particular case, the time period that the officers were with the suspect doesn't pose a problem for you, does it?

A: No.

Q: That would be what you recommend them to do if you were advising them, correct?

A: I would have done exactly what they did.

Q: Okay. Now the basis—you said that you've listened to the tape extensively, is that correct?

A: Hm-mm. Hm-mm.

Q: Now, you previously testified at another hearing in this matter and indicated that you never heard the tape?

A: That's true.

Q: Okay. And when you had never heard the tape you said basically the same thing or rendered the same opinion as you have since you heard the tape, correct?

A: True.

Q: So, I assume that your opinion was already set before you even listened to the tape of Jessie Misskelley?

A: True.

Q: Okay. Now, you said that there needed to be some specific fact that was unique or that could be corra—could not—could identify that this person was there at the crime, correct?

A: True.

Q: Okay. And in a situation where a defendant describes that one of the three victims was castrated and is able to identify which of those three victims was castrated, wouldn't that indicate to you that that defendant had some peculiar knowledge that only a person that was there would know?

A: Providing you know all the antecedent conditions that led up to that statement. I don't know what inferences or suggestions were made by the interrogators prior to him making that definitive statement but if that was done, just suddenly blurted out, yes that's significant.

Q: [interrupting] Okay.

A: [continuing] but if that was suggested in some way, during hours of interrogation, then that negates its weight.

Q: Okay, but that's one of those things that you would look for in determining whether that confession was accurate?

A: Absolutely.

Q: And if the witness said "yes, one of the three victims was castrated" and that person was able to identify which one of three was, accurately, then that would be an important factor for you to consider?

A: Absolutely.

Q: Okay. Now, if there were also reports from a medical examiner that there were bruising to the victims' ears, significant trauma to each one of the three, little 8-year-old boys' ears and, in the course of the interrogation, the defendant tells you, upon questioning, that, in fact, the persons had grabbed the victims by their ears in the course of performing—having them perform oral sex, that would be significant too, wouldn't it?

A: Yeah, but not as significant as not knowing what time the crime occurred or while they were tied up.

Q: Okay. Would it be—if the parents of the little boys didn't even know that injuries had existed to their ears and only the medical examiner and a few, very limited, law-enforcement officers knew that, then that becomes a pretty significant finding, doesn't it?

A: It does, providing he can explain how he got that information by inference or otherwise through the interrogators and if he can't say that, then that is significant, yes.

Q: Okay. So, the only way that you would discount that information as being important would be if there was some independent source where he could have obtained that information?

A: Right.

Q: Okay. Absent that independent force, that's one of those factors that you're looking for to nail down that this confession is true?

A: Right.

Q: Okay. Now, during an interrogation, you told us that it's important to go for at least 4 hours in an interrogation, it's also what you train officers that it's important once they're in an interrogation, to keep them talking, right?

A: True.

Q: Okay. So, if something happens during the course of an interrogation and something comes up that maybe unexpected or whatever, you don't throw your hands up and go "Oh, my God, you said something that was wrong," you let them keep talking and explaining what's going on, correct?

A: Well, not in this instance. When he comes up with the wrong time and he doesn't know what the victims were tied up with, right then you should have said to yourself "Hey, wait a second, there's something wrong, here." Now, why didn't they try to clarify that when they took the confession? They steered totally away from that. The minute they saw something was wrong with the time factor and the ligature, they never asked any questions to try to clarify it, only after they turned the tape recorder off, then they clarified the time factor in the second taping but they omitted clarifying the difference between shoelaces and rope.

Q: Okay. So, you recall a difference between the shoelaces and rope, involved in the first statement, is that correct?

A: Well, they didn't clarify that in the second—second tape. They did clarify the time factor but you know, some of this stuff is miniscule but by comparison the time factor and the ligature, to me is the key to this whole case.

Q: Okay, but you say it's miniscule but the fact is that this defendant knew which of the victims had been castrated, that's pretty dag gum important, isn't it?

