

Jessie Misskelley's trial: Transcript of Dr. Richard Ofshe's testimony
<http://www.wm3.org/html/ofshe/ofshe.html>

Jo~Io Mi5skeIIeys trial:
Transcript of Dr. Richard
Ofshe's testimony

uring Jessie

isskelley's trial,

several expert

witnesses were

called by the

Defense. The

following is a

transcript of the

testimony given by

Dr. Richard Qfshe, a

Pulitzer Prize winning

professor of

sociology and expert

on false and coerced

confessions.

DOCTOR RICHARD OFSHE

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. Please state your name for the Court.

A. Richard Ofshe.

Q. And what do you do for a living, Mr. Ofshe?

A. I'm a professor of sociology at the University of California
at

Berkeley.

your Q. Okay. Can you tell the Court and the jury a little about

education and background?

A. I received a Bachelor's Degree in psychology from Queens
College of the City University of New York, and then a Master's
Degree in sociology from the same institution, and then a Ph.D.

in

the sociology department of Stanford University with a
specialty in a

sub-field called social psychology.

Q. Would you explain to the Court and the Jury what social

psychology is?

within A. Social psychology is a specialty area that is found both
psychology and within sociology. It has to do principally and
influence, particularly the part that I specialize in -- it has to do with
pressure, decision making, belief, and attitude change, techniques of
techniques and coercion and I specialize particularly extraordinary
control and influences.

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influence Q. Do you have any experience or training in the area of
police and more specifically in the area of influence with regard to
interrogation?
A. All my work for the last thirty years or more has been on
the subject of influence starting out doing work in traditional
problems --
to do excuse me -- traditional problems in social psychology having
with decision making, group influence, interpersonal influence.
That Then starting about the early part of the nineteen seventies I
very became interested in complex real world systems of influence.
of is to say not laboratory research, but rather studying on-going
studying complicated influence environments and particularly those kinds
of environments that have massive effects on individuals.
very So initially I did a lot of work for about ten or twelve years
and what are called cult groups. That is to say groups that are
the strongly organized, that exert enormous pressure on individuals
otherwise that can lead individuals to change the way in which they see
generate world and be willing to take part in activities that they
often would ordinarily not take part in.
During -- and I specialized in studying cult groups that
violence. During that period of time I did a great deal of work

involving the analysis of groups that led their followers to
commit murders. I did a lot of work for prosecutorial agencies,
analyzing and prosecuting such crimes.
Then my interest in influence continued and I began to become
interested in the study of police interrogation. Ah, police
interrogation is the root of -- out of which various studied round the world
procedures of influence groups -particularly techniques that
have to do with coercing confessions from individuals and generally
manipulating them in extraordinary ways.
And that work began in the late nineteen eighties and since
then I've done a great deal of work and written about police
interrogation tactics, in particular police interrogations that can and does
lead to coerced and/or false confessions.
Q. Has any of your work been published, Doctor Ofshe?
A. Yes. I've published four or five books, and thirty or more
articles in scientific journals, and presented papers at dozens of
conferences over the years. The work on all of these subjects have been
published.
Q. Are you familiar with a Doctor Gudjonsson?

A. Yes, I am.

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Q. And how are you familiar with his work?

A. He's one of the other people who is a specialist in
techniques of interrogation and influencing police interrogations.

MR DAVIS Your Honor, at this time if I may interrupt, as I

understood it he is qualifying him as -or in the process of
qualifying
him as an expert. They're moving on to another area and I'd ask
that
I'd have an opportunity to voir dire the witness regarding his
special
qualifications.

THE COURT: Well---

MR. STIDHAM: Your Honor, I asked him about what has been
published.

THE COURT: You're-asking about somebody' else's work.

MR. STIDHAM: Your Honor, I was---

then if
THE COURT: Right now if you're' qualifying him, then-- then go
through his qualification, his vitae, and then pass him, and
dire.
they've got any questions, then I'm going to allow them to voir

MR. STIDHAM: I think my next question will clear this up, your
Honor.

THE COURT: All right.

BY MR. STIDHAM:

Q. Are you mentioned in Doctor Gudjonsson's book, "The
Psychology of interrogations, Confessions, and Testimony?"

A. My work is discussed in that book, yes.

Q. Did you contribute to the book in any form or fashion?

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and I
the
work in
A. Welt, he asked me to review certain chapters of the book
reviewed them, and made comments, and then he thanked me in
the
introduction for doing that, and then he also discusses my
the substance of the book.

Prize?
Q. I also understand, Doctor Ofshe, that you've won a Pulitzer

public
service, yes.
A. I shared in the nineteen seventy-nine Pulitzer Prize for

your---
Q. And what was that for-- I mean, what was the subject of

a
A. That was for work I did with the publisher of small weekly
newspaper in West Mann County, California. We did an expose of
a
group called Synanon which started out as a drug

rehabilitation.

organization and turned into a violent cult group that was assaulting and attempting to murder people in the immediate area. It became

quite a major subject and that year we were lucky enough to be awarded a Pulitzer Prize.

Q. Are you a member of any professional associations?

A. Yes. I'm a member of the American Psychological Association, the American Sociological Association, the American Psychological Society, the Sociologic Practice Association, and the Pacific Sociologic Association.

Q. Have you ever served as a consultant to any law enforcement agencies?

A. Oh, yes, I have. Starting in nineteen seventy-nine I served as

consultant to Mann County Sheriff's Department and then subsequent to that the office of the Attorney General of the State of California, the office of the Attorney General of the state of Arizona, the United States Department of Justice -- both the tax division and

the criminal division -- the Prosecuting Attorney of Jefferson County, West Virginia, the Los Angeles District Attorney's office, the Internal States -- that's not a law enforcement agency, I guess. The United

Attorney's office in West Virginia, the Thurston County, Washington, prosecutor's office, currently the State's Attorney's office in Fort

Lauderdale, Florida, and again for the United States Attorney's office in West Virginia'

Q. Have you ever testified on behalf of the prosecution in a criminal case?

A. I don't believe -- I'll have to look at the list of cases in which I've testified.

Q. Well, I'll go on to the next question.

Do you lecture to groups regarding the influence of police tactics in false confessions?

A. Yes, I do. I'm -- in fact I've been asked to -- in May of this year to -- at the request of the Supreme Court of the State of Florida -- been

asked to address for a half day a judicial conference in Florida on

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the subject of false confessions.
Q. Have you been involved in both civil and criminal cases
dealing with false confessions and confessions in general?
A. Yes, I have.
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Q. How many -- excuse me -- how many cases dealing with
confessions have you been involved in?
A. Confessions specifically thirteen -- I've testified thirteen
separate times. I've been involved in many more cases. Much of the work
that I do is consulting work that doesn't necessarily culminate in
testimony. That's why I wasn't certain whether I had actually
testified in this criminal matter. I'm scheduled to the week after next,
but I can't at this moment think of another example where I already
have.

Q. Okay. Have you testified in court with regard to any
confessions taken on the defense side?
A. Yes. Most -- most of the confession cases in which I've
testified have been cases involving coerced or coerced false confessions
and, therefore, my testimony has been principally for the
defense in those cases.
Q. How many times have you been qualified as an expert in the
area of influence and police interrogation? A. Twenty-five times.

Q. Twenty-five times? In both state and federal courts?

A. Yes, sir.

MR. DAVIS: Your Honor, if I might -- the question was:

Qualified as

an expert in the area of influence and police interrogations --

can we

break that down? I didn't hear anything in the background as

far as

police interrogation.

THE COURT: Can you break it down?

BY MR. STIDHAM:

Q. Have you been qualified as a expert by any court in the area

of

police interrogation tactics and influence on individuals

during police

interrogations tactics?

A. Yes. On influence in police interrogation in particular I've

qualified

and testified thirteen times. On influence in general I've been

qualified and testified an additional twelve times making a

total of

twenty-five.

Q. Okay. Have these been in both state and federal courts?

A Yes, they have.

Q. Have you ever testified in the State of Arkansas?

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A. Yes, I have.

Q. And where was that at?

A. In Fort Smith in federal court in a case brought by a young

man

and his family against a person named Tony Alamo who ran a cult
group located in Fort Smith, and the case had to do with the

beating

of this child.

MR. STIDHAM: Your Honor, at this time we would ask that the

witness be qualified as an expert in the area of police

interrogation

tactics and influence of people involved in police

interrogations.

MR. DAVIS: Whether or not he's qualified as a expert is what we
would like to address in voir dire.

THE COURT: All right.

VOIR DIRE

BY MR. DAVIS:

Q. Doctor Ofshe, you are a social science professor at the

University

of California at Berkeley. Is that correct?
A. I'm a professor in the sociology department.
Q. Okay. And what-- so you teach sociology. Is that right?
A. I teach specifically courses in social psychology and
courses on extreme techniques of influence including police interrogation.
Q. You are not a licensed psychologist, correct?
A. Ah, that's correct.
Q. Okay. You can't practice psychology in California or any
other state, can you?
A. Ah --no, I don't practice clinical psychology which is --
what is generally licensed.
Q. Okay. And would it be a fair statement to say that
psychology is different from social -- sociology in that sociology deals with
group activities?
A. No, that's a very general and unhelpful definition. Social
psychology which is an area that I work in is an area that's
professional represented in both disciplines and I'm a member of the
association of both disciplines. Both disciplines maintain
deals sub-sections called social psychology and social psychology
on with a very special set of topics that has to do with influence
and individuals, decision making, attitude change, interpersonal
group pressure.
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Q. Are you a licensed social psychologist?
A. It's not necessary to be licensed to be a social
psychologist because I don't treat anyone.

Q. Is there such a thing as a licensed social psychologist?

A. NO.

Q. Okay. In other words---

A. Because it does not engage in the treatment of people it's generally not licensed

Q. Okay. So there are sociologists and there are people that hold

themselves out to be social psychologists, correct?

A. People who are members of the requisite professional specialties in associations and members of the sub-sections that are

social psychology and I'm a member of both and in each case as a

social psychologist.

Q. How many states and how many courts have refused to accept you as an expert in this work?

A. No state has ever refused to accept me as an expert.

Q. How many courts?

A. There's one case in which a line of testimony to which my do testimony would have been foundational was rejected. It has to

with whether or not a certain theory---

Q. Where was that?

A. That was in California.

Q. Okay.

A. That had to do with whether or not a certain line of testimony was

appropriate for the insanity defense and in that case the judge barred that line of testimony.

Q. As far as -- what is it that you studied in relationship to this case?

A. In this case in particular I have studied the following materials:

The police reports and notes of Detectives Gitchell, Ridge, and Durham, the transcript of the first tape recorded interrogation

of Jessie Misskelley, the transcript of the second tape recorded

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interrogation of Jessie Misskelley. I've listened to the tape recordings

of both interrogations. I studied the transcript and the video recording of an interview of Buddy Lucas. I've studied the

treatment records of Jessie Misskelley at East Arkansas Mental Health Center.

The transcript of a hearing in which Detective Ridge sought his

this search warrants from Judge Rainey. I attended a hearing in
I heard case on January the thirteenth, nineteen ninety-four at which
and saw the testimony of Detectives Allen, Durham Ridge, and
interrogation. And I Gitchell with respect to what occurred during the
I subsequently reviewed the transcripts of that hearing and then
interviewed Jessie Misskelley on December the fifteenth,
nineteen ninety-three, and have subsequently carefully reviewed, and
studied, and analyzed the transcript of that interview.

Q. How long was that interview?

have A. Three hours, more or less. It may have a bit more. It may
might be been a bit less. I don't have the -- I don't have that -- it
helpful. It worked out to an eighty-seven page transcript.

right? Q. You talked with Jessie Misskelley for three hours. Is that

it took to A. No. I talked with Jessie Misskelley for the length of time
produce this transcript here.

Q. And you reviewed testimony of the police officers?

of the one A. I reviewed their reports. I reviewed the actual transcript
interrogation part of the interrogation that -- or the two parts of the
studied that were tape recorded, I studied and analyzed their notes,
and analyzed their testimony.

opinion Q. And what scientific basis is it that you intend to give an
on?

clear picture A. Well, the first thing that's necessary is to try to get a
of the history of the interrogation of exactly what happened
step-by-step. Subsequently, that---

Q. if you could---

A. Yes.

basing your Q. What scientific basis and what scientific tests are you
testify opinion on that you-- that the defense is proposing that you

to?

and A. It is based on the literature on the subject of influence,
particularly what is known about techniques of influence, the
conditions that lead up to coerced confessions. The analysis

that I will do on this involves specifying the pattern, what happened
during the interrogation---

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Q. --What scientific basis is it based on? Not what your
procedure is,

but what scientific basis is your opinion grounded in?

A. The opinion is grounded in the research on what is known
about

the conditions that lead up to coerced confessions. There are
patterns of conduct that are known to lead to coerced
confessions.

There are consequences that follow from those patterns that are
generally used to identify a coerced confession. There are

criteria
that are used to judge whether or not a confession is coerced

or is
not coerced, and whether it is a confession that appears to be
the
product of influence or appears to be the product of memory.

Q. Again -- is that -- is that based on empirical studies?

A. Oh, yes.

Q. And those empirical studies would have to determine which
confessions were coerced and which were not coerced in order
for

those studies to have any validity, correct?

A Well there are studies of confessions---

Q. Would you answer my question, please, sir? You would -- you
would, have to determine-- someone would have to determine was
a

confession coerced or was it voluntary before those studies
would
have any validity?

A. The studies of confessions are often broken down into---

MR. DAVIS: Your Honor, could you ask him---

THE COURT: Answer yes or no and then -- then I'm going to allow
you to explain your answer.

THE WITNESS: Okay.

THE COURT: If you can, answer yes or no. If you can't, Just
say,

"I'm not capable of being answered yes or no."

THE WITNESS: It's not capable of being answered yes or no. I
could probably answer your question if you'll allow me to
explain why

it's not capable.

THE COURT: Well, I don't want to allow a long narrative
discourse. If

you can answer the question concisely then proceed.

BY THE WITNESS:

A. The validity -- the truth or falsity of a confession is certainly

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important and sometimes it's possible to know whether a confession was in fact true or false. There have been studies -- a lot of studies are done on what are called disputed confessions as opposed to undisputed confessions, and the undisputed confessions are more important because it is known whether or not the confession was true or false.

Q. Well, if your studies are based -- is there empirical data that you're basing your opinion on?

A. Yes.

Q. Okay. Those studies would have to say -- you would have to have presume that a confession was coerced for those studies to have any validity, correct?

A. No. Sometimes one knows that a confession is false and as therefore coerced because of -- of independent factors, such be. knowing -- eventually identifying who the real killer might

Q. But in those studies for those to have any value at all scientifically, somebody has to make a determination that the confessions were coerced or not, correct?

A. Not necessarily because we know the conditions that lead up to confessions that are undisputed where individuals give true confessions and do not recant them, and we know under other circumstances when People give false confessions which are fact subsequently proven to be false because the perpetrator is in caught.

Q. Well, let me ask you this: How would you characterize the situation where you said it was a false confession and a court determined that it was not a false confession, where would you categorize that?

A. I don't know that I've ever said that something was a false confession. I know I've testified as to whether something was coerced or not.

Q. So you -- as far as this talk previously about false confessions

you don't deal in that area?
A. No. I -- the question suggested to me, you're asking me
about a time when I testified in a court that a confession was false,
and it was judged the other way and I don't believe that that's ever
occurred.
Q. Have you not testified as to inaccurate contents of
confessions in a court and the jury disregarded that and ruled another way?
A. I testified I believe in one case in which I testified that
in my opinion a particular confession was coerced and the confession
was not suppressed and I've testified in other cases where it is
my opinion that a confession was in fact coerced and the court
found that way.

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Q. Okay. Well---
MR. CROW: May we approach the bench, please?
THE COURT: All right.
(THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH
OUT OF THE HEARING OF THE JURY.)
MR. CROW: Your Honor, is he qualifying this witness or is he
cross examining him?
MR. DAVIS: Your Honor---
THE COURT- Well, I'm going to be honest, gentlemen, I'm real
that interested in knowing what a sociologist is going to testify to
of that would aid and benefit the jury and what is the scientific basis
give an testimony. It seems to me that you've called this witness to
opinion that the confession was coerced---

MR. STIDHAM: That is---
THE COURT: ---and that it was involuntary.
MR. STIDHAM: That's exactly right, your Honor.
THE COURT: And I think that -- that's a question for the Jury
to
decide and I'm not sure I'm going to allow him to testify in
that
narrow framework. I can see him having value testifying that
these
are common techniques employed by the police overrides one's
free
will. I found such and such of these conditions prevailing here
and
things of that nature, or maybe group dynamics of a cult.
MR. CROW: Your Honor--
THE COURT: But I'm not sure I'm prepared to allow him to
testify
that in his opinion it's coerced and therefore invalid.
MR. CROW: Your Honor---
THE COURT: I mean, what the hell do we need a jury for?
MR. STIDHAM: He's not going to testify whether or not the
confession is false or true or whether the defendant is guilty
or
innocent. He's going to testify to the voluntary nature of the
confession -- statement to the police -- whether or not it was
coerced. That's an issue that the jury has to decide and that's
what
an expert witness is for, to help the jury decide these issues.

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MR. DAVIS: No. No, Judge, that's where -- that's the real crux
of the
matter whether-- the confession was coerced or not, doesn't
make --
whether it was the truth. It's whether it was the truth and
they're
trying to get through the back door what they can't get
through the
front door.
MR. CROW: Disagree, your Honor. I---
MR. STIDHAM: Your Honor, that's not the correct statement of
the
law.
MR. CROW: The law recognizes--
THE COURT: No. The -- the -- the -- I mean, of course, I've

ruled
decide
that it was voluntary. The jury, I guess, could go back and
that it wasn't. If that's the issue you're talking about
MR. CROW: That is what Arkansas law--
THE COURT: ---but the question of whether or not psychological
ploys or tools were used to get a guilty person to give a true
statement, now that's another issue.
MR. STIDHAM: Your Honor, that's not what he's going to testify
to.
THE COURT: I don't know what you've got him here for. What is
he
going to testify to? I want to know.
MR. STIDHAM: Your Honor, he has an opinion as to whether or
not
the statements made by Mr. Misskelley to the West Memphis
Police
Department were voluntary.
THE COURT: Is that the way you're going to couch the question
to
him and is that the way he's going give his opinion. In my
opinion
they were involuntary.
MR. STIDHAM: Yes, your Honor.
THE COURT: That the police used subtle techniques to cause an
innocent man to confess-- to confess.
MR. CROW: He's not going to say whether he's innocent or not,
your
Honor.
MR. STIDHAM: Your Honor, that's for the Jury to decide.
MR. DAVIS: Judge, what we've got -- they're trying to get
through
the back door what they can't get through the front. It's the
same
way.
MR. STIDHAM: Your Honor---
THE COURT: Well, unfortunately they might be able to do that
under
the status of our law.
MR. DAVIS: Your Honor, the concern that I have here is that
for
there to be any empirical data and for him to actually claim
to have

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any scientific basis, somebody somewhere has to categorize

these cases as false confession cases or coercion cases. And what I'm saying is that this man along with his cohorts in the field have -- they label things to -- to back up or substantiate their particular theories, and -- and---

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THE COURT: Well, I think all of those go to the weight of his -
weight of his testimony.

MR. STIDHAM: That's what -- that's what experts do. If they
want to bring an expert to counter them, they can!.

THE COURT: I think you can call your man to say in his opinion
that there was nothing that they did out of the ordinary and that
the statement was freely and voluntarily made.

MR. STIDHAM: That's the correct statement of the law, your
Honor.

THE COURT: Well, we might as well get on with it. I'm going to
let him testify but I'm not about to let him testify that in his
opinion Misskelley is innocent--

MR. CROW: No, your Honor.

THE COURT: ---that his confession was a lie and false. I'm not
going to allow him to do that.

MR. STIDHAM: He has an opinion as to what--

THE COURT: Don't even try to ask him whether or not he has an
ruling opinion whether the confession was true or false, because I'm
that he cannot do that.

MR. DAVIS: I want him cautioned before we proceed any further
so
that he doesn't blurt that out.
MR. CROW: Your Honor, can you give us two minutes?
THE COURT: Okay. Well, do you understand what I'm saying? I'm
be of saying that there are areas where he has expertise that might
area some benefit and that is in the areas of group dynamics, in the
of -- of possibly coercive or -- or techniques that can be
employed to make someone testify -- or -- or give a statement. Now, whether
or not that statement true or false is another matter.
MR. CROW: That's not what he's testifying about, your Honor.
THE COURT: And I'm not going to allow him to testify that, In
my opinion these officers illegally exacted or coerced a
confession from
his either. I'm not going to allow him to testify to that.
MR. STIDHAM: That's the Court's job, your Honor. That's the
jury job.
THE COURT: Well, that's exactly right. So what is he going to
testify

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to?
MR. STIDHAM: He's going to testify as to -- he has an opinion
that
this -- the statements made by the defendant were involuntary
and a result of psychological coercive tactics employed by the West
Memphis Police Department.
THE COURT: Were involuntary in what sense?
MR. STIDHAM: That's what he'll testify to.
THE COURT: Well, I want to know. What -- in what sense?
MR. DAVIS: Could we move in chambers?
(RECESS.)
THE COURT: All right, ladies and gentlemen, you can have about
a
fifteen minute recess with the usual admonition not to discuss
the
case.
(RECESS.)
THE COURT: All right, court will be in session. All right,
ladies and
gentlemen, you have heard a number of persons testify that

have
perhaps
an
be read to
skill,
the
for his
opinion is
conclusive,
have. You
been presented and characterized as expert witnesses and
will hear some more, and in that regard I'm going to give you
instruction of law that you should consider and it will again
you at the time all of the instructions are given.
An expert witness is a person who has special knowledge,
experience, training, or education on the subject to which his
testimony relates. An expert witness may give his opinion on
questions and controversies. You may consider his opinion in
light of his qualifications and credibility, the reasons given
opinion, and the facts and other matters upon which his
based. You are not bound to accept an expert opinion as
but you should give it whatever weight you think it should
may disregard any opinion testimony if you find it to be
unreasonable.
All right, gentlemen, let's proceed.
MR. STIDHAM: Your Honor, may I approach the bench?
THE COURT- Sure.
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Jessie Misskelleys trial: Transcript of Dr. Richard Ofshe's testimony
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Transcript of Or. Richard
Ofshe~s testimony

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co n t i n u e d...

(THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH
OUT OF THE HEARING OF THE JURY.)

MR. STIDHAM: I assume that the witness has now been qualified
and I can go on with my questioning?

THE COURT: Again, I never make that statement. I Just tell you
to
proceed.
MR. STIDHAM: Thank you.

(RETURN TO OPEN COURT.)

THE COURT: Do you have any additional voir dire?

MR. DAVIS: No, sir, your Honor, not at this time. We'll reserve
it for
cross examination.

THE COURT: All right. All right, you may proceed.

MR. STIDHAM: Thank you, your Honor.

CONTINUED DIRECT EXAMINATION

BY MR. STIDHAM:

Q. How many confessions has you analyzed, Doctor?

A. I've been requested to analyze a total of forty-eight
separate
interrogations leading to confessions.

Q. Okay. Have you ever taken a coerced confession or a false
confession from someone?

A. Yes, I have.

Q. Can you give us an example of that?

A. In one particular case I was called in by the prosecution
with the
putting together the investigation of what was believed to be a
multiple murder and sex abuse crime case. In the course of my
work
on that case -- again at the request of the prosecution -- I
had
access to an individual who was confessing to all manner of
heinous
crimes.

In the course of my interviewing of him I began to become
suspicious as to the validity of the confessions that he had
been
giving now for five months on a series of subjects. At that
point after
hearing from him what happened during the interrogation and
certain

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other things about his reactions to the interrogation, I
determined
that there was a possibility that he had been falsely
confessing and I
determined to run an experiment.
I then invented a crime on the spot and told him that one of
his sons
and one of his daughters had said that he had done something

in particular to them, and asked him if he could remember it.
Initially he said, "No." He then started using the techniques that he had
been using to try to remember these events and I simply allowed him
to do that -- in fact, sent him away and asked him to continue doing
this alone and within twenty-four hours using the techniques that
he had learned in the course of his five month long interrogations,
he produced for me the next day a three page written detailed
the confession including dialogue that supposedly happened during
daughter crime -- to a crime that never happened that I invented and
who was supposedly involved in it confirmed never happened.
I then concluded that this was a highly suggestible individual
eliciting a because I had now succeeded with very minimal effort in
false confession from him.
break Q. Have you been ever -- excuse me -- have you been able to
these down your work into percentages with regards to analyzing
confessions and the work you've done with confessions?
have been A. Yes, I have. Of the forty-eight separate interrogations I
has asked to analyze, fifty-five percent of the time my conclusion
percent of been that the statement that was made was voluntary or it was
impossible for me to make a determination and forty-five
either the time that the particular statement that was elicited was
a what's called a coerced compliant confession or what's called
types of coerced internalized confession -- these are two different
confessions. confessions generally two different types of false
of Q. Could you tell the jury the difference between these types
of confessions?
recognized A. In the literature on interrogation and confession it was
One that there are two kinds of involuntary and false confessions.
that is to kind is called coerce compliant. This is a an-- inaccurate --
no say false statement -- that comes about because an individual
gives a longer stand the strain of the interrogation and knowingly
statement that they know to be untrue.
coerced The other kind is much more complicated. It's called: a
an internalized confession and this kind of statement arises when

individual actually becomes convinced that he or she has committed a crime that they had nothing to do with.

The second kind of confession comes about out of the use of very special or very extraordinary influence techniques that operate in a particular way. It can occur by accident in the course of an ordinary police interrogation, but if it occurs certain things have to be present in the interrogation and they have to happen in a certain sequence in order to persuade someone that they've committed a crime of which they are innocent.

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The far more common kind of coerced statement is the coerced compliant statement when the individual simply gives up and agrees to say whatever they need to say because they can no longer stand the strain of what's going on.
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Ofshe's Transcript of Dr. Richard
testimony

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continued...

produce a Q. Doctor, is it possible for police interrogation tactics to
false confession?

this A. Yes. I don't know of any -- any researcher, any scholar in

false area -- who works in this area who does not acknowledge that
and in confessions come about in the course of police interrogation,

fact, a few years ago there was a landmark study of
miscarriages of

Justice in capital cases in American history. A study done by
Professors Bideau (phonetic) of the University of Michigan and
Ratalid (phonetic) of the University of Florida published in

the Stanford Law Review.

of In this study they identified three hundred and fifty examples
history. miscarriages -- false convictions in capital cases in American

or not And using the standards that they developed to judge whether

other words a particular conviction was a miscarriage of justice -- in

fifty an improper conviction -- they identified three hundred and

with the examples in which by their criteria, which often had to do

-- real killer being found, the person ultimately being pardoned

fifty standards of that sort -- they identified three hundred and

fact examples where the jury had found someone guilty who was in

innocent.

by In that study nineteen percent of the miscarriages were caused

false confessions given by---

MR. DAVIS Your Honor---

BY THE WITNESS:

A. ---the suspects.

be MR. DAVIS: ---I have an objection to make and I think it would

more appropriate if I made it at the bench rather than---

THE COURT: All right.

(THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH

OUT OF THE HEARING OF THE JURY.)

we're MR. DAVIS: The Court laid down certain ground rules and now

confessions. We talking about percentages in terms of false -- false

aren't talking about opinion.

to use THE COURT: I'm interpreting this as an -- as an attempt to --

coercive techniques on the jury to suggest to them that this

is a false

confession and that there is danger on their considering the
confession and that it suggests to them that they have to be
very
careful not to make a three hundred and fifty error ,whatever
the

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Jessie Misskelleys trial: Transcript of Dr. Richard Ofshe's testimony
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percentages were.
Gentlemen, that's -- that's a -- I'm---
MR. FOGLEMAN: I thought this would -- what they did is exactly
what the Court had told them not to do.
MR. STIDHAM: No, your Honor, I asked the witness if there were
empirical scientific studies and he was simply relating those
to the
jury.
THE COURT: Well, I don't care. You're still making inferences
that
by these statements that this particular statement was false
and
untrue.
MR. CROW: Your Honor, if I can interject. Yesterday I objected
to
questions that -- where Mr. Holmes stated that ninety-nine
percent
were real or something like that. That's empirical data that
now the
shoe is on the other foot.
THE COURT: Well, no, in that particular case I think you
offered it or
it came up through your all's testimony and he brought it out--
-
MR. CROW: No.
THE COURT: ---is the way I recall it.
MR. CROW: I don't think that's correct, your Honor.
THE COURT: Well, I may be wrong on that. This is totally
different.
This has done just exactly what I indicate I wasn't going to
allow.
MR. DAVIS: Judge, and that's what's going to happen because of
this witness as you surmised. He's very astute. He's very
smart, and
he's going -- he's going to slip around the ground rules and
we're
sitting here talking to jury in terms of percentages of cases
in which
there's been a false confession.
THE COURT: I'm going to sustain the objection.

(RETURN TO OPEN COURT.)

THE COURT: Objection sustained.

MR. DAVIS: Your Honor, could we ask the jury to disregard this last

-- to be admonished to disregard---

MR. STIDHAM. Your Honor, I would object to an instruction of that nature. The witness is merely relating scientific studies and empirical

studies with regard to that issue.

MR. DAVIS: In an area---

MR. STIDHAM: I would be happy to move on and ask him about how he analyzes the---

MR. DAVIS: The concern we have, Judge, is we understood he was

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relating things that are outside the area of his expertise.

MR. STIDHAM: That's not at all the case, your Honor.

THE COURT: Go ahead. Move on to something else and I'll see.

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Jessie Misskelley's trial: Transcript of Dr. Richard Ofshe's testimony
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Jessie Misskelley's trial: Transcript of Dr. Richard Ofshe's testimony

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continued...

BY MR. STIDHAM:

Q. Doctor Ofshe, are certain individuals more susceptible to coercive police tactic than others?

in
are
coercive and
analyze a

A. Generally, it's been found that individuals who are lacking self-confidence, low self-esteem are more persuadable and also more likely to respond to coercive tactics. Individuals who mentally handicapped are also at risk to responding to overly persuasive tactics.

Q. Can you tell the jury what it is that you do when you analyze a 'confession?

A. Ah, that -- that starts with determining whether or not the interrogation has been tape recorded, if the interrogation has been tape recorded in its entirety, then the analysis of the influence process during the interrogation is time consuming and -- is time consuming, but is fairly straightforward. When police agencies have not tape recorded the interrogation, the problem becomes much more complicated because it becomes necessary to try to reconstruct the events of the interrogation from the available information. So that in a case such as this case in which part of the interrogation was recorded and most of it was not, it becomes necessary to first try to identify what actually happened in the interrogation and the order in which things happened to then relate that to the statements that are undisputed. That is to say that parts of the interrogation which are recorded so that one can hook up the analysis or hook up the history of the interrogation as it occurred in the unrecorded part but as reported on by the police officers involved as well as the suspect, in order to try to rebuild and get a picture of how the interrogation progressed from start to step-by-step-by-step, and the changes that occurred over the course of the interrogation.

recorded
what
things about
suspect in
that are
as to the
extremely

Now, in this particular case this culminates in the two statements which give us a great deal of information about what happened during the interrogation and illustrate certain the tactics that were used and the suggestibility of the terms of how he responded to particular tactics that are -- simply captured in the recorded part of the interrogation. Then because it is -- has been reported on in the literature kinds of ideas that develop people's minds in response to pressured interrogations, I usually---

MR. DAVIS: Your Honor, at this time, if I may-- first enter an

objection. He keeps referring to "as reported in the literature". Can he be more specific about what he's referring to? I don't know if these are books he's written or if it's something from other sources.

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MR. STIDHAM: Judge, that's exactly what I was trying to elicit from the witness before when he objected.

MR. DAVIS: Your Honor--

MR. STIDHAM: The scientific studies in this area that's what he was trying to testify about when the prosecutor objected.

MR. DAVIS: Your Honor, the -- if I may explain. The reason I objected was because he was going into scientific literature which as

I understood it the Court has ruled was beyond his area of expertise and that's exactly why I wanted him to -- to be more specific because

he keeps referring to the literature and if I don't know what it is, I don't know whether that literature is valid literature. I don't know if it's

something he has expertise in, or I don't know if it's a THE COURT: Okay, I think my ruling was that it invaded the province of the jury and that it was an ultimate question for the jury

that exceeded the scope of his capabilities. That was my ruling. But that was to a narrow portion of it.

I think what you're raising now -- if you're asking about the underlying data or information or scientific research that he - he's

utilizing, I think you're entitled to know that.

MR. STIDHAM: I'd be happy to:

THE COURT: However, I think you're entitled to bring that out on

cross examination. So I'm going to let you develop it on cross examination. You might have him refer to any treatise or any scientific journal or -- that he's referring to and when he

says

"literature", and then you can develop it further.

MR. DAVIS: Judge, one other thing. He -- he indicated -- as I understood it -- that his analysis would be based on a

reconstruction

of the period prior to the taped confession, and it's my

understanding

that that reconstruction would require him to presume facts not

in

evidence and to base that upon speculation and upon statements

--

out of court statements made by other individuals and we would strenuously object to him being able to give an opinion or to 'reconstruct' something based on such speculative premises.