A: Well, that's presumptuous to assume that that emanates from guilt, that could emanate from—he may have glimpsed that through the interrogation. He was with these guys for hours.

You're bound to absorb something when you're with investigators for hours, indirectly or directly, they're going to reveal something.

Q: Okay. So, basically when--when you place less significance on that, you're doing that because you're assuming that officers imparted that information to him, correct?

A: In this case, yes.

Q: Okay. And the truth of the matter is, you've never heard what the officers' testimony was regarding what went on there, correct?

A: Correct.

Q: You've never reviewed any transcripts of what the officers said, correct?

A: Correct.

Q: Okay. So, as far as what went on during this interrogation process, the only thing you know is what you've seen or heard on that tape?

STIDHAM: Your Honor...

DAVIS: [interrupting] Is that accurate?

STIDHAM: Your Honor, I--I'm making an objection. The prosecutor objected to the witness hearing that. We asked that the witness be allowed to hear that...

DAVIS: [interrupting] Your Honor...

STIDHAM: [continuing] ...the prosecutor objected. We'd ask that he shouldn't be allowed to impeach him with that information.

THE COURT: I don't think he asked for a rule to be applied to him. I don't know why any material necessary to formulate an opinion couldn't have been supplied to him, if that's what saying.

STIDHAM: Well, your Honor, if he can't be in the courtroom and listen to him testify, how can we provide him with the transcripts of it and why should the prosecutor be allowed to impeach him on that basis? We, specifically, requested that Mr. Holmes be allowed to hear the testimony of the officers and formulate his opinion in this case, the State objected and now they're trying to impeach him because he doesn't have that information before him. I think that's improper.

THE COURT: Well, Overruled. Go ahead.

DAVIS: Your Honor, for the record, they did have a transcript of the entire testimony of the officers that they could have provided.

By DAVIS:

Q: Now, Mr. Holmes would you agree—let me back up just a minute, have you talked with the defendant in this case, personally?

A: No.

Q: Okay. So, you've never interviewed the defendant to get any gauge as to his demeanor, character, intelligence, anything of that nature?

A: No, the only feel I got for that was the tape.

Q: Okay. And you would agree with the statement that a lot of people who don't have a formal education, have what we call "street-smarts," correct?

A: Well, that's called social intelligence.

Q: Right, and...

STIDHAM: [interrupting] Your Honor, is he asking the witness to testify about things that he didn't want him to testify when I asked him questions about the psychological nature?

THE COURT: Well...

STIDHAM: [interrupting] It's like the same thing.

THE COURT: Wait a minute, I know you're trying to make an objection but tell me what is?

STIDHAM: Your Honor, I asked him if people who are—give false confessions...

THE COURT: [interrupting] What is your objection?

STIDHAM: Your Honor, my objection is I asked the witness if he could testify as to psychological profiles of people who give false confessions. The prosecutor objected and said that it was improper and the Court sustained it. Now, he's asking him the same questions. I'm objecting....

THE COURT: [interrupting] No, I'm not allowing him to testify—I don't--is that what you're asking him, Mr. Davis, what is his psychological profile?

DAVIS: [interrupting] Judge, it's been so long since I asked the question, I—I may have to go back and rephrase and give Mr. Stidham an opportunity to object again.

THE COURT: [interrupting] Well, I'm not going to allow either one of you to ask this witness to give a psychological profile of anyone or even a hypothetical psychological profile unless it follows—first of all, are you prepared and capable from your experience, training and education to give such a profile?

HOLMES: Yes.

THE COURT: Well, I might allow it.

DAVIS: I don't think I'm asking that question yet, Judge.

By DAVIS:

Q: Would--would it be accurate to say that one of the first things you teach people to do in an interrogation is to assess the mental capability of the person they're interrogating?

A: You get a thumbnail sketch of the individual you are interrogating. You have to know his basic personality structure.