MR. STIDHAM: Your Honor, there's nothing speculative about it.

In

fact the rule is very clear that he can base his opinion on

such

things. We discussed that earlier.

THE COURT: I'm not sure I'm going to allow him to reconstruct,

if

that's what you're referring to. I'm going to allow him to

testify based

upon his learning, education, publications, and so forth an the

field of

social -- what was the field, Doctor?

THE WITNESS: Social psychology.

THE COURT: Social psychology, Okay, and I'm not real sure what that is, but I am real sure about what I told you I wasn't

going to let in

because that's for the jury to decide, and I'm not going to

substitute

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this witness's opinion for theirs.

All right, so let's proceed. You all know where we stand.

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Jessie. Lisskelleys trial: Transcript of Dr. Richard Ofshes testimony
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Transcript of Dr. Richard
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BY MR. STIDHAM:

Q. Let's back up to the scientific studies in this area, Doctor
Ofshe,
interrogation that you're familiar with regard to influence in police
tactics

You mentioned the Stanford Law Review article. Are there any
other
treatises or studies you can refer to?

A. Yes. The book you held up before is perhaps the authoritative
work in the area at this point by Professor Gudjonsson and he
cites

numerous studies by himself by hundreds of other people that all
contributes to the analysis of police interrogation.

Q. Are these theories and empirical studies commonly accepted by
professionals in your field?

A. Yes.

THE COURT: Are they in universal acceptance?

THE WITNESS: The empirical studies are research based studies
that people don't dispute the honesty of the researchers. They
provide data I think the data is accepted. The theories are not
particularly esoteric, so that these are very data based
studies. They

have to do with studying the conditions, for example, under
which

individuals make the decision to confess when in fact they
committed a crime. In other words, when interrogation is
effective

and when it elicits certain sorts of decisions, and they have to
do

with conditions that lead to statements that are coerced
statements

and in particularly---

MR. FOGLEMAN: Your Honor, I would like to object to this speech
that he's making, It's not responsive to what the Court's
question

was which is whether this is universally accepted and he never
said

yes or no, he just---

THE COURT: Well, I think I understand what he's saying, but I
guess

you're right. He didn't---

MR. FOGLEMAN: I didn't -- I didn't get -- I didn't catch him
saying

that, yes, it was universally accepted. I think he's being evasive.

THE COURT: Well, that might have been a real general question, too.

Can you answer yes or no and then continue with your explanation?

THE WITNESS: Yes, your Honor, they' re universally accepted in the

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sense that they are data based and no one disputes the honesty of

the researchers who report the data. The data is accepted. I then

tried to go on to explain that the theories are not particularly esoteric

arise from the data. So this is a very empirically grounded line of

work.

THE COURT: Is there contrary work?

THE WITNESS: Pardon?

THE COURT: Are there contrary theories and contrary empirical data?

THE WITNESS: The -- the disputes would be about explaining why something happens rather than whether or not it happens. So

that

there might be different theories about the impact. For example, how

much is attributable to personality or how much is attributable to

something else. But there are hair-splitting disputes if everyone

agrees to the basic -- that the basic phenomena exists.

THE COURT: All right. Go ahead.

BY MR. STIDHAM:

Q. Doctor, I believe you stated earlier what you had to look at in this

case with regard to Jessie Misskelley?

A. Yes, I did.

Q. You read the transcripts of his statement to the police -- both

statements?

A. Yes, I did.

Q. You've listened to the tapes?

A. Yes.

Q. You've also heard the officers testify at a previous hearing?

A. Yes, I did.

issue of Q. Have you formed an opinion with regard to the specific
police? the voluntary nature of the defendant's statements to the

A. Yes, I have.

Q. And what is that opinion?

THE COURT: Wait just a minute. Approach the bench.

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Transcript of Dr. Richard
Ofshe's testimony

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continued...

(THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH

OUT OF THE HEARING OF THE JURY.)

THE COURT: I'm not sure that's an appropriate question.

MR. CROW: I thought that's---

MR. STIDHAM: I thought that's what we--

THE COURT: No. I mean, are we going to start calling
sociologists
and psychologists to second guess a court?

MR. CROW: How about, your Honor---

THE COURT: Are we going -- are we going -- I mean, that -- I've
witness get
already ruled it was voluntary. Now, am I going to let a

up here and contradict my ruling?

MR. STIDHAM: Kagebein versus State, your Honor.

THE COURT: That's not what Kagebein holds---

MR. STIDHAM: Your Honor---

THE COURT: And that is a jury issue granted.

MR. STIDHAM: Yes, sir.

MR. DAVIS: And the question is, obviously the Court's given an
the Jury.
expert opinion regarding that and we can't bring that out to

THE COURT: No.

MR. DAVIS: And it's based on the same thing. It's based on your
review of those facts and evidence and we can't bring that out.

MR. CROW: Your Honor, if I -- would the question be allowed,
have

treating physician.

THE COURT: That's a little bit different.

Honor. MR. STIDHAM: Well, I don't see any difference at all, your

where a MR. DAVIS: It is very analogous to a child abuse situation

they doctor can testify, I found these factors and these factors,

sometimes exist when this happens, but they can't say, in my opinion sexual abuse occurred.

child. THE COURT: It's just like the Johnson case on the rape of that

where he's I'm going to allow him to testify right up to the point of

it was giving an opinion or inference that it was involuntary -- that

coerced.

MR. STIDHAM: Can he use that word coercive?

THE COURT: It's the same thing.

MR. STIDHAM: Your Honor, the Jury is here to decide the voluntariness---

ruling. THE COURT: That's exactly right and he's not, and that's my

regard to MR. STIDHAM: This expert is here to offer an opinion with

that issue. It will assist the trier of fact in determining that issue. It's

for the jury.

opinion. THE COURT: I'm not going to allow him to testify on that

You can make an offer of proof if you want.

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that MR. STIDHAM: Your Honor, please -- please tell me what it was

ask I could ask him a few minutes ago that I don't understand I can

him now.

THE COURT: I just told you.

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Je~Ie Mis~keIle~t~ trial:
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Ofshe's testimony

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continued...

MR. STIDHAM: I can ask him what?

THE COURT: You can ask him to talk about the facts and
circumstances, the conditions that he observed and that he saw
these factors for what the police did, that they -- that they're
suggestive techniques. Those are the kinds of things I'm going

to
allow him to testify to. But I'm not going to allow him to give
that
ultimate opinion, an I know what the rules say, and I'm saying
that
our Court will adopt the modification that the federal court
made, and
that you're trying to get this witness to supplant the Jury and
to

become the jury on that issue. I'm not going to allow it.

that is
MR. DAVIS: Judge, another thing for the record his opinion on
based in large part on what the defendant told him.

THE COURT: I understand that. That's another basis for it.

us
MR. STIDHAM: Your Honor, will you note our objection and allow
to--

THE COURT: Sure.

MR. STIDHAM: ---make an offer of proof?

THE COURT: Yes. You're making a record now.

shown on
MR. CROW: In that case if this is our offer, it needs to be

the record that his opinion would be that it was -- however the
question was worded either involuntary confession or coerced
confession -- that is how he would testify.

follow
MR. STIDHAM: I want to make sure I'm crystal clear. I want to
the Court's order to a tee. Can I ask this witness whether or

not any
of the tactics employed by the police in this interrogation were
coercive or psychologically overbearing?

MR. DAVIS: Based on what he heard in their testimony.

questions.....But the
difference is you're asking him whether or not this was
involuntary
and allow him to say, In my opinion it was involuntary well,
what

does involuntary mean? Does that mean the State --or the

officers

things did something impermissible, illegal -- there are a number of
police in the psychological area and the sociological area that the
techniques are could do that are perfectly permissible. Psychological
not necessarily improper or wrong. From a psychologist's
standpoint, he might say, Well, by using these subtle techniques
they caused him to -- to confess. That doesn't mean that they're
involuntary. It means that they're good techniques. So it means
a lot

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Jessie ivlisskelley's trial: Transcript of Dr. Richard Ofshe's testimony
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of different things, and I'm not---
MR. STIDHAM: Am I allowed to ask the question---
MR. FOGLEMAN: Your Honor, for the record, what this person is
saying from a standpoint of a psychologist it might be
involuntary in
the sense that the person didn't want to say it, but it
doesn't mean in
a legal sense that it's involuntary, and for that reason we
would
also---
THE COURT: Well, that's what I was trying to enunciate just a
minute ago.
MR. STIDHAM. Your Honor, after I ask that question we would
like
to make an offer of proof.
THE COURT: I told you I would let you ask that last question.
MR. DAVIS: Judge, that is premised on what he's read in their
transcript of that -- read or heard him testify to.
THE COURT: Yes, that's correct.
MR. STIDHAM:: That's what I just asked him Judge.
THE COURT: All right. I'll allow that.
(RETURN TO OPEN COURT.)
BY MR. STIDHAM:
Q. Doctor Ofshe, I need to rephrase the question for you. Do
you
have an opinion as to whether or not some of the interrogation
coercive tactics employed by the police against Mr. Misskelley were
in nature or overborne his will?
A. Yes, I do.
Q. Could you tell the jury what that opinion is?
MR. DAVIS: Your Honor, I -- wait -- wait -- wait. We -- I hate
to object

and I apologize for this, but the Court just told Mr. Stidham-

--

MR. STIDHAM: That I could ask that question.

THE COURT: Well---

MR. DAVIS: He knows---

THE COURT: ---I think the question grew, but---

MR. DAVIS: It sure did. Your Honor, we would object to that question and we would object to that response. He knew what

the

question was and he went ahead and extended it further beyond what the Court has instructed.

MR. STIDHAM: I -- I asked Your Honor if I could ask that

question

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and I understood that Your Honor said I could ask that question.

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THE COURT: Well, you lengthened it to some extent, but I'm not going to comment any further on that. I don't need to. All right, ladies and gentlemen, you're going to be instructed

to

disregard the last question and the last answer. And, gentlemen, my ruling is that this witness will not be

allowed to

testify as to the ultimate jury issue. That's solely and only

the

methods, province of the jury. He may testify as to scientific tools,
think notions that he may possess and it will be limited to that. I
any we've outlined that enough up here that I don't need to go on
further.

MR. STIDHAM: Your Honor, can I write the question down and ask
your Honor to approve it before I ask it?

give THE COURT: Write it down and see if they agree to it and then
it to me, then we'll get on with it.

MR. STIDHAM: May I have a moment, your Honor?

THE COURT: Yes.

I MR. STIDHAM: I can write better sitting down. Your Honor, may
approach the bench.

THE COURT: Sure.

(THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH
OUT OF THE HEARING OF THE JURY.)

MR. STIDHAM: I hope you can read my writing.

(HANDING TO THE COURT.)

along THE COURT: (EXAMINING.) I'll struggle through. I think I'll go
with that.

MR. STIDHAM: Thank you.

THE COURT: Have you got any objection to that?

MR. FOGLEMAN: Your Honor, that's exactly what you told him not
to.

see THE COURT: Well, not really. Let me -- just a minute. Let me
and what I can come up with. Let's take a ten minute recess, ladies
gentlemen, with the admonition not to discuss the case.

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(RECESS.)

(THE FOLLOWING HEARING WAS HELD OUT OF THE
PRESENCE OF THE JURY.)

the THE COURT: Let the record reflect this is out of the hearing of
jury and it's for a proffer of proof.

to us MR. DAVIS: While we're here, can we see that seventy-eight page
confess -- or statement that he has that's never been provided
through discovery?

going to THE COURT: Well, I thank you're entitled to it, yes -- if it's

be used.
MR. STIDHAM: Your Honor, we would object to that. It's not
going to be used. The Court ruled that it wouldn't be used.
going to THE COURT: It will be used if he's going to use it. If he's
refer to it and relate to it.
MR. DAVIS: Well -- well---
MR. STIDHAM: It won't be for the Jury to see and have reference
to.
THE COURT: Well, I don't know.
MR. FOGLEMAN: It's part of the basis of the defense.
MR. STIDHAM: This is a proffer, your Honor, an offer of proof.
MR. CROW: The Court---
MR. STIDHAM: But the jury's not going to see it.
MR. CROW: I believe the Court ruled that he would -- basically
his opinion is based on the undisputed things these officers said.
So if anything
MR. FOGLEMAN: Well, if that's the case, if it's only on the
there to undisputed things he's not going to have anything coercive
do. Isn't that right, Mr. Ofshe?
ruled THE WITNESS: No, I think you ruled -- as I remember -- you
I did with that this is part of the basis for my opinion -- the interview
Jessie.
THE COURT: Yes, that's what I---
that MR. FOGLEMAN: Mr. Ofshe, could I ask a question? Isn't it true
if you exclude what the defendant told you that you don't find
anything coercive, do you?
THE WITNESS: Not true.
THE COURT: Okay. Let's -- let's do this in some order. Go ahead
if you want to make a proffer of proof and jet's be sure that I
know

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attempting to what I'm excluding and what -- that I know what you're
put in and then maybe it'll change my opinion. I don't know.
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PROFFER OF PROOF
BY MR. STIDHAM:

Q. Doctor, have you formed any opinions with regard to this
case?

A. Yes, I have.

Q. Could you tell the Court your opinion?

A. That the statement made by Jessie Misskelley was a product of
the influence tactics brought to bear on him, and that it
overbore his

initial stated intention to maintain that he had nothing to do
with this

crime and was not there, and that it was a process of influence
brought to bear represented by the interrogation tactics that
progressively changed his statements about that subject.

Q. Okay. Were there any other tactics in particular that -- that
you

thought were important?

A. The interrogation forms a process in which one step builds on
the

preceding step. And so, for example, the interrogation changes
dramatically prior to and then after the polygraph -- I assume

it's all

right at this point for me to discuss the polygraph.

THE COURT: Yes, since we're outside the presence of the Jury.

BY THE WITNESS:

A. The poly -- the polygraph as used in this interrogation---

Q. First of all, Doctor, are you familiar with Mr. Holmes'
report on the

polygraph?

A. Yes, I am.

Q. Okay.

A. The polygraph as used in this interrogation has two effects.
One

based on the opinion formed by the polygrapher -- which as I'm
aware Mr. Holmes says was an inappropriate opinion -- that Mr.
Misskelley was "lying his ass off." That that created the
circumstances under which the interrogators could shift to a --

an

accusatory interrogation, one in which maximum pressure is

brought

to bear on the suspect and they then did precisely that.
The second effect of the polygraph is that Mr. Misskelley was

told

that there existed this machine -- scientific machine that was
recording that he had done something that he knew he had not

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done. While Mr. Misskelley reported to me that he did not
believe the polygraph the fact that -- the fact that he was told that
contributed to his sense of helplessness that he had which developed over the
course of the interrogation.
In conjunction with the other tactics and the other procedures
of the interrogation the polygraph played an important role in swaying
the influence process that was the entire interrogation and
culminated with the two recorded statements.

Q. What effect did the diagram -- the circle diagram, the
photographs of the body and the playing of the tapes have in your analysis?

A. Those particular techniques as testified to by the police
officers and as I would understand them to fit in police interrogations
so far as I -- I understand police interrogations and have studied
them -- the technique of using the circle is an important technique
because in this particular interrogation and consistent with what the
officers say, that the technique was not being used to try to suggest
that Jessie Misskelley that he was a suspect who was believed to be
vital to culpable but rather than he possessed information that was
the case and that the offer that was communicated through that
was an offer to join the police.

Mr. Misskelley in my interview with him when I asked him about
the impact of the circle technique, did not fully comprehend what
would

follow if you could not get out of circle. He simply did not understand what the consequences would be. The extent to which he could understand that was characterized by him in the interview I did. He knew that it was bad. He knew that it was a place where he did not want to be. And he knew that if he simply conformed -- and that is to say to agree with the police -- that they would take him out from the center of the circle and they could join him. Over the course of the interrogation as the interrogation became accusatory and the offer for safe harbor was made using the circle technique as what then happened after the circle technique was used and based on my analysis of the sequence of the interrogation, based on the notes -- the contemporaneous notes of the interrogation by Detective Ridge together with the testimony of the police officers -- it's my opinion that that circle technique probably occurred early in the interrogation. It was then followed by an hour and a half of intense pressure brought to bear on Mr. Misskelley in which he was told repeatedly when he said -- first he would often say that he wanted to go home and he was told he could not go home, that's what Mr. Misskelley reports, which for my purposes contributed to the sense of helplessness that there was no way to escape these pressures. Over the course of this hour and a half we have Detective Ridge's notes which, indicate that Mr. Misskelley was now beginning to talk about the existence of a satanic cult, was giving the detective the kinds of statements that would implicate Damien and Jason which it is my opinion that the purpose of the entire interrogation and particularly the use of the circle technique. The contemporaneously notes illustrate the statement that Mr. Misskelley was successively giving that were statements that were damning to Damien and

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Jason. This according to Mr. Misskelley was coupled with
repeatedly being asked questions about the facts of the crime and every
time he would guess something and it would be an incorrect guess
even what was known about the facts of the crime, Detective Ridge
would be sitting there shaking his head no indicating that this was
the wrong answer.
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This was repeated on several subjects and Mr. Misskelley was
continually pressured in this way. Mr. Misskelley describes
that what he learned to do was to feed back to the interrogators what
they were telling him happened and he sought to avoid making
mistakes because when he made mistakes they would make him go back
through the entire story and they would not believe him when he
repeatedly told them that he was working with Rickey Deese that
day and he knew nothing about the crime.
Those repeated refusals to believe his statements about where
he was contributed again to his sense of helplessness. Then the
picture technique and the tape recording was used. According to the
testimony of Detective Gitchell and Detective Ridge the purpose
of using -- at least Detective Gitchell on this point -- the
purpose of using the picture was to get a response from Mr. Misskelley.

The object in the course of an interrogation would have been -- and this is still at this point -- for someone whose principal interest to the interrogators to obtain statements against another, the -- the technique is showing a group of photographs of a murdered boy was designed to put additional pressure on Mr. Misskelley and it succeeded and there are descriptions in the testimony of Detective Gitchell and Detective Ridge and the description that I obtained from Mr. Misskelley about his reactions to the use of the picture. All of those descriptions include Mr. Misskelley's becoming transfixed, terribly upset by the picture, staring at it, not responding to other questions, Mr. Misskelley adds that it was a horrible picture and he began to cry. He became increasingly upset in immediate response to the use of the picture. That was followed by the audio tape of a little boy's voice saying the words that the little boy said. Subsequent to that, Mr. Misskelley stated that -- in effect he stated -- and the very words are quoted by Detective Gitchell and similar words are used by Detective Ridge -- "I want out." I have the exact quote and what I just quoted is not exact either, but the statement that was made, was the statement 'I want out.' A reference to the offer contained in the circle that, I'll do what you want in order to escape this continuing relentless pressure of the interrogation. Subsequent to that and immediately following that according to Detective Gitchell he got the tape recorder and would get the first recorded statement. The person -- it's possible now to analyze the influence process contained in the first recorded statement. We now have the first undisputed record in the case and in that part of the interrogation it's possible to demonstrate how relentless, the leading, suggestions, and an unwillingness to accept anything other than what the police knew the facts of the crime to be. This was continually suggested to Mr. Misskelley and we can chart his moving step-by-step-by-step from an inaccurate statement to a statement that was put in his mouth by the police and the tape recorded part of

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it illustrates that. And I'm prepared to go through that step-by-step to

illustrate how that happened.

Even then there were still gross inaccuracies in the statement.

The

next thing that happened is that Mr. Misskelley is left alone

and

Detective Gitchell meets with Prosecutor Fogleman and some of

the

specific gross inaccuracies in the -- the recorded statement

are now

discussed and according to Detective Gitchell's statement, Prosecutor Fogleman sends him back in to work on these

particular

statements.

And then we can look at the second statement and show how precisely that happened and how again Jessie Misskelley is conforming to the demand placed on him and is changing his statement from direct response to suggestions and direct instructions by Detective Gitchell. There are illustrations of interrogation tactics in the second part of the statement that

illustrate

what I'm talking about and also illustrates Mr. Misskelley's

strategies

of simply parroting back to the police what they told him in

order not

to displease them and not to be subject to additional

questions.

That's the outline of my testimony and analysis of the process

of

influence in this interrogation.

Q. And you are prepared to go through step-by-step and cite

page

numbers of the statement to demonstrate this?

A. Page numbers of every statement, on every point, statements made by the police officers, statements made by Mr. Misskelley. These are the facts that I deal with.

Q. Have you also formed an opinion as to the classification of

his

confession?

A. I would classify this confession as a coerced compliant

confession

and for a number of other reasons having to do with other

specific

statements in the confession statement and gross inaccuracies

in

the scenario that Mr. Misskelley produces, I would reach the

opinion

far more that this interrogation was far more -- these statements are
likely product of influence than they are based on any memory
that

Mr. Misskelley has of the crime.

THE COURT: You want to ask him more?

MR. STIDHAM: Yes, your Honor, I---

THE COURT: Go ahead.

BY MR. STIDHAM:

to the Q. Are there any other opinions you have, Doctor, with regard
interrogation itself?

that I've been A. I don't believe so. I have a lot of specific illustrations
talking about.

Q. I understand that you also have some experience and training

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with regard to cult---

A. Yes, I do.

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cults? Q. ---and you won a Pulitzer Prize with regard to working in

A. Yes, I did. I shared one, yes.

regards to Q. And is it true that you have worked internationally with
satanic cult homicides or -- or let me rephrase that -- to

allegations of
satanic ritualistic abuse or homicides?
A. I've consulted internationally, if Canada counts, ah,
specifically on
an occult inspired murder which was a real occult inspired
murder.
I've consulted on other cases in which there had been
allegations of
the existence of a baby murdering satanic cult of the sort that
is
based on all the available evidence, based on the studies done
by
the F. B. I., appear to be totally without foundation insofar
as there
have now been over three hundred separate investigations of
allegations of child murdering, child sexual abusing, secret
satanic
cults. None of these allegations have resulted in any evidence
that
suggests that these groups exist. This is a conclusion by
Kenneth
Lanning of the F. B. I.
On the other hand, there are in my experience what I would call
youth culture groups that get interested in the occult and
these are
the groups that are responsible for graffiti, responsible for
the
undisputed animal mutilations that sometimes occur.
The dividing line is between the murderous baby killing satanic
cults
and the youth culture groups and the occasional occult inspired
criminal groups that in fact do exist. So there's both a
reality to it and
then there's a mythical level to it.
Q. Have you -- do you have an opinion of whether or not the
homicides in question Mr. Misskelley is charged with or have
anything to do with satanic rituals or anything of the occult?
A. As far as I am able to tell from what I know of the
evidence, there
is no evidence that suggests that there is an occult element to
this
and as far as the satanic panic tips that are given to the
police, my
understanding is that none of them have panned out. None of
them
has produced corroboration and that they have been investigated
and this is what one would expect if this is an example of a
satanic
hysteria that it's picked up by the police. This sort of thing
happens,
when it happens, when there is a particularly heinous crime for
which
there is no obvious explanation. This is when these sorts of
allegations are likely to surface.
Q. What are you basing your opinion on in this case -- that
opinion
with regards to this not being a cult killing?

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A. What I know about the follow-up, the lead that suggested that there existed some cult, that Jessie Misskelley or anyone else was a member of. For example, during his interrogation, Mr. Misskelley provided a list of people who were supposedly members of the cult and according to the testimony of Detective Ridge who followed that up was knowledgeable at the time of the deaths, none of those people confirmed the existence of a cult. Apparently there is one individual who claims to have attended a cult meeting. Apparently her testimony also -- or her report is equally unconfirmed. As far as I can tell there is an absence of hard area and information suggesting that such a satanic cult exists in this suggests in addition, I know of nothing about the crime scene that that this is an occult ritual killing.

Q. Thank you, Doctor.

THE COURT: Do you want to add anything?

MR. DAVIS: Judge, my concern at this point and I got lost in that monologue there---

THE COURT: Don't feel too bad.

MR. DAVIS: ---Okay. I got lost back there about the time he got to the first taped confession, but at least prior to that time

what I heard was Mr. Ofshe talking about what Jessie told him in a statement.

And, Judge, there are two things about that.

Number one, what he has done is taken these-- a statement that jury we've never seen, we weren't privy to, and he is now going to paraphrase that statement -- or so-called statement -- to the the coming from a so-called expert in some official capacity to be the basis for why he finds police coercion.

expert Now, number one, we -- we objected to him coming in as an

limit his -- in the first place, but assuming he is an expert, if he can

testimony, of his testimony to what he heard the officers say in their

when what he read in a transcript about what the officers said, but
really bore he starts saying, "Jessie told me at this point the officer
down on him and they spent another hour and a half with him.
This made him increase his feelings of helplessness.
Now, your Honor, we can't cross examine Jessie if his voice is
coming through the body of Doctor Ofshe, and that's what
they're basically trying to do and that's clearly inappropriate. He --
there is no possible way that a person in his position can rely on a
statement he took from a person and then paraphrase it and translate it
to a jury. That's hearsay. It doesn't matter whether it comes from
him or whether it comes from someone else. That's hearsay testimony.
He can say what he observed. He can testify how that affects
his opinion. He can list the facts that indicate coercion. If he
goes beyond that, your Honor, the State feels that he's clearly
gotten into a province that's -- that's the sole province of the jury -- in
the area that's the sole province of the jury.

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THE COURT: All right, I've heard the proffer of proof and it
can be submitted as a proffer of proof, and it would be my finding
that the information elicited and the testimony proffered not only
embraces the ultimate issue or facts for the jury to consider, that it
in effect tells the jury what their finding should be.
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And I'm -- I'm going to apply the rule in Gramling versus
Jennings,
274 Ark. 346. I'm going to apply the additional phrasing
adopted by
Congress in nineteen eighty-four to Rule Eight Oh Four that
says
explicitly, "No expert witness testifying with respect to the
mental
state or condition of a defendant in a criminal case may state
an
opinion or inference as to whether the defendant did or did not
have
the mental state or condition constituting an element of the
crime
charged or a defense thereof."

And I think that applies here and I think the term -- just
reading Rule
704 alone, it says, "Testimony in the form of an opinion or
inference
otherwise admissible is not objectionable because it embraces
an
ultimate issue to be decided by the trier of the fact."
The question is: What does embrace mean and our court tried to
define it in two or three cases. One of them was that Gramling
case.
Another one is Aetna Casualty -- that was a civil case.
I just think under the facts and circumstance of this case, to
allow
him to testify in the fashion tendered would be eliminating the
jury
and accepting an expert's opinion. So the opinion of the jury
is
what's significant to me.
There are some things that he testified to such as the occult
activity
that he might properly testify to. There are other things that
I would
allow him to testify to that would be in the general nature of
his
expert knowledge, but to give that final and conclusive opinion
in --
in the fashion that it's elicited -- says, Jury, you must find
this way -
and I'm not going to allow it.

-- I -- everything -- everything you've just said, however, I
submit

would be an appropriate argument that you may make to the jury
at the proper time, and that an expert in his capacity normally is
employed to consult with and discuss trial strategies and
techniques with counsel. And if I allowed him to testify based upon a --
you say a seventy-five page statement taken from the defendant would be
doing just exactly what the prosecutor says -- allowing him to
testify as a surrogate.
MR. STIDHAM: That's why we did it as a proffer, your Honor.
THE COURT: Yes Well, I'm not going to allow that.
MR. STIDHAM: Your Honor, I understand your ruling and we would
just ask the Court to note our objections pursuant to Rule
Seven Oh Four with regard to our interpretation as we discussed earlier
with regard to Rule Seven Oh Four.
THE COURT: We just made a record.

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MR. STIDHAM: Thank you, your Honor.
MR. CROW: Thank you, your Honor.
MR. FOGLEMAN: Your Honor, we would like to make as a part of
the record State versus Luff, 621, N.E. 2d 493, which is an Ohio
case in which the defendant (sic) was found not qualified to
testify and also United States versus Fish man it' s---
THE REPORTER: You said, "defendant." Did you mean witness?
MR. FOGLEMAN: He was found not qualified to testify as a
witness, right. And also State versus Fishman, which is in the Northern
District of California 743 F. Supp. 713.
THE COURT: Okay.
MR. STIDHAM: Your Honor, likewise, we would like to offer two
examples of when Doctor Ofshe was allowed to testify as an
expert in this exact area and we would like to submit those exhibits.
THE COURT: All right, they may be received.
(DEFENDANT'S EXHIBITS NUMBER EIGHT AND NUMBER NINE
ARE RECEIVED AS A PROFFER.)
(STATE'S EXHIBITS NUMBER ONE HUNDRED SIX AND NUMBER
ONE HUNDRED SEVEN ARE RECEIVED AS A PROFFER.)
MR. STIDHAM: I'm going to make some copies and have---
THE COURT- Sure, you can do that later if you want to.
MR. STIDHAM: Thank you, your Honor.

THE COURT: Where do we stand now?

MR. STIDHAM: Your Honor, I think that we're at the point where I can -- we can ask the Jury to come back in and I can read the question that -- that the Court permitted. At least that's my understanding of where we're at.

MR. FOG LEMAN: Your Honor, my only concern is whether or not this gentleman is going to base his opinion on -- on what this defendant told him because from what he testified to in the proffer he adopted the defendant's version versus the officers' version.

THE COURT: I think that's what he said.

MR. FOGLEMAN: All right, and I think that that's an improper basis of his opinion and if he's going to purport to testify now about coercive tactics and adopt what this defendant's told him and say things that aren't in accordance with the evidence, I think the jury is going to be---

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THE COURT: I don't think that's the way I worded it. I -- I allowed him to ask a question using the two statements, the files and as testimony that he reviewed and whether or not he had an opinion would to whether or not the tactics employed were suggestive or that lead Misskelley to make a statement.

MR. STIDHAM: And the basis of his opinion is the statements and tapes that he's heard of the defendant's statements to the police.

THE COURT: I'm going to allow him to do that. And, of course, if everything he just said you may use in an argument to your jury you want to.

MR. STIDHAM: Thank you.

MR. CROW: Thank you, your Honor.

MR. DAVIS: But the question would be restricted and would not

include whatever statements -- his opinion would have to be based on everything except those statements he received from the defendant.

THE COURT: I think he said he could do that.

MR. DAVIS: I want to be sure of that because then in cross examination when I ask what specific police misconduct or police coercive tactics are you talking about, I don't want him to go back and say, Well, Jessie told me -- or -- or even through the back door because, your Honor, at least the last few hours I've come to respect the witness. I know he can certainly catch you when you make questions that give---

THE COURT: Tricky, isn't he.

MR. DAVIS: ---give him an opportunity to answer, and--

THE COURT: He's an expert, you know.

MR. DAVIS: If he doesn't understand very clearly that he is not to refer to that statement as a basis of his opinion, then I think we're going to end up getting it in one form or another.

MR. STIDHAM: Do you understand, Doctor Ofshe, that you're not to refer to the defendant's statement.

THE WITNESS: I understand.

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MR. STIDHAM: May I proceed, your Honor?

THE COURT: Yes.

BY MR. STIDHAM:

Q. Doctor Ofshe, do you have an opinion based on the transcription of the statements made by this defendant to the West Memphis Police Department and listening to those tapes of the statements made to The West Memphis Police Department by the defendant or the testimony of the officers that you've heard as to whether any of the interrogation tactics used by the police against the defendant, Jessie Misskelley, were suggestive or led Misskelley to make that statement?

A. Yes. I would add to that that I would also rely on the notes that

been were produced by the officers and also certain other facts I've informed have been testified to by various witnesses in this courtroom.

those Q. So if I understand your testimony it is your opinion that tactics did---

MR. FOGLEMAN: Your Honor---

THE COURT: If he's talking about testimony, that's fine.

MR. FOG LEMAN: Was he here to hear this testimony in the courtroom?

THE COURT: Well, if it was made known to him, he doesn't have to be here.

MR. FOG LEMAN: But how do we know it was made known to him accurately, your Honor? If somebody told him that so and so testified---

MR. STIDHAM: Judge, I asked the Court Reporter to give me a transcript and that's what he looked at.

THE COURT: All right.

MR. FOGLEMAN: Well, if that's the case, that's all right.

THE COURT: All right. Is that the case?

MR. FOG LEMAN: Is that the case?

certain THE WITNESS: I have not seen a transcript of this hearing. I've seen a transcript of a prior hearing and was informed as to

and specific testimony given and presented by the medical examiner

be helpful. I'll identify the particular facts that I'm using if that would

BY MR. STIDHAM:

used by Q. Well, if I understand your testimony, it is that the tactics

the police were suggestive and led the defendant to make a

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statement?

was A. Yes, and that the statement- the contents of the statement

shaped by these techniques.

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Ofshe~s Je~sIa Misskeileys trial:
 Transcript of Dr. Richard
 testimony

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continued...

CROSS EXAMINATION

BY MR. DAVIS:

about -- Q. Now, Mr. Ofshe, earlier in your testimony you referred
to you were telling us about this scenario where you have claimed

have obtain a false confession in a case you worked on?