Q: And isn't it true that when you teach your courses that you advise the—the people that you are teaching that you don't just look for book smarts but you look for street wise—street smarts, also?

A: Yes.

Q: Okay. And there are two different...

THE COURT: [interrupting] Mr. Davis, just a minute. I'm going to allow him to ask that question if you want to reserve your cross-examination, at this point. If you want to go back and ask him that...

STIDHAM: [interrupting] Yes, sir...

THE COURT: [continuing] ...I'm going to allow it.

STIDHAM: ...I want to go back and ask him. Thank you.

THE COURT: You want to wait and let him do that and then continue to cross?

DAVIS: Yeah. I think that would be best, your Honor.

THE COURT: Okay.

[unintelligible mumbling]

THE COURT: Are you saying that you have developed that profile through the years of your...

HOLMES: [interrupting] Empirically, empirically—empirically based on the false confessions that I, myself, have taken.

DAVIS: Your Honor, that...

THE COURT: [interrupting] Well, I'm going to let you give a generic, if there is one, statement of the profiles that you could expect if that's what you're questioning...

STIDHAM: [interrupting] That's exactly what my question is, your Honor.

THE COURT: [continuing] ...that does not relate to a specific case, gentlemen, just a generic profile of what one would look for, if he knows.

STIDHAM: Thank you, your Honor.

DAVIS: Judge, our objection would be that, as I understand it, his profile will be based on specific, innumerable number of or however many specific cases he's had.

THE COURT: What? I think that...

DAVIS [interrupting] And that--that will be...

THE COURT: [continuing] Well, I've allowed him to testify as an expert in interrogations and interrogation techniques and--and it's been very well established that he teaches police officers so if—if in the course of that, if he describes for them a particular set of personality traits to look for, then I'm going to allow him to describe what they are.

STIDHAM: Thank you, your Honor.

By STIDHAM:

Q: Could you describe those for us, Mr. Holmes?

A: Low I.Q, highly suggestible in personality structure, intimidated when in the presence of dominant personalities, always attempting to solve the immediate stress factor, "get the interrogators off my back and just let me go home," naively assumes that they can all straighten it out later on wherein they become an agent of their own victimization. They give the police or the prosecutors a sword and then the sword is stuck in them with their own confession but they assume that they can go out and tell their parents or an attorney that "I just made it up," and the whole thing will be straightened out. It's extremely difficult for the average person to believe that someone would confess to a crime they didn't do...

FOGLEMAN: [interrupting] Your Honor, I'm going to have to object. Mr. Holmes is going beyond the question and there—they just...

THE COURT: [interrupting] I'm going to sustain the objection, at this point.

By STIDHAM:

Q: Mr. Holmes, you stated that the first factor that you discussed earlier was that, in a valid confession, the confessor tells you something that you don't already know?

A: Right.

DAVIS: Your Honor, he--he's, now, I think, going outside this limited area or scope.

THE COURT: Well, I'll let him open it back up. Go ahead.

STIDHAM: You need me to repeat the question, Mr. Holmes?

HOLMES: Yeah, please.

STIDHAM: Okay.

By STIDHAM:

Q: You said that the first factor that an interrogator should look for to determine whether or not, they're getting a false confession, is that the confessor tells you something that you don't already know? In other words...

A: [interrupting] He'd just throw them back at you what he's already heard from you.

Q: That's a red flag?

A: Yeah.

STIDHAM: Pass the witness.

By DAVIS:

Q: When you say that he's throwing back something that he's already heard from you, you're presuming that he acquired that information from one of the interrogators, correct?

A: Yes.

Q: Okay. And, in this case, you don't have any earthly idea if that's the situation, do you?

A: No.

Q: And, if in fact, that information was not received from the interrogating officers, you would agree that the one individual being named that was castrated and the injuries to the ears would be factors that would be corrobative of a true confession?