A. That's correct.

Q. Is that the case out in Washington State?

A. That's right.

agreed Q. Okay, and in that case the scenario you presented to the
 defendant in that case that you said you created and he -- he

actual case, with, that scenario was similar to the allegations in the
 correct?

from A. No. The scenario was specifically designed to be different
in the same any of the allegations in the case. I invented it to make it

specifically area, otherwise it would be meaningless, but I made it
with one different from any allegations in the case and then I verified

it never of the people who was supposedly involved in it that in fact

involved happened just to double check that in fact it did not happen.
 Q. Well, isn't it true that in both instances the allegations

him the child sexual abuse?
 A. This was a case about child sexual abuse and when I told

very specifics as to a particular event which I made up -I made up
and then peculiar circumstances for that event and he then produced a

 detailed confession specific to that event including dialogue

 I verified from one of the victims that no such event had ever
 occurred.

both daughters Q. And isn't it true that in that particular scenario that

 of that defendant had testified he had sexually abused them?

made A. I don't believe they ever testified to that. I believe they

testimony was allegations as to that effect. I don't think their formal

bodies ever taken. They also made allegations to the fact that their

were covered with scars which were then subject to examination
and -- a court ordered medical examination and there were no scars
on their bodies. So they made a lot of allegations, none of which
proved empirically correct.
Q. Those were two adult daughters, correct?

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A. That's correct.
Q. Okay, and also the wife also made allegations that he
sexually abused the daughters, correct?
A. The wife was being threatened with having her-
MR. DAVIS: Your Honor, could you ask him -- if he has an
on explanation we can hear that, but would he answer the question
the front end before we go through the five minute---
need to THE COURT: --Try to answer yes or no and then -then if you
explain, I'm going to let you.
THE WITNESS: Thank you, your Honor.
BY THE WITNESS:
pressured A. Yes. The wife during the period when she was being
child by the police and threatened with having her one remaining
against taken away from her if she did not come up with accusations
cult her husband, proceeded to come up with such accusations and
over some of those accusations included being present at a satanic
ceremony where blood flowed out of a book and flowed uphill
her arms -- over her body.
I was asked to evaluate her by the prosecution to help them
make a determination as to whether or not to charge her or whether or
-- or -- whether or not to charge her and it was my recommendation
not to charge her.
abuse Q. And in fact her husband had pled guilty to these sexual

charges, correct?
A. No. In fact her husband pled guilty to six counts of third
degree -- entered pleas to six counts of third degree rape when he was
told that if he did not enter that plea---
MR. DAVIS: Your Honor, would he be responsive to the question?
BY MR. DAVIS:
Q. Did he enter a plea of guilty to charges of rape or sexual
abuse?
A. He entered --yes--he entered a plea to six counts of third
degree rape.
Q. Did he maintain his guilt for a period of five months prior
to entering that plea of guilty?
A. Oh, yes.
Q. Okay, and isn't it true, Doctor, that he did not decide
that he was not guilty until he talked with you?
A. After he talked---

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Je~Eie Mis~keIIOy~ trial:
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continued...

MR. DAVIS: Your Honor, could he be asked to respond yes or no?
THE COURT: Yes or no and then---
BY THE WITNESS:
A. Yes, that's technically correct. However, the discussion that
I had with him which was tape recorded was not a discussion that
precipitated his changing his mind. He changed his mind
subsequent to that after he independently began to look at the things that
he had confabulated and after the pressures that he had been under
during this five month period were withdrawn, after which he had been
gotten to enter a guilty pleA. So his decision -- his
realization that he in fact committed none of these things -- was done independent
of any conversation I had with him.
Q. And despite your opinion that his confession was coerced or

involuntary in that case, the jury and the court found otherwise,
correct -- or the court did?
A. The court found based on statements made prior to the statements that I analyzed -- found that it was sufficient to accept --
or not to accept his request to withdraw his guilty plea and go to trial.
Q. So in that scenario with the husband saying for five months he's
guilty, with the wife saying that he's guilty, and the two daughters
giving statements as to his guilt, you met with him and convinced
him that he was not guilty, correct?
A. Incorrect.
Q. Well, after you met with him is when he decided that he was not
guilty, correct?
A. A month after he met with me after going through his own analysis of what happened -- after he was no longer being constantly
coached by the interrogators, by the psychologists, and by his minister, he realized that the beliefs that he had formed made no
sense whatsoever and he realized that he -- he had come to believe
something that was not true.
What he came to believe was that he was the leader of a satanic cult
that had been in operation for seventeen years, that had killed hundreds of children for which there was no evidence. That's what
he came to realize made no sense.
Q. And you testified in his behalf in a hearing designed to get that
guilty plea set aside, correct?

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A. I test -- that's correct, and the result of that was that the judge
chose to maintain the guilty plea based on statements that he had
made prior to the matter that I testified about, and that was the
justification for not allowing him a trial.
Q. What exactly -- based on the testimony that you heard from the

of officers at the prior hearings and based upon your examination
that those taped statements -- what coercive tactics do you allege
the police made in this case -- or did?

A. In order to answer your question, first I need to break the
out parts interrogation down into its component part so that I can cut
of it and focus on a particular part.

Q. Well, one thing I want you to assure me, Doctor, is that
you're referring to either testimony you've heard, or to the taped
statements

of the---

A. That's correct, and the notes.

First---

Q. When you say "the notes", what notes are you talking about?

A. The detectives' handwritten notes and typed notes and also
I may refer to a fact I've been informed that was testified in this
courtroom and I'll specify exactly what that was when I do.

Q. Let me -- let me back up just a minute. Did you find any
evidence in any of those things you refer to as to physical coercion.
A. No, I did not.

Q. Did you find anything in any of that evidence to indicate
that any of the officers yelled or used a loud voice or were degrading
to the defendant in those tapes or in that testimony that you
reviewed?

A. No, the officers testified they did not do that.

Q. Okay, and in those tapes that you observed, you didn't hear
anything of that nature, did you?

A. No, I did not.

Q. Okay, and there is nothing in the notes prior that would
indicate there was any undue influence, pressure, or loud voices and
demands made on the defendant, was there?

A. Not in the limited set of materials you're allowing me to
testify on.

Q. So as far as those type of tactics you would have to agree
that

what you reviewed is devoid of any evidence of that, correct?

A. I would have to agree that based on the set of materials on
which

I am now testifying, I can find no example of that.

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Q. And those things that you refer to that you're testifying
to are based on your review of testimony and your observance of that
confession? You've read it and listened to it, correct?

A. That's correct.

Q. And is what you term or what you find in there coercive
that the officers asked at times, leading questions -- is that one of
the things?

A. The questions were more than leading. The questions were
very directly specifying what the answers should be.

Q. Did you find anything in your review of the officers'
testimony, in your review of the statement of the defendant or either of the
statements of the defendant to indicate that the officers gave
him the information about which boy was castrated?

A. In their statements? No.

Q. And in their notes?

A. In their notes? No.

Q. In the taped confession?

A. Other than I seem to recall that he was being shown a
picture of one of the boys and that happened to be the boy that was
castrated and I believe that, if memory serves, that he then identified
that boy as the one that was castrated, but I believe -- and perhaps
I'm wrong -- but I believe that he was being shown a picture of that boy
at the time.

Q. Do you know where that is in the transcript?

A. No, that's not something I'm sure of at this point.

Q. And if that turns out to be inconsistent with what the
testimony at trial has been, then you certainly wouldn't disagree with
that?

A. My memory may be defective on that.

Q. And those facts that -- in fact -- let -- let ask you this:
In fact after this defendant makes the statement and identifies the one
that's castrated, the next question is, "Are you absolutely certain
that's the one?" Isn't that the next question in the interview?

A. Can you direct me to that?

Q. Yes, sir. It's in the first statement. It's on page seven.
Let me see

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Jessie Msskelley's trial: Transcript of Dr. Richard Ofshes testimony
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which statement you have. (EXAMiNING.) Okay, it's that transcript on page seven.
A. (EXAMiNING.)
Q. Down at he bottom of the page. Where the officer asked, "Which boy was that?"
And the defendant said, "That one right there"
And Officer Gitchell said, "You're talking about the Byers boy again?"
And the defendant said, "Yes."
Then what was the next question that Officer Ridge asked?
A. (EXAMiNING.) "Are you sure that he was the one that was cut?"
Q. Okay. Now, Mr. Ofshe, if the police are coercing him when he has just given them the accurate information and has just told them the Byers boy is the one who was castrated, are you saying that it's coercive for Officer Ridge to then ask, "Are you sure that he was the one that got cut?"
A. Well, judging from this statement apparently there was a photograph of the Byers boy because he was able to say, "That one right there."
Q. So you're presuming those facts?
A. I think -- it says, "Which boy was that?" And then Mr. Misskelley responds, "That one right there." I read that as indicating he is identifying some representation of that boy right there.
Q. Okay, an do you know how many photographs were there?
A. No, I don't, and I don't know how those photographs were being manipulated at the time.
Q. But---
A. I'm just pointing out that that's a possibility.
Q. You don't know anything as far as from the testimony or from the taped confessions and anything to indicate that those photos were manipulated, do you?
A. No, I don't.
Q. Okay, so you would have to presume that fact if you were not to take some -- place some significance on that particular

statement,

correct?

or the A. It's a possibility, If the record is not clear as to one way
area other as to whether or not this is being suggestive. This is an
that in my mind is unclear.

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Q. Well, explain to me how it's suggestive or if -- if the
police are trying to coerce someone into giving them incorrect or a
specific scenario, why would they go back and ask them, "Are you sure
that he was the one that was cut?" Why wouldn't they leave it alone
when they had the answer they wanted?

A. Because when they got the answer that they wanted, then they
emphasize it in order to stabilize that so that when you get
somebody here you want them, you emphasize that's what you're
trying to do.

Now, I can show you other examples of very direct leading
these suggestions that shows that in the course of this interrogation

picture officers were capable of doing that and I know there was a

there and it may have happened that they indicated which picture
should be selected.

Q. Well, gee, Doctor, to say it may have happened you would have
to assume and presume certain inappropriate police conduct,
wouldn't you?

here A. I would have to assume there are other inappropriate police
conduct which I can specify might also have expressed itself

This is and I might point out that you brought up this point, I didn't.

be not one of my examples. This is something that I would judge to

unclear.

Q. And that's why the answer to that -- is that not clear to you that

when the officers have the answer that's consistent with the evidence and they keep on going and they say, 'Are you certain that's the one?' Doesn't that indicate to you that those officers are trying to get an accurate statement rather than coerce him into saying something?

A. Well, if we -- we're looking at an interrogation that was free of the kind of gross leading and suggestion that characterizes this interrogation---

Q. Is -- wait, let me -- let me stop you. The question, "Are you certain that is the one?" -- are you characterizing that as a gross leading statement?

A. I'm suggesting that if---

Q. Could you answer that question for me, please?

MR. STIDHAM: Your Honor, he's trying to answer the question and the prosecutor won't let him.

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THE COURT: Answer the question.

BY THE WITNESS:

A. Under some circumstances that could be and that would be under some circumstances a gross leading suggestion if it were done in a particular way.

Q. Do you have any actual facts or knowledge from that transcript and those tapes and you're hearing the officer testify that there was anything that would contribute with that statement to make it a gross leading statement?

A. As I said, this is your example I think it's unclear because I don't --

I don't believe the record is clear in my mind as to the circumstances under which this occurred and I'm simply pointing out that there are other examples of gross leading, highly suggestive, if not demanding statements on other points that illustrate that as an operating

procedure this is present in this interrogation and, therefore, there is a possibility -- and I don't know the particular circumstances of this particular presentation of the photograph. You brought it up, I didn't.

Q. Okay. When you say, "It's my example", it's his voice, isn't it true, Doctor? I mean, you heard the tape.

A. It's also -- yes, it is his voice. It is also his voice that says that he arrives at the scene at nine-o'clock in the morning, which is the very first statement that he makes about the time that this all began, and that statement is a statement that because it is not the statement as I analyze the influence process of this interrogation, because it is not the statement that fits with the facts. The statement about the time at which this crime occurred is a statement that comes up and is manipulated eight different times over the course of this interrogation and over the course of those eight manipulations one sees a pattern

of unrelenting pressure on Mr. Misskelley.

Q. When you talk in terms of general valid---

A. May --may I finish?

Q. Mr. Ofshe, when you talk in terms of generality--

MR. STIDHAM: Your Honor, may the witness finish answering the question?

MR. DAVIS: Your Honor, he hasn't answered my question yet.

MR. STIDHAM: He hasn't answered the question the way he wants him to.

MR. DAVIS: Well, your Honor, I asked him the question about part of the statement and he starts off talking about something that's on

page twenty-four.

THE COURT: All right, answer yes or no and then if you need to explain I'm going to permit it.

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THE WITNESS: May I have the question again, please?

BY MR. DAVIS:

Q. I don't know what the terminology is in Berkeley, California, but is

one
it different when somebody says, "Are you sure that he was the
that was cut?" Is that a leading statement in California?
A. No, it's not a leading statement in California and may I
explain?

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Q. Is it a leading statement in Arkansas?
A. If it is a state -- I never said it was a leading statement.

I think what I tried to explain and what I would like to explain is---

Q. Well, are you -- are you going to confine your remark to
that statement, Doctor, or are we going to roam around the entire
tape

recording?
MR. STIDHAM: Your Honor---
THE COURT: Yes.
MR. STIDHAM: He's asking questions and he didn't get the right
answer he wanted---
THE COURT: You're making a statement. Make an objection if
you've got one.
MR. STIDHAM: Your Honor, my objection is that the witness

should be allowed to answer the question and explain his answer.

question THE COURT: All right, I'm going to allow him to answer the
question yes or no and then give your explanation. Were you through?

BY THE WITNESS:
A. No, that is not a leading statement in California and I

think the point I was trying to make was if following manipulating a
suspect to

a statement that the interrogator likes, the interrogator is
likely at that

point to try to reinforce that particular statement and will,
therefore,

said, because it's very likely that if the person has immediately

'That's the one," however, that was accomplished.

person To stabilize that, one would then reinforce it by allowing the
likelihood that to restate it, yes, I'm sure, because it's a very very low
tactic the person is not going to immediately continue. That's a good
for stabilizing an answer that you like.
THE COURT: Doctor, excuse me, are you assuming that a single
photograph of one individual was exhibited?
THE WITNESS: No. I am -- I am assuming that I don't know how
the photographs were placed, that I don't know what prominence it
might have been given, and I don't know what indication might or
might not have been given, and therefore, I don't know what surrounds
that is not included in this record in this particular choice---
THE COURT: --Have you read the officer's description of the

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showing or viewing of the photographs or photograph?
THE WITNESS: Yes, I have.
THE COURT: Have you seen the photographs or photograph?
THE WITNESS: No, I have not.
THE COURT: Show them to him.
MR. DAVIS: Your Honor, for the record I believe it's marked as
State's Exhibit Number One Oh Five.
(HANDING TO WITNESS.)
THE WITNESS: (EXAMINING.)
BY MR. DAVIS:
Q. Doctor, if that -- if that -- if those three photographs are
laid out on the table and he makes the statement that one of them was cut
on his bottom and is pointing to his private parts at the time he
does that and the officer says, "Which boy was that?" and he points
to the picture and says, "That boy right there," are you saying that
that's unduly suggestive?
A. Or if he responds to an officer whose finger is on the
picture and says, "That one there." If that happened, that would be a way
of accomplishing that identification.
Q. But we're in a court of law and we deal with evidence and if

there's no testimony or evidence in the record or in anything
you've looked at to indicate that that happened, then there's nothing
suggestive about that question or there's nothing that
indicates that

that response was coerced, is there?

A. And all I said was, "That's a possibility. I don't know all
the facts."

Q. Okay. But you have to presume facts or assume things in
order

for you to reach the conclusion that that indicates coercion,
isn't that

correct, Doctor?

A. If I were to reach that conclusion about that particular
statement, I

would agree with you. If I say, "I don't know" on that
particular

statement, then I'm trying to say I don't know.

Q. And, also, on that same page the defendant indicates that
one of

the boys was being cut in the face. Isn't that correct? Page
seven.

A. Yes.

Q. And the question before that was, "Where did he' cut him
at?"

And Jessie's response was, "He was cutting him in the face." Is
there anything coercive or suggestive about the question,

"Where

did he cut him at?"

A. No, my Judgment is indeterminate because I don't know the
facts

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surrounding it.

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continued.

Q. So when the defendant identified who it was who was
castrated
and he indicated that one of the boys was cut in the face, you
don't
know and you can't give an opinion that any of those questions
were

coercive in nature, can you?

A. And the record -- no, I can't because the record that we are
dealing with is very incomplete because this part of the record

is
preceded and everyone agrees by over two hours of interrogation

in
which many subjects were discussed and in which we do not know
what was said on the subjects because we have two hours of
interaction about this for which we have no record.