A: Well, I would have looked at this kid with a fish eye the same way these investigators did and I probably would have felt the same way they did but the minute he came out with that

wrong time of death and not knowing what the proper ligature is, that's when I would have backed off. Then, I would have know "Hey, there's something wrong, here." That's the only disagreement I have with these officers. I'm not in here to castigate them and their tactics because I've probably done things twice as bad as they have, in my career. All I'm saying is when they didn't resolve those things, that's when they aborted professionalism and they should have—and I have a sense, in listening to the tape, that they had a sense that they're was something wrong and that's the reason...

DAVIS: [interrupting] Your Honor...

HOLMES: [continuing] ...and that's the reason they didn't ask more probing questions.

DAVIS: Your Honor, he's not being responsive to the question and now, we're getting way far afield in an area that he doesn't have the expertise to testify to.

THE COURT: All right, I'm going--please answer "yes" or "no" and then, I'm going to allow you to explain your answers.

HOLMES: Okay.

THE COURT: All right.

By DAVIS:

Q: And—and I just want to be sure that we're clear on this, assuming that the officers did not impart knowledge to this defendant about the child being castrated, let's—let's assume that as a hypothetical, okay, then when this defendant tells us the child and is able to pinpoint the child that was castrated and that information is not general, public knowledge, then, that's one of those factors you would look for to corroborate the truthfulness of a confession, correct?

A: Yes.

Q: And the same with the injury to the ears?

A: Yes.

Q: Okay. So, the only way that you discard that and begin to think that's not important is if you presume that the officers imparted that knowledge to the defendant?

A: That and it's overwhelmed by the importance of the time factor and the—the rope versus the shoelaces.

Q: So, you're saying that even if this defendant is able to accurately describe the injuries to one of the three youths and describe the specific and unusual type injuries that we have here, absent police providing that information, that still isn't all that significant?

A: Well, it is significant if it's not contaminated by anything they said or did. That's the only qualifier I'd put on it.

Q: Now, there's certainly nothing unusual about a defendant recanting a confession, is there?

A: No.

Q: In fact, wouldn't you agree that in 99% of the cases where a defendant has confessed to a crime and they then recanted, in 99% of those cases, the defendant is guilty?

A: Yes.

Q: And, in fact, you teach in your seminars, don't you, that you don't expect defendants to keep reiterating their confessions?

A: True.

Q: In other words, once somebody tells their involvement in a crime, then you don't expect them to come back and tell other people, correct?

A: Correct.

Q: And, in fact, it would be the rare exception if they did that, correct?

A: Correct.

Q: So, in this case, this defendant recanting his confession....

CROW: [interrupting] I'm going to object, your Honor. Can we approach the bench?

Bench Conference

CROW: I don't care what the percentages are as to what other people's [unintelligible] guilt or innocence. That's showing other people's innocence---guilt or innocence to infer that this client---this individual is guilty [unintelligible].

DAVIS: He's indicated his opinion.

CROW: Yes, your Honor [unintelligible] can not be shown [unintelligible] guilt of Mr. Misskelley. Just like the---just like evidence of a crime that afternoon can not show guilt or innocence of Mr. Misskelley. I think [unintelligible] it's the exact same thing, your Honor [unintelligible] we have a rule.

THE COURT: Well, I mean I don't think he's capable of testifying whether or not the statement was true or false.

CROW: [interrupting] Right, your Honor.

THE COURT: [continuing] or whether or not Mr.—Mr. Misskelley is guilty or innocent, if that's what you're saying.

CROW: Yes, your Honor but I don't want like him testifying unless the response is [unintelligible] other people are or not, it's not the issue in this court, your Honor.

THE COURT: Well, but the issue here is this—this guy is an expert in interrogation and interrogation techniques and the issue that you've raised is a false confession...

CROW: [interrupting] Yes, your Honor...

THE COURT: [continuing] an untrue confession and I'm not really sure you raised that but, at least, a coerced confession.

STIDHAM: It's certainly outside the scope of direct.