Q. And your speculation on what might have happened during that
time and your guess as to what occurred and what transpired and
what happened after reading this testimony, you can't speculate

any
better than any of these people can, can you?

A. Not on this particular point, no. There are other points
about

which the record is quite clear, about which I'm happy to be
helpful.

Q. How many cases in the past twelve months have you provided
expert testimony on?

A. Perhaps five or six.

Q. What percentage of your income last year was derived from
the
providing of expert testimony?

A. I don't know what the percentage was. I can tell you the
number if
you'd like.

Q. What's that number?

A. In my -- I -- I earned Forty Thousand Dollars last Year out
of this

part of my professional life for which I take half time leave
from the
university every year to free up my time to do it.

Q. And is your going rate--- A. Half time unpaid leave from the
university.

Q. Is your going rate approximately Three Hundred Dollars an
hour?

A. No, it is not.

Q. What is it?

A. My rate is a hundred and fifty dollars an hour for
consultation and

Three Hundred Dollars an hour for time spent in court or in
depositions.

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Jessie kiisskelleys trial: Transcript of Dr. Richard Ofshes testimony
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Q. Okay. So---

A. Because time sent in court or depositions is very, very hard work.

Q. Okay. I will agree with that, Doctor.

asked -- So it's Three Hundred Dollars per hour in court and you're

when you're initially asked to evaluate a case, you don't get the

that's Three Hundred Dollars an hour unless you give an opinion

they consistent with what the person asking you wants to hear. If

Dollars don't call you as a witness, you don't get your Three Hundred

an hour, correct?

MR. STIDHAM: Judge, that's a ridiculous question. It has an inference that---

and say, THE COURT: --Are you -- again, you're making a statement. How many times have I got to tell you, Dan. Stand up first of all

"I object", okay?

MR. STIDHAM: I object, your Honor.

THE COURT: All right. What is your objection?

the MR. STIDHAM: My objection is it's not a proper way to impeach

witness has witness. It's very -- it's -- it's speculation and it's -- the

testified, your Honor, that he is a consultant--

THE COURT: Well---

several MR. STIDHAM: ---to the prosecuting attorney's office in

areas throughout the United States.

MR. DAVIS: Your Honor---

ruling THE COURT: Okay. Again, that gets into statement. My -- my

an on your objection is it's common and customary practice to ask

going expert what their compensation for their testimony is, and I'm

to allow it to that extent.

supposed MR. STIDHAM: To ask him -- if he doesn't say what he's

asked to say he's not going to get paid? That's what the prosecutor

him.

I think THE COURT: Well, I'll let you rehabilitate him then, although

he don't needs much help.

MR. STIDHAM: Thank you, your Honor.

BY MR. DAVIS:

opinion Q. Isn't it true, Mr. Ofshe, that you actually formulated an
police before you ever heard or examined any testimony from the
officers?

A. No. I -- I had an idea about what might have happened, but
I

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Jessie M. Skelley's trial: Transcript of Dr. Richard Ofshe's testimony
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needed to hear the testimony from the officers to find out much
more information about what did happen. In fact in order to try to
get that information I tra -- I tried to travel to Memphis to meet with
the officers to interview them about what happened so that I could
have a fuller basis for it, but that meeting was in part unscheduled
because of the airplane problems and in part apparently because
they were going to refuse to talk to me in any case.
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Ofshe's Je6~Io Mis~kelley~ tr~a~:
Transcript of Dr. Richard
testimony
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continued.,

And so at the hearing that I attended, I observed the officers
and listened to their testimony and in fact my opinions changed
very substantially because of the testimony that I heard.

Q. Isn't it true that you had advised Mr. Stidham that you had
an

the time opinion as to the coercion that was used in this case prior to

you ever heard the police officers testify?

A. Uh -- the opinion that I had at that point was based on the materials available to me which included my having interviewed Jessie Misskelley.

an Q. Well, my question I have for you is: Didn't you formulate opinion before you ever heard the officers? And you just indicated,

"My opinion was" so you had formulated an opinion, correct?

there A. I had formulated a tentative opinion and I was aware that

could was much that I wanted to know about the interrogations that I

attended not know from just the records, and so the hearing that I

I was an opportunity to hear answers to specific questions that wanted to know from the officers which allowed me to refine my opinion about what happened.

coerced Q. Was your opinion before that that the officers had not anyone?

coerced A. Well, the opinion that Mr. Misskelley's statement was a statement can be supported from the records that were

available---

to MR. DAVIS: --Doctor -- your Honor, would he--would you ask him answer the question?

THE COURT: Answer yes or no and then if you need to explain you're going to be permitted to.

BY THE WITNESS:

A. Could you repeat the question, please?

reviewing Q. Prior to hearing the police officers testify or either their testimony in the form of a transcript, was your opinion at that point that the police -- that the police officers didn't coerce anybody?

A. No, that was not my opinion.

but before Q. Okay, so your opinion prior to that -- granted tentative you even heard or sat -- saw or read anything about what the police officers did -- you already formulated an opinion that this was -- this confession was coercive in nature, correct?

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Jessie M.sskelley's trial: Transcript of Dr. Richard Ofshe's testimony

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A. That is correct because there is adequate evidence as to the coercive nature of it contained in the materials that I already saw, but there were many questions that I had about the specifics of it that were very unclear until I heard the officers and what they said caused me to modify substantially my analysis of what led to the materials that I already had seen.

Q. How many cases in the last twelve months have you testified to and indicated that there was coercion on the part of police in obtaining a confession?

A. I can recall one that I testified to that most of my work consists of evaluating the interrogation and feeding back opinions to attorneys and, more than half the time those opinions do not lead me back into the courtroom because I tell the attorneys there is nothing for me to testify about because I don't find in materials that have been provided to me suggesting that there is coercion.

Q. How many times have you testified at the rate of Three Hundred Dollars an hour that a confession was coerced?

A. To the best of my knowledge, never.

Q. How many times have you testified for hire and testified that a confession was coerced or as a result of police coercion?

A. I think that number is -- over the years I've done this -- testified -- I've testified to coercion thirteen times. Of those thirteen times at least once I was testifying without fees and in no case was I paid Three Hundred Dollars an hour because -- while that's my standard fee, to the best of my recollection all of the other cases involved indigent defendants and the State rarely pays very much money for one's time to do this work.

So in no case has anyone ever paid me my customary rate and I do it for whatever rate is appropriate once I reach the conclusion that this is what the facts tell me and I have done it for nothing and would do it for nothing again.

Q. But the truth of the matter is that the more you do it and the more high profile cases you do it in, the more attention you get, correct?

A. The more what?

Q. Attention. --

A. I suppose.

coercive Q. If it's my understanding, Doctor, you didn't find anything
injuries about the statement that Jessie Misskelley made about the

of Stevie -- or of Christopher Byers. Is that correct?
A. No, that is not correct. I didn't reach any conclusion
about those statements because I don't believe that the record is
sufficient for me to reach a conclusion one way or the other.

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Q. And the remainder of it is basically because you found some
questions that you determined to be leading?

A. Oh, no, not at all.

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continued...

Q. Is that not what your testimony was earlier?

A. I don't believe I said that the remainder of it was because I
merely

found the questions to be leading. My recollection of my
testimony was that it was much more than that which I would be happy to
explain to you.

MR. DAVIS: Your Honor, wait just a second. Your Honor, we'll

pass

the witness.

REDIRECT EXAMINATION

BY MR. STIDHAM:

Q. Doctor Ofshe, you mentioned that sometimes you will testify

for

indigent defendants. Is that correct?

A. I believe every time I've testified in a confession case it

has been

for an indigent defendant.

Q. Were you told that this particular defendant over at counsel

table

was indigent?

A. I believe so.

Q. Have you received any money in this case so far?

A. I haven't even received my expenses for the three trips I've

made

to Arkansas. No, I haven't received any money.

Q. Do police officers usually yell at suspects when the tape

recorder

is on?

MR. DAVIS: Your Honor, I would object to that question because

this

individual doesn't have any expertise in the field of police interrogations as far as his personal experience of being there

to

make that determination.

MR. STIDHAM: I'm not sure I understand his objection.

THE COURT: Well, I'm not sure it takes an expert to answer that question, so I'm going to allow him to answer it.

MR. STIDHAM: Thank you, your Honor.

BY THE WITNESS:

A. No, when the tape recorder is on, one gets behavioral

statements

that are tailored to the fact that the tape recorder is there

and so one

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would, not expect the yelling to happen.

In my experience the yelling and the other improper activities happen when the tape recorder is off.

Q. Is there any difference between cops yelling at people in

Los

Angeles or Corning, Arkansas, when the tape recorder is on or

off?

A. I don't see why.

Q. The prosecutor kept wanting you to ask question -- or asked

you

questions about the coercive nature of the statements on --

the questions and answers on page seven that he pointed out to you
on the transcript, and I kind of got the impression when I was
sitting over there in that chair that you wanted to talk about other
examples of leading and suggestion that was employed by the police.
Would you like to talk about those?
A. Yes, I would.
THE COURT: How long are we going to be talking about them?
MR. STIDHAM: We're all tired and we know you're tired and the
jury looks tired---
MR. FOGLEMAN: Your Honor---
MR. STIDHAM: ---so we won't be long.
MR. FOGLEMAN- ---we don't mind Mr. Stidham asking questions
but to try to elicit some narrative, we don't think that's proper.
THE COURT: I'll object -- I mean I'll sustain your objection
to the invitation for a narrative. This witness is capable of
answering questions in question form and answer rather than a narrative
and that objection will be sustained. The Court Reporter is not
going to be able to go much longer.
MR. STIDHAM- May I have just a few more minutes, Judge?
THE COURT: Sure.
BY MR. STIDHAM.
Q. Doctor Ofshe, could you point to a few areas of the
interrogation which you feel are leading and suggestive?
MR. STIDHAM: Your Honor, may I use the word coercive like the
prosecutor used?
THE COURT: I guess that's the goose and the gander thing,
isn't it?
Go ahead.
BY MR. STIDHAM:
Q. Could you give some examples of the police being coercive
and leading or suggestive during the course of the interrogation?

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is A. Yes, I can. Perhaps the most powerful example in my opinion
the example of the eight revisitings of the question of the

time at

which the crimes occurred.

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Transcript of Dr. Richard
Ofshe's testimony

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continued...

The first example occurs on page -- in my numbering -eleven -- which I believe is page three -- and this is the point at which Detective Ridges says, "All right, when did you go with them?" Mr. Misskelley says, "That morning." Detective Ridge says, "Nine o'clock in the morning?" Jessie says, "Yes, I did. I went with them and then"-- Then they talk about walking. At that point Jessie is now saying he went there at nine o'clock in the morning. I believe that there is a mistyping here. I believe it's Jessie said, "Nine o'clock in the morning." But this transcript does not say that and I'll point that out. That's my recollection. In any case he agrees or says that it was nine o'clock in the morning. There is no follow-up at that point. The tape recorder is on. Nine o'clock in the morning is grossly inaccurate as everyone knows. first time Detective Ridge has testified in hearings that that was the the that any time for this occurring happened and in his hearing testimony at page ninety-nine of the transcript. The next time the subject of the time at which the events occurred comes up is on point page nine of the first transcribed interrogation and, at this asked Mr. without reading it, I'll just point out that Detective Ridge Misskelley -- he's now revisiting the subject. He asks Mr. Misskelley, "I'm not saying when they called you. I'm saying what time was it that you were actually there in the park?" Mr. Misskelley says, "About

noon.

Ridge says, "About noon? -- and it has a question mark.

Jessie says, "Yes."

Ridge now says something that in my opinion was an attempt to manipulate Mr. Misskelley's statement about the time because Detective Ridge now says, "Okay, was it after school had let

out?"

This is immediately after Jessie saying, "It's at noon." He's

now

suggesting it must be later by saying, "Is it after school let

out?"

Jessie says, "I didn't go to school."

Ridge now has to clarify and say, "These little boys."

Jessie says, "They skipped school."

Ridge says, "They skipped school?" -- with a question mark.

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Then there was more discussion about their bikes and so on.

Again,

there is an error. We know it's impossible for these boys to

have

been there at noon.

Going on to the third example on page nineteen. Now, it's

Detective

Gitchell who revisits the question of time still because the

time is

inaccurate and he raises -- "Now, did you say the boys skipped school that day? These little boys did?" Said in that way,

it's a

suggestion that you change your answer indicating, I'm

displeased

with this. This isn't the right answer. Did you really say

would be the

emphasis on that.

Jessie then answers. He asks -- Gitchell now asks, "What time

did

you get there?"

Jessie again repeats, "I got there about nine."

Gitchell says, "In the morning?"

Jessie says, "Yes." So Jessie now attempts again to say he got there at nine in the morning.

Now, I am of the belief that there has been testimony that

Jessie

was roofing that morning. I believe that that was testified

to. So that

would be an example if I'm correct in that belief that Jessie

was

somewhere -- says he was somewhere else and someone confirms

that and he is now saying he got there at nine o'clock in the morning.

Clearly a contradiction.

Q. Doctor Ofshe, is there another example in the second recorded

statement?

A. Yes. This goes on and is repeated several times. If I can just

illustrate one other point in the first statement. Q.

Certainly.

A. There is a very important example of the way in which the detectives refuse to allow Jessie's inaccurate statement to

stand and

directly manipulated Jessie's statement through skillful

interrogation

tactics.

So for example, on page eighteen of the transcript at the conclusion

of a discussion about the supposed cult, Detective Ridge now changes the subject. There is nothing that precedes this about

the

timing, but now for the fourth time revisits the timing and

this time

Detective Ridge says and I quote "Okay. The night you were in

the

woods, had you all been in the water?"

Jessie replies, "Yeah, we'd been in the water. We were in it

that

night playing around in it.

This is the first time in the record according to my analysis

according to Detective Ridge's testimony that it is directly

suggested

to Jessie that the correct answer is, "This happened at

night."

Immediately upon that being suggested Jessie is -- responds by accepting and now he starts to use the word "at night", where

he had

never used it before, where he had consistently said it was

during

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the day. It is in direct response to Detective Ridge's substitution and

introduction into the interrogation the correct fact that this happened

at night so Jessie now adopts that. That is an influence

tactic. It is a

way of getting someone to accept something out of pressure and

out

of suggestion.

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Joaia Misakelleya trial:
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Detective Ridge follows up with his victory on page thirty --
page twenty-four of the transcript at the bottom where Detective
Ridge now capitalizing in my opinion on his victory at getting night
into the story now seeks to do what I was describing before -- stabilize
that -- by saying the following -- and again, this is introduced by
Ridge and there is nothing preceding it from which this follows. He is
choosing to return to this subject and he says, Okay they killed the
boys. You decided to go. You went home. How long after you got home before
you received the phone, call-- thirty minutes or an hour?"
Now there has been previous testimony about a phone call to
Jessie at home at nine P.M. That's what Detective Ridge is referring
to. But Detective Ridge now links this up with Jessie going home and
gives Jessie the choice of having arrived home either thirty minutes
or an hour before the phone call occurred, which would mean he's now
suggesting to Jessie and elaborating on the story and getting
Jessie to--as he next does -- Jessie says, "Uh" -- there's a silence
and then he says, "An hour."

So Ridge had given Jessie a choice. You can either say you got
home a half hour before the phone call or you can say you got
an hour before the phone call. Those are the only choices he's
got.

Jessie now chooses an hour.
Again, that's a tactic of influence. That is posing the question
in such a way that you only have two choices. Either one of those
choices, I win. Detective Ridge is using that technique.
Then we get to the second interrogation. That's the last time
that the time subject comes up in the first interrogation. As we know at
two forty-four in the afternoon -- at three-eighteen in the
afternoon the first tape was finished. According to Detective Gitchell no one
spoke with Jessie between then and the time that Detective Gitchell--
after meeting with the Prosecutor Fogleman-- went back in to get the
statement that is labeled "Interview of Jessie Misskelley,
Junior,
Second Interview Conducted to Clarify Previous Statement."
The last two times you will recall that Jessie said that
anything was brought up about time, Jessie had been successfully moved to
talk about the events happening in the evening instead of in the
morning which is where he started. So now Gitchell comes in and on page
one of the second transcript begins with, "Jessie, uh --when you
got with the boys and with Jason Baldwin when you three were in the
woods and them little boys come up, about what time was it when
the boys come up to the woods?"
Jessie replied, "I would say it was about five or so five or
six."
So Jessie is now moving in the direction of later but it's as if
there is

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the original statement that he made about the morning and he's
being slowly moved towards the evening but clearly in this
statement he has not gone far enough because five or six I gather from
what I've been informed about the testimony is too early for the
boys to have shown up at the woods.
Now, we have---
MR. FOG LEMAN: Your Honor, I'm going to have to object to that

Statement by this witness. There is no basis for him concluding
that five or six is too early for this defendant and the defendants
to show up in the woods. There is no basis for that.
THE COURT: Well, he's been talking for ten minutes. I guess
that's been in response to a question. I don't know. What is your
objection?
MR. FOGLEMAN: Your Honor, my objection is that he is testifying
on things that are not in the record and have not been testified
to.
THE COURT. Doctor, I'm -- I'm assuming that all of your
testimony is based upon the testimony you've heard, the statements you've
read and listened to, and the notes given by the officers.
THE WITNESS: Absolutely, your Honor, and specifically on this
point the transcript says when the little boys come up. It is a
specific statement about when the children arrived.
THE COURT.. All right. Mr. Stidham.
BY MR. STIDHAM:
Q. Your last example, Doctor?
A. The next after failing to get the time moved to the proper
time, Detective Gitchell uses another interrogation tactic. He now
says -- and I quote from page one of the second transcript -- "All
right, you told me earlier around seven or eight. Which time is it?"
And there are two important things about this. The first one is
it's obvious that Detective Gitchell is doing the same thing that
Detective Ridge has done earlier -- giving Jessie a choice. Pick one and
I win or pick two and I win -- either seven or eight.
Gitchell can live with either answer and he's giving Jessie
only those two choices. But what's even more important about this is that
detectives nowhere in the record, including the record of what the
say, the notes, the specific statements by Detective Ridge, the
transcript of the first interrogation, is there any indication
that Jessie ever said -- as Detective Gitchell says, "You told me earlier
around seven or eight." There is an absolute absence of anything
indicating that.
That's extremely important to me because what this illustrates
is the legitimate interrogation tactic of making up evidence, of
overstating, inaccurately stating the evidence. This is something that
happens in police interrogations all the time. It is not something that it

is my

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understanding is improper in police interrogations. It is something I see all the time and it is a tactic for manipulating the suspect and, in this case, based on my review of the evidence there is no place at which Jessie told Ridge ---told Gitchell that they had arrived there at seven or eight, And in fact Detective Ridge in his testimony in the hearing makes very clear that the very first time any time came up was when Jessie said, "Nine o'clock in the morning." And we have a complete record of every utterance from that point forward. So prior Detective Ridge who was present with Detective Gitchell says to the beginning of the tape no time was mentioned and we note every mention of time prior to that.
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Jessie Misskelley's trial:
Transcript of Dr. Richard
Ofshe's testimony

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So it's my opinion that this is a tactic and it's a very effective tactic because Jessie now simply repeats back to Detective Gitchell what

doesn't
Gitchell
comply
of--
this

Gitchell told him. He says, "It was seven or eight." Jessie even make a choice. He just tells Gitchell everything that told him. That's an indication of someone who is willing to and does not want to take any chances of making a mistake and therefore being punished for it through pressure. Then there's some more discussion of that and -- and it changes again. But that's one example. There are many other examples of illustrations of manipulation on important points throughout record.

Q. Thank you, Doctor.

MR. STIDHAM: Pass the witness.

RE CROSS EXAMINATION

BY MR. DAVIS:

anybody.
That is
police

Q. Doctor, Just one question. It's certainly option for Jessie Misskelley to make the statement, I wasn't there. I didn't kill I didn't see anybody killed. I don't know anything about that. certainly an option that he could have used in talking to the officers, is it not?

A. Yes, it is and may I explain?

MR. DAVIS: Your Honor, I -- I have no further questions.

MR. STIDHAM: Your Honor, I would like to give the witness the opportunity to explain that since the prosecutor brought it up.

MR. DAVIS: Your Honor, I don't think that question calls for a response.

MR. STIDHAM: Well, then it wasn't a question.

MR. DAVIS: Other than -- other than a yes or no response.

MR. STIDHAM: Your Honor, may the witness please explain his answer?

to
that
that
literature

THE COURT: What -- what is the -- what explanation is necessary that-- your answer?
THE WITNESS: The presumption that that's an option presumes the person does not feel pressure and in fact the scientific literature

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is
on the subject of when one gets a coerced compliant confession
when the individual feels that they have no choice, cannot

escape

the situation---

MR. DAVIS: Your Honor---

THE WITNESS: ---and can no longer resist and therefore simply

give

up resisting and comply.

MR. STIDHAM: Nothing further, your Honor.

RE CROSS EXAMINATION

BY MR. DAVIS:

Q. Doctor, just one more time. When the person is being asked questions and they don't know anything about it, and they don't

know

any of the details, they can always say, I don't know. I don't

know

anything about it. I don't know the details you're asking me

about.

They can always say that, can't they?

A. They can and sometimes they get to the point at which they

can

no longer do that and so they simply give up.

THE COURT: All right, anything else?

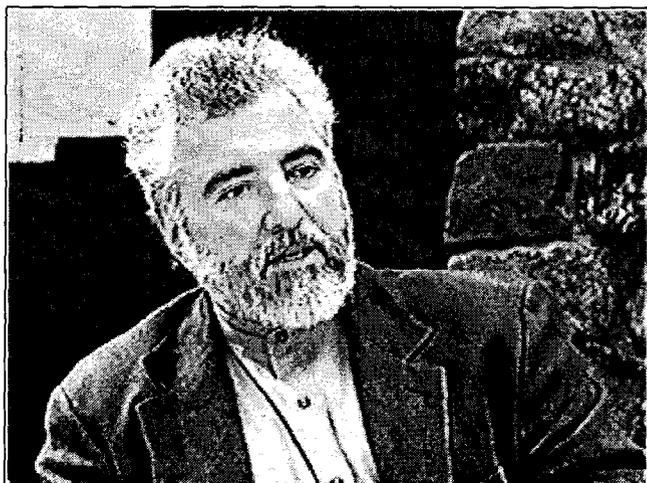
MR. STIDHAM: No, your Honor.

(WITNESS EXCUSED.)

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Jessie Misskelley's trial:
Transcript of Dr. Richard Ofshe's testimony



During Jessie Misskelley's trial, several expert witnesses were called by the Defense. The following is a transcript of the testimony given by Dr. Richard Ofshe, a Pulitzer Prize winning professor of sociology and expert on false and coerced confessions.

DOCTOR RICHARD OFSHE

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. Please state your name for the Court.

A. Richard Ofshe.

Q. And what do you do for a living, Mr. Ofshe?

A. I'm a professor of sociology at the University of California at Berkeley.

Q. Okay. Can you tell the Court and the jury a little about your education and background?

A. I received a Bachelor's Degree in psychology from Queens College of the City University of New York, and then a Master's Degree in sociology from the same institution, and then a Ph.D. in the sociology department of Stanford University with a specialty in a sub-field called social psychology.

Q. Would you explain to the Court and the Jury what social psychology is?

A. Social psychology is a specialty area that is found both within psychology and within sociology. It has to do principally and particularly the part that I specialize in -- it has to do with influence, decision making, belief, and attitude change, techniques of pressure and coercion and I specialize particularly extraordinary techniques control and influences.

Q. Do you have any experience or training in the area of influence and more specifically in the area of influence with regard to police interrogation?

A. All my work for the last thirty years or more has been on the subject of influence starting out doing work in traditional problems -- excuse me -- traditional problems in social psychology having to do with decision making, group influence, interpersonal influence.

Then starting about the early part of the nineteen seventies I became interested in complex real world systems of influence. That is to say not laboratory research, but rather studying on-going very complicated influence environments and particularly those kinds of environments that have massive effects on individuals.

So initially I did a lot of work for about ten or twelve years studying what are called cult groups. That is to say groups that are very strongly organized, that exert enormous pressure on individuals and that can lead individuals to change the way in which they see the world and be willing to take part in activities that they otherwise would ordinarily not take part in.

During -- and I specialized in studying cult groups that generate violence. During that period of time I did a great deal of work often involving the analysis of groups that led their followers to commit murders. I did a lot of work for prosecutorial agencies, analyzing and prosecuting such crimes.

Then my interest in influence continued and I began to become interested in the study of police interrogation. Ah, police interrogation is the root of -- out of which various studied round the world procedures of influence groups -particularly techniques that have to do with coercing confessions from individuals and generally manipulating them in extraordinary ways.

And that work began in the late nineteen eighties and since then I've done a great deal of work and written about police interrogation tactics, in particular police interrogations that can and does lead to coerced and/or false confessions.

Q. Has any of your work been published, Doctor Ofshe?

A. Yes. I've published four or five books, and thirty or more articles in scientific journals, and presented papers at dozens of conferences over the years. The work on all of these subjects have been published.

Q. Are you familiar with a Doctor Gudjonsson?

A. Yes, I am.

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Jessie Misskelley's trial:
Transcript of Dr. Richard Ofshe's testimony

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Q. And how are you familiar with his work?

A. He's one of the other people who is a specialist in techniques of interrogation and influencing police interrogations.



MR. DAVIS: Your Honor, at this time if I may interrupt, as I understood it he is qualifying him as -or in the process of qualifying him as an expert. They're moving on to another area and I'd ask that I'd have an opportunity to voir dire the witness regarding his special qualifications.

THE COURT: Well---

MR. STIDHAM: Your Honor, I asked him about what has been published.

THE COURT: You're-asking about somebody' else's work.

MR. STIDHAM: Your Honor, I was---

THE COURT: Right now if you're' qualifying him, then-- then go through his qualification, his vitae, and then pass him, and then if they've got any questions, then I'm going to allow them to voir dire.

MR. STIDHAM: I think my next question will clear this up, your Honor.

THE COURT: All right.

BY MR. STIDHAM:

Q. Are you mentioned in Doctor Gudjonsson's book, "The Psychology of Interrogations, Confessions, and Testimony?"

A. My work is discussed in that book, yes.

Q. Did you contribute to the book in any form or fashion?

A. Well, he asked me to review certain chapters of the book and I reviewed them, and made comments, and then he thanked me in the introduction for doing that, and then he also discusses my work in the substance of the book.

Q. I also understand, Doctor Ofshe, that you've won a Pulitzer Prize?

A. I shared in the nineteen seventy-nine Pulitzer Prize for public service, yes.

Q. And what was that for-- I mean, what was the subject of your---

A. That was for work I did with the publisher of small weekly newspaper in West Marin County, California. We did an expose of a group called Synanon which started out as a drug rehabilitation organization and turned into a violent cult group that was assaulting and attempting to murder people in the immediate area. It became quite a major subject and that year we were lucky enough to be awarded a Pulitzer Prize.

Q. Are you a member of any professional associations?

A. Yes. I'm a member of the American Psychological Association, the American Sociological Association, the American Psychological Society, the Sociologic Practice Association, and the Pacific Sociologic Association.

Q. Have you ever served as a consultant to any law enforcement agencies?

A. Oh, yes, I have. Starting in nineteen seventy-nine I served as consultant to Marin County Sheriff's Department and then subsequent to that the office of the Attorney General of the State of California, the office of the Attorney General of the state of Arizona, the United States Department of Justice -- both the tax division and the criminal division -- the Prosecuting Attorney of Jefferson County, West Virginia, the Los Angeles District Attorney's office, the Internal -- that's not a law enforcement agency, I guess. The United States Attorney's office in West Virginia, the Thurston County, Washington, prosecutor's office, currently the State's Attorney's office in Fort Lauderdale, Florida, and again for the United States Attorney's office in West Virginia'

Q. Have you ever testified on behalf of the prosecution in a criminal case?

A. I don't believe -- I'll have to look at the list of cases in which I've testified.

Q. Well, I'll go on to the next question.

Do you lecture to groups regarding the influence of police tactics in false confessions?

A. Yes, I do. I'm -- in fact I've been asked to -- in May of this year to -- at the request of the Supreme Court of the State of Florida -- been asked to address for a half day a judicial conference in Florida on

the subject of false confessions.

Q. Have you been involved in both civil and criminal cases dealing with false confessions and confessions in general?

A. Yes, I have.

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Q. How many -- excuse me -- how many cases dealing with confessions have you been involved in?

A. Confessions specifically thirteen -- I've testified thirteen separate times. I've been involved in many more cases. Much of the work that I do is consulting work that doesn't necessarily culminate in testimony. That's why I wasn't certain whether I had actually testified in this criminal matter. I'm scheduled to the week after next, but I can't at this moment think of another example where I already have.

Q. Okay. Have you testified in court with regard to any confessions taken on the defense side?

A. Yes. Most -- most of the confession cases in which I've testified have been cases involving coerced or coerced false confessions and, therefore, my testimony has been principally for the defense in those cases.

Q. How many times have you been qualified as an expert in the area of influence and police interrogation? **A.** Twenty-five times.

Q. Twenty-five times? In both state and federal courts?

A. Yes, sir.

MR. DAVIS: Your Honor, if I might -- the question was: Qualified as an expert in the area of influence and police interrogations -- can we break that down? I didn't hear anything in the background as far as police interrogation.

THE COURT: Can you break it down?

BY MR. STIDHAM:

Q. Have you been qualified as a expert by any court in the area of police interrogation tactics and influence on individuals during police interrogations tactics?

A. Yes. On influence in police interrogation in particular I've qualified and testified thirteen times. On influence in general I've been qualified and testified an additional twelve times making a total of twenty-five.

Q. Okay. Have these been in both state and federal courts?

A. Yes, they have.

Q. Have you ever testified in the State of Arkansas?

A. Yes, I have.

Q. And where was that at?

A. In Fort Smith in federal court in a case brought by a young man and his family against a person named Tony Alamo who ran a cult group located in Fort Smith, and the case had to do with the beating of this child.

MR. STIDHAM: Your Honor, at this time we would ask that the witness be qualified as an expert in the area of police interrogation tactics and influence of people involved in police interrogations.

MR. DAVIS: Whether or not he's qualified as a expert is what we would like to address in voir dire.

THE COURT: All right.

VOIR DIRE

BY MR. DAVIS:

Q. Doctor Ofshe, you are a social science professor at the University of California at Berkeley. Is that correct?

A. I'm a professor in the sociology department.

Q. Okay. And what-- so you teach sociology. Is that right?

A. I teach specifically courses in social psychology and courses on extreme techniques of influence including police interrogation.

Q. You are not a licensed psychologist, correct?

A. Ah, that's correct.

Q. Okay. You can't practice psychology in California or any other state, can you?

A. Ah --no, I don't practice clinical psychology which is -- what is generally licensed.

Q. Okay. And would it be a fair statement to say that psychology is different from social -- sociology in that sociology deals with group activities?

A. No, that's a very general and unhelpful definition. Social psychology which is an area that I work in is an area that's represented in both disciplines and I'm a member of the professional association of both disciplines. Both disciplines maintain sub-sections called social psychology and social psychology deals with a very special set of topics that has to do with influence on individuals, decision making, attitude change, interpersonal and group pressure.

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Q. Are you a licensed social psychologist?

A. It's not necessary to be licensed to be a social psychologist because I don't treat anyone.

Q. Is there such a thing as a licensed social psychologist?

A. NO.

Q. Okay. In other words---

A. Because it does not engage in the treatment of people it's generally not licensed :

Q. Okay. So there are sociologists and there are people that hold themselves out to be social psychologists, correct?

A. People who are members of the requisite professional associations and members of the sub-sections that are specialties in social psychology and I'm a member of both and in each case as a social psychologist.

Q. How many states and how many courts have refused to accept you as an expert in this work?

A. No state has ever refused to accept me as an expert.

Q. How many courts?

A. There's one case in which a line of testimony to which my testimony would have been foundational was rejected. It has to do with whether or not a certain theory---

Q. Where was that?

A. That was in California.

Q. Okay.

A. That had to do with whether or not a certain line of testimony was appropriate for the insanity defense and in that case the judge barred that line of testimony.

Q. As far as -- what is it that you studied in relationship to this case?

A. In this case in particular I have studied the following materials: The police reports and notes of Detectives Gitchell, Ridge, and Durham, the transcript of the first tape recorded interrogation of Jessie Misskelley, the transcript of the second tape recorded

interrogation of Jessie Misskelley. I've listened to the tape recordings of both interrogations. I studied the transcript and the video recording of an interview of Buddy Lucas. I've studied the treatment records of Jessie Misskelley at East Arkansas Mental Health Center. The transcript of a hearing in which Detective Ridge sought his search warrants from Judge Rainey. I attended a hearing in this case on January the thirteenth, nineteen ninety-four at which I heard and saw the testimony of Detectives Allen, Durham Ridge, and Gitchell with respect to what occurred during the interrogation. And I subsequently reviewed the transcripts of that hearing and then I interviewed Jessie Misskelley on December the fifteenth, nineteen ninety-three, and have subsequently carefully reviewed, and studied, and analyzed the transcript of that interview.