THE COURT: I don't think so. I think—don't, don't go to far in that area but I'm going to allow you to pursue it.

CROW: [unintelligible]not the right rule in my mind but is it 404 [unintelligible]?

THE COURT: 404? 404b? That's in...

CROW: [interrupting] [unintelligible] maybe I've the wrong one...

THE COURT: I've got it right here. I think it's 405.

CROW: It may be, your Honor. [Pause]. That's not it.

THE COURT: That's 404.

CROW: It's just like evidence of a crime whether it be of this defendant or another defendant, your Honor, are not admissible to prove guilt or innocence but—but only--only admissible to prove what's in the rule, the guilt or innocence of other individuals in Mr. Holmes' career. He's---what's he's proffering the question--the way he's proffering...

THE COURT: [interrupting] But this isn't character evidence.

CROW: I understand that. The way he's proffering the question is "99% of the people who confess are guilty." Now that's....

DAVIS: [interrupting] This guy's an expert in the field.

CROW: Yes, but a lot of people are, doesn't mean [unintelligible].

FOGLEMAN: [unintelligible] Listen, he's trying to testify...

THE COURT: [interrupting] I'm going to allow you to pursue that line of questioning but I don't want you to attempt to elicit from him whether or not the statement was true or false and whether or not the defendant was guilty or innocent and I'll sustain an objection on those points.

STIDHAM: Thank you, your Honor.

THE COURT: Your welcome.

DAVIS: Judge, I forgot what question we were at. Was there ever a response to it?

HOLMES: No. You asked me if it was unusual for people to recant. We both agreed "no, it's not."

By DAVIS:

Q: Okay. And, in fact, would you agree, Mr. Holmes, that there is a very brief time frame in the lives of most people who've committed a serious crime in which they will confess?

A: It only comes at one critical point. It's like two people come together, the chemistry is right and he just decides "I'm going to tell this guy the truth" and he may never get that feeling again.

Q: Okay. And, in fact, after that brief moment occurs, that person may recant and deny his involvement, is that correct?

A: Well, they begin to realize the consequences of what they've done, yes.

Q: Okay. Now, sometimes you get confessions that don't quite jive with the facts that you know them to be, correct?

A: There's always things that are unresolved, always dangling things that you don't seem to be able to put all the pieces of the puzzle together but not of this magnitude.

Q: In your lectures to law-enforcement officers, you specifically address that area regarding matters that are unresolved or that are inconsistent concerning statements by witnesses, do you not?

A: That's the nature of our existence. There's always something you can't resolve. There's always the inexplicable.

Q: And, isn't it true that in instances where a defendant makes incriminating admissions regarding his involvement, that it's your opinion that 99% of the time those people are guilty?

CROW: Your Honor, I'm going to raise the same objection. I feel that's a totally improper question.

DAVIS: Your Honor, I'm—I'm asking him his—his opinion regarding that.

STIDHAM: Your Honor, he should ask him his opinion regarding the defendant.

THE COURT: I know...

FOGLEMEN: [interrupting] The Court's already ruled that's improper.

THE COURT: Go ahead. I'm going to allow it. Overruled.

HOLMES: I agree.

By DAVIS:

Q: So you would agree that if people make incriminating admissions regarding their involvement, then 99% of the time they're guilty?

A: They're telling the truth, right.

Q: And sometimes they just give you tidbits of information, is that correct?

A: Well, everybody wants to put their best foot forward and they don't want to make themselves look bad and they don't always want to go into the gory details of what they did. Sure, you don't always get a complete, vivid description of why they did it, the motive behind it, etc. That's rare that you get a full disclosure. There's always things that are unresolved but there are no major discrepancies as, in my opinion, we have in this case.

Q: Okay. And wouldn't you agree that it is contrary to human nature to even give a statement admitting or indicating your involvement in something as heinous as the murder of three 8-year-old boys?

A: It's against the nature of most people, yes.

Q: Okay. And that's why when somebody makes an admission regarding their involvement in such a crime, you place a great deal of weight on that, isn't that true?

A: Yes, I would agree with that.

Q: Okay. Now, Mr. Holmes, when you testified at a previous matter involving this case, do you recall what you told us the most important thing there was in determining the accuracy of a confession?

A: Well, you talking about looking for something to corroborate it, physically or the emotional factor that's evident?

Q: Do you recall stating that the most important thing of all is if they sound and look like they are telling the truth, then you can tell?

A: Yes.

Q: Okay. And wouldn't you agree, Mr. Holmes, that, order, to make that determination and the person in the best position to make that determination, is the one who's there during the interview?

A: No, not in this case because in a case of this importance, national significance, they had a vested interest in it.

Q: Okay. So a person in a better position to make a determination in this case is someone who never talked to the defendant, wasn't there in the confession, only listened to the tape in the last week or so, that person is in a much better position, is that what you're telling us?

A: Well, I respect their opinion but I also respect my own.

Q: And your opinion would be different or—let me rephrase that, your Honor. You presume—what gives you concern is because you presume the officers provided information regarding the castration of the one victim and other physical findings to the defendant during the course of the interrogation, correct?

A: No, what I'm concerned about is the defendant didn't provide enough information to offer a valid confession, in my opinion. That's what I'm concerned about.

Q: Okay. Well—but you presume that the defendant was provided with that information in order to have concerns about this particular interrogation, correct?

A: You can guess at a lot of things. Fortune tellers do it all the time. If you're going to utter a bunch of statements, you're going to be on the money with one or two of them, just by chance alone. I'm not saying that's the case in this situation but that happens, you know, but what I'm concerned about are the things that are not reconciled.

Q: Okay. So, really what your job and—and—are you hired by the defense in this case?

A: I don't really know. They told me they didn't have any money and that they felt that there was something wrong and I said "well, send it down, let me take a look at it." And I looked at it...

Q: [interrupting] Are you submitting a bill in this case?

A: I haven't done it, yet.

Q: Are you intending to submit a bill?

A: Yeah, I'll ask for my plane fare.

Q: You have presumed that the officers tainted the defendant's mind prior to or during the confession, is that true?

A: I'm not attempting to impugn the professionalism or the integrity of these officers...

DAVIS: [interrupting] Your Honor, if he could answer my question. I--I asked him a question.

THE COURT: Answer "yes" or "no" and then you can explain.

HOLMES: All right. Let me have the question again, counselor.

By DAVIS:

Q: Okay. Are you presuming that the officers tainted the mind of the defendant with facts and information about the crime?

A: Yes.

Q: Okay. And is your job here and what you're hired to do in this case basically to second guess what the officers did?

A: No.

Q: Okay. You indicated that you would—it would be a guess regarding whether or not, excuse me, let me rephrase that. You indicated, a minute ago, that it could have been a lucky guess, on the part of the defendant, when he guessed—when he said that Chris Byers was the boy that was castrated and described the injuries?

A: It's only one out of three.

Q: Okay. And also describing that type of injury to that particular individual?

A: Well, I don't know the antecedent conditions to that so I really—really can't speculate on that.

Q: Well, the truth—the truth of the matter, Mr. Holmes, is that you aren't acutely familiar with the facts and circumstances surrounding this case, isn't that true?

A: I'm acutely aware of some troubling things in the confession that I read.

Q: Okay. Now, would you answer my question?

A: Yes.

Q: You aren't familiar with the facts and circumstances surrounding this case?

A: Not all of them, no.

Q: Okay. And that is vitally important in being able to ascertain whether facts given by the defendant are accurate or not, correct?

A: I've read thousands of confessions and this is just one more confession that I've read in 39 years, so...

Q: Well, I appreciate you providing that information to us...

A: Mhmm.

Q: Now, if you would, would you answer my question? Now, that information, the details of this case, if you're going to be able to determine whether this confession—how accurate it was or to judge it or to weigh it, it's important to have a good grasp of the facts and circumstances surrounding this case, correct?

A: Correct.

Q: And you admit that you don't have that acute awareness regarding the facts and circumstances of this particular case?

STIDHAM: Your Honor, we object

A: No, I don't admit that at all.

STIDHAM: [continuing] ...we asked that the witness be allowed to hear the officers' testimony and the prosecution objected to that.

Q: What have you reviewed in the way of records? Have you got those with you? The records that you have reviewed in preparation...

A: [interrupting] I have reviewed enough to prompt me to come up here and testify.

Q: Okay. Have you got with you those documents and records that you've reviewed prior to coming here and testifying?

A: I've got the copies of the two confessions that were taken from him, yes.

Q: Okay. And what other documents did you review?

A: Well, I listened to the tape.

Q: Okay. And what did you do beside listen to the tape and review the two confessions?

A: Well, you know what else I did.

Q: Okay. Did you also review any of the investigative reports?

A: No.

Q: Did you review any of the statements of other witnesses?

A: Yeah, I'm aware that the defense has a lot of alibi witnesses. I'm aware that there were other suspects in this crime. I'm aware of a lot of things.

Q: Did you review those statements?

A: No.

Q: I assume, since you say you're aware of them, you were fed that information by the defendant's attorneys?

A: Yes.

Q: Okay. And as far as information from the medical examiner's office, have you ever reviewed any of that information?

A: I read the psychological profile of the defendant. I don't think I read the autopsy, no.

Q: Okay. And you haven't been provided a transcript of that--the medical examiner's testimony, here at trial?

A: No.

Q: Okay. So, as far as his physical findings, you have no real working knowledge of what he found in his autopsy report?

A: No.

Q: Okay. And therefore, no way of determining whether the statements or the confessions jived with what his findings were in that autopsy report?

DAVIS: One second, your Honor.

HOLMES: nods head

THE COURT: Was that a—you didn't answer, you just nodded your head.

HOLMES: Well, it was kind of an elongated question. I was trying to figure out at what point I should respond, now...

THE COURT: [interrupting] All right.

HOLMES: [continuing] if he wants to reiterate the confession...

DAVIS: [interrupting] I'll pass the witness, your Honor.

HOLMES: Okay.

STIDHAM: Just a moment, your Honor.

[unintelligible mumbling]

STIDHAM: We'll pass the witness, your Honor. We have no further questions.

DAVIS: Judge, I—I did think of—well...

THE COURT: Well, go ahead.

DAVIS: One. second. Okay. No further questions, your Honor.

THE COURT: Are you all both sure you got out of him what you wanted because after I let him go, I assume he's leaving?

THE COURT: All right, sir. You're free to go.

HOLMES: Thank you very much.

THE COURT: Call your next witness.

STIDHAM: Your Honor, we'd request that we recess until in the morning... (unintelligible)

THE COURT: Alright. Can you gentlemen give me some idea of how many witnesses you got left, and how many potential rebuttal witnesses you'll have?

STIDHAM: Your Honor, I anticipate we'll be resting by lunch time tomorrow.

THE COURT: How many witnesses you think you're gonna have tomorrow?

STIDHAM: Four, approximately four.

THE COURT: You anticipate the need for any rebuttal witnesses at this time and what length would it take?

FOGLEMAN: Your Honor, I don't think it'll take very long. I -- I think four or five witnesses.

THE COURT: Real short questions?

FOGLEMAN: Yes.

THE COURT: And you say you can finish by noon?

STIDHAM: We anticipate that being the approximate time, yes.

THE COURT: Are you anticipating lengthy cross examination on any of your witnesses?

STIDHAM: Not anymore than usual, your Honor.

THE COURT: That doesn't tell me a whole lot.

STIDHAM: You might want to ask him that.

THE COURT: Well, alright, ladies and gentlemen, with the usual admonition not to discuss the case, you may stand in recess until nine-thirty in the morning.