Q. How long was that interview?

A. Three hours, more or less. It may have a bit more. It may have been a bit less. I don't have the -- I don't have that -- it might be helpful. It worked out to an eighty-seven page transcript.

Q. You talked with Jessie Misskelley for three hours. Is that right?

A. No. I talked with Jessie Misskelley for the length of time it took to produce this transcript here.

Q. And you reviewed testimony of the police officers?

A. I reviewed their reports. I reviewed the actual transcript of the one part of the interrogation that -- or the two parts of the interrogation that were tape recorded, I studied and analyzed their notes, studied and analyzed their testimony.

Q. And what scientific basis is it that you intend to give an opinion on?

A. Well, the first thing that's necessary is to try to get a clear picture of the history of the interrogation of exactly what happened step-by-step. Subsequently, that---

Q. if you could---

A. Yes.

Q. What scientific basis and what scientific tests are you basing your opinion on that you-- that the defense is proposing that you testify to?

A. It is based on the literature on the subject of influence, and particularly what is known about techniques of influence, the conditions that lead up to coerced confessions. The analysis that I will do on this involves specifying the pattern, what happened during the interrogation---

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Q. --What scientific basis is it based on? Not what your procedure is, but what scientific basis is your opinion grounded in?

A. The opinion is grounded in the research on what is known about the conditions that lead up to coerced confessions. There are patterns of conduct that are known to lead to coerced confessions. There are consequences that follow from those patterns that are generally used to identify a coerced confession. There are criteria that are used to judge whether or not a confession is coerced or is not coerced, and whether it is a confession that appears to be the product of influence or appears to be the product of memory.

Q. Again -- is that -- is that based on empirical studies?

A. Oh, yes.

Q. And those empirical studies would have to determine which confessions were coerced and which were not coerced in order for those studies to have any validity, correct?

A. Well there are studies of confessions---

Q. Would you answer my question, please, sir? You would -- you would, have to determine-- someone would have to determine was a confession coerced or was it voluntary before those studies would have any validity?

A. The studies of confessions are often broken down into---

MR. DAVIS: Your Honor, could you ask him---

THE COURT: Answer yes or no and then -- then I'm going to allow you to explain your answer.

THE WITNESS: Okay.

THE COURT: If you can, answer yes or no. If you can't, Just say, "It's not capable of being answered yes or no."

THE WITNESS: It's not capable of being answered yes or no. I could probably answer your question if you'll allow me to explain why it's not capable.

THE COURT: Well, I don't want to allow a long narrative discourse. If you can answer the question concisely then proceed.

BY THE WITNESS:

A. The validity -- the truth or falsity of a confession is certainly

important and sometimes it's possible to know whether a confession was in fact true or false. There have been studies -- a lot of studies are done on what are called disputed confessions as opposed to undisputed confessions, and the undisputed confessions are more important because it is known whether or not the confession was true or false.

Q. Well, if your studies are based -- is there empirical data that you're basing your opinion on?

A. Yes.

Q. Okay. Those studies would have to say -- you would have to presume that a confession was coerced for those studies to have any validity, correct?

A. No. Sometimes one knows that a confession is false and therefore coerced because of -- of independent factors, such as knowing -- eventually identifying who the real killer might be.

Q. But in those studies for those to have any value at all scientifically, somebody has to make a determination that the confessions were coerced or not, correct?

A. Not necessarily because we know the conditions that lead up to confessions that are undisputed where individuals give true confessions and do not recant them, and we know under other circumstances when people give false confessions which are subsequently proven to be false because the perpetrator is in fact caught.

Q. Well, let me ask you this: How would you characterize the situation where you said it was a false confession and a court determined that it was not a false confession, where would you categorize that?

A. I don't know that I've ever said that something was a false confession. I know I've testified as to whether something was coerced or not.

Q. So you -- as far as this talk previously about false confessions you don't deal in that area?

A. No. I -- the question suggested to me, you're asking me about a time when I testified in a court that a confession was false, and it was judged the other way and I don't believe that that's ever occurred.

Q. Have you not testified as to inaccurate contents of confessions in a court and the jury disregarded that and ruled another way?

A. I testified I believe in one case in which I testified that in my opinion a particular confession was coerced and the confession was not suppressed and I've testified in other cases where it is my opinion that a confession was in fact coerced and the court found that way.

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Q. Okay. Well---

MR. CROW: May we approach the bench, please?

THE COURT: All right.

(THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH
OUT OF THE HEARING OF THE JURY.)

MR. CROW: Your Honor, is he qualifying this witness or is he cross
examining him?

MR. DAVIS: Your Honor---

THE COURT- Well, I'm going to be honest, gentlemen, I'm real
interested in knowing what a sociologist is going to testify to that
would aid and benefit the jury and what is the scientific basis of that
testimony. It seems to me that you've called this witness to give an
opinion that the confession was coerced---

MR. STIDHAM: That is---

THE COURT: ---and that it was involuntary.

MR. STIDHAM: That's exactly right, your Honor.

THE COURT: And I think that -- that's a question for the Jury to
decide and I'm not sure I'm going to allow him to testify in that
narrow framework. I can see him having value testifying that these
are common techniques employed by the police overrides one's free
will. I found such and such of these conditions prevailing here and
things of that nature, or maybe group dynamics of a cult.

MR. CROW: Your Honor--

THE COURT: But I'm not sure I'm prepared to allow him to testify
that in his opinion it's coerced and therefore invalid.

MR. CROW: Your Honor---

THE COURT: I mean, what the hell do we need a jury for?

MR. STIDHAM: He's not going to testify whether or not the
confession is false or true or whether the defendant is guilty or
innocent. He's going to testify to the voluntary nature of the
confession -- statement to the police -- whether or not it was
coerced. That's an issue that the jury has to decide and that's what
an expert witness is for, to help the jury decide these issues.

MR. DAVIS: No. No, Judge, that's where -- that's the real crux of the matter whether-- the confession was coerced or not, doesn't make -- whether it was the truth. It's whether it was the truth and they're trying to get through the back door what they can't get through the front door.

MR. CROW: Disagree, your Honor. I---

MR. STIDHAM: Your Honor, that's not the correct statement of the law.

MR. CROW: The law recognizes--

THE COURT: No. The -- the -- the -- I mean, of course, I've ruled that it was voluntary. The jury, I guess, could go back and decide that it wasn't. If that's the issue you're talking about

MR. CROW: That is what Arkansas law--

THE COURT: ---but the question of whether or not psychological ploys or tools were used to get a guilty person to give a true statement, now that's another issue.

MR. STIDHAM: Your Honor, that's not what he's going to testify to.

THE COURT: I don't know what you've got him here for. What is he going to testify to? I want to know.

MR. STIDHAM: Your Honor, he has an opinion as to whether or not the statements made by Mr. Misskelley to the West Memphis Police Department were voluntary.

THE COURT: Is that the way you're going to couch the question to him and is that the way he's going to give his opinion. In my opinion they were involuntary.

MR. STIDHAM: Yes, your Honor.

THE COURT: That the police used subtle techniques to cause an innocent man to confess-- to confess.

MR. CROW: He's not going to say whether he's innocent or not, your Honor.

MR. STIDHAM: Your Honor, that's for the Jury to decide.

MR. DAVIS: Judge, what we've got -- they're trying to get through the back door what they can't get through the front. It's the same way.

MR. STIDHAM: Your Honor---

THE COURT: Well, unfortunately they might be able to do that under the status of our law.

MR. DAVIS: Your Honor, the concern that I have here is that for there to be any empirical data and for him to actually claim to have

any scientific basis, somebody somewhere has to categorize these cases as false confession cases or coercion cases. And what I'm saying is that this man along with his cohorts in the field have -- they label things to -- to back up or substantiate their particular theories, and -- and---

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THE COURT: Well, I think all of those go to the weight of his -- weight of his testimony.

MR. STIDHAM: That's what -- that's what experts do. If they want to bring an expert to counter them, they can!.

THE COURT: I think you can call your man to say in his opinion that there was nothing that they did out of the ordinary and that the statement was freely and voluntarily made.

MR. STIDHAM: That's the correct statement of the law, your Honor.

THE COURT: Well, we might as well get on with it. I'm going to let him testify but I'm not about to let him testify that in his opinion Misskelley is innocent--

MR. CROW: No, your Honor.

THE COURT: ---that his confession was a lie and false. I'm not going to allow him to do that.

MR. STIDHAM: He has an opinion as to what--

THE COURT: Don't even try to ask him whether or not he has an opinion whether the confession was true or false, because I'm ruling that he cannot do that.

MR. DAVIS: I want him cautioned before we proceed any further so that he doesn't blurt that out.

MR. CROW: Your Honor, can you give us two minutes?

THE COURT: Okay. Well, do you understand what I'm saying? I'm saying that there are areas where he has expertise that might be of some benefit and that is in the areas of group dynamics, in the area of -- of possibly coercive or -- or techniques that can be employed to make someone testify -- or -- or give a statement. Now, whether or not that statement true or false is another matter.

MR. CROW: That's not what he's testifying about, your Honor.

THE COURT: And I'm not going to allow him to testify that, In my opinion these officers illegally exacted or coerced a confession from his either. I'm not going to allow him to testify to that.

MR. STIDHAM: That's the Court's job, your Honor. That's the jury job.

THE COURT: Well, that's exactly right. So what is he going to testify

to?

MR. STIDHAM: He's going to testify as to -- he has an opinion that this -- the statements made by the defendant were involuntary and a result of psychological coercive tactics employed by the West Memphis Police Department.

THE COURT: Were involuntary in what sense?

MR. STIDHAM: That's what he'll testify to.

THE COURT: Well, I want to know. What -- in what sense?

MR. DAVIS: Could we move in chambers?

(RECESS.)

THE COURT: All right, ladies and gentlemen, you can have about a fifteen minute recess with the usual admonition not to discuss the case.

(RECESS.)

THE COURT: All right, court will be in session. All right, ladies and gentlemen, you have heard a number of persons testify that have been presented and characterized as expert witnesses and perhaps will hear some more, and in that regard I'm going to give you an instruction of law that you should consider and it will again be read to you at the time all of the instructions are given.

An expert witness is a person who has special knowledge, skill, experience, training, or education on the subject to which his testimony relates. An expert witness may give his opinion on questions and controversies. You may consider his opinion in the light of his qualifications and credibility, the reasons given for his opinion, and the facts and other matters upon which his opinion is based. You are not bound to accept an expert opinion as conclusive, but you should give it whatever weight you think it should have. You may disregard any opinion testimony if you find it to be unreasonable.

All right, gentlemen, let's proceed.

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

THE COURT- Sure.

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(THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH
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MR. STIDHAM: I assume that the witness has now been qualified
and I can go on with my questioning?

THE COURT: Again, I never make that statement. I Just tell you to
proceed.

MR. STIDHAM: Thank you.

(RETURN TO OPEN COURT.)

THE COURT: Do you have any additional voir dire?

MR. DAVIS: No, sir, your Honor, not at this time. We'll reserve it for
cross examination.

THE COURT: All right. All right, you may proceed.

MR. STIDHAM: Thank you, your Honor.

CONTINUED DIRECT EXAMINATION

BY MR. STIDHAM:

Q. How many confessions has you analyzed, Doctor?

A. I've been requested to analyze a total of forty-eight separate
interrogations leading to confessions.

Q. Okay. Have you ever taken a coerced confession or a false
confession from someone?

A. Yes, I have.

Q. Can you give us an example of that?

A. In one particular case I was called in by the prosecution with the
putting together the investigation of what was believed to be a
multiple murder and sex abuse crime case. In the course of my work
on that case -- again at the request of the prosecution -- I had
access to an individual who was confessing to all manner of heinous
crimes.

In the course of my interviewing of him I began to become
suspicious as to the validity of the confessions that he had been
giving now for five months on a series of subjects. At that point after
hearing from him what happened during the interrogation and certain

other things about his reactions to the interrogation, I determined that there was a possibility that he had been falsely confessing and I determined to run an experiment.

I then invented a crime on the spot and told him that one of his sons and one of his daughters had said that he had done something in particular to them, and asked him if he could remember it. Initially he said, "No." He then started using the techniques that he had been using to try to remember these events and I simply allowed him to do that -- in fact, sent him away and asked him to continue doing this alone and within twenty-four hours using the techniques that he had learned in the course of his five month long interrogations, he produced for me the next day a three page written detailed confession including dialogue that supposedly happened during the crime -- to a crime that never happened that I invented and daughter who was supposedly involved in it confirmed never happened.

I then concluded that this was a highly suggestible individual because I had now succeeded with very minimal effort in eliciting a false confession from him.

Q. Have you been ever -- excuse me -- have you been able to break down your work into percentages with regards to analyzing these confessions and the work you've done with confessions?

A. Yes, I have. Of the forty-eight separate interrogations I have been asked to analyze, fifty-five percent of the time my conclusion has been that the statement that was made was voluntary or it was impossible for me to make a determination and forty-five percent of the time that the particular statement that was elicited was either what's called a coerced compliant confession or what's called a coerced internalized confession -- these are two different types of confessions generally two different types of false confessions.

Q. Could you tell the jury the difference between these types of confessions?

A. In the literature on interrogation and confession it was recognized that there are two kinds of involuntary and false confessions. One kind is called coerce compliant. This is a an-- inaccurate -- that is to say false statement -- that comes about because an individual no longer stand the strain of the interrogation and knowingly gives a statement that they know to be untrue.

The other kind is much more complicated. It's called: a coerced internalized confession and this kind of statement arises when an individual actually becomes convinced that he or she has committed a crime that they had nothing to do with.

The second kind of confession comes about out of the use of very special or very extraordinary influence techniques that operate in a particular way. It can occur by accident in the course of an ordinary police interrogation, but if it occurs certain things have to be present in the interrogation and they have to happen in a certain sequence in order to persuade someone that they've committed a crime of which they are innocent.

The far more common kind of coerced statement is the coerced compliant statement when the individual simply gives up and agrees to say whatever they need to say because they can no longer stand the strain of what's going on.

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Q. Doctor, is it possible for police interrogation tactics to produce a false confession?

A. Yes. I don't know of any -- any researcher, any scholar in this area -- who works in this area who does not acknowledge that false confessions come about in the course of police interrogation, and in fact, a few years ago there was a landmark study of miscarriages of Justice in capital cases in American history. A study done by Professors Bideau (phonetic) of the University of Michigan and Ratalid (phonetic) of the University of Florida published in the Stanford Law Review.

In this study they identified three hundred and fifty examples of miscarriages -- false convictions in capital cases in American history. And using the standards that they developed to judge whether or not a particular conviction was a miscarriage of justice -- in other words an improper conviction -- they identified three hundred and fifty examples in which by their criteria, which often had to do with the real killer being found, the person ultimately being pardoned -- standards of that sort -- they identified three hundred and fifty examples where the jury had found someone guilty who was in fact innocent.

In that study nineteen percent of the miscarriages were caused by false confessions given by---

MR. DAVIS Your Honor---

BY THE WITNESS:

A. ---the suspects.

MR. DAVIS: ---I have an objection to make and I think it would be more appropriate if I made it at the bench rather than---

THE COURT: All right.

(THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH
OUT OF THE HEARING OF THE JURY.)

MR. DAVIS: The Court laid down certain ground rules and now we're talking about percentages in terms of false -- false confessions. We aren't talking about opinion.

THE COURT: I'm interpreting this as an -- as an attempt to -- to use coercive techniques on the jury to suggest to them that this is a false confession and that there is danger on their considering the confession and that it suggests to them that they have to be very careful not to make a three hundred and fifty error ,whatever the

percentages were.

Gentlemen, that's -- that's a -- I'm---

MR. FOGLEMAN: I thought this would -- what they did is exactly what the Court had told them not to do.

MR. STIDHAM: No, your Honor, I asked the witness if there were empirical scientific studies and he was simply relating those to the jury.

THE COURT: Well, I don't care. You're still making inferences that by these statements that this particular statement was false and untrue.

MR. CROW: Your Honor, if I can interject. Yesterday I objected to questions that -- where Mr. Holmes stated that ninety-nine percent were real or something like that. That's empirical data that now the shoe is on the other foot.

THE COURT: Well, no, in that particular case I think you offered it or it came up through your all's testimony and he brought it out---

MR. CROW: No.

THE COURT: ---is the way I recall it.

MR. CROW: I don't think that's correct, your Honor.

THE COURT: Well, I may be wrong on that. This is totally different. This has done just exactly what I indicate I wasn't going to allow.

MR. DAVIS: Judge, and that's what's going to happen because of this witness as you surmised. He's very astute. He's very smart, and he's going -- he's going to slip around the ground rules and we're sitting here talking to jury in terms of percentages of cases in which there's been a false confession.

THE COURT: I'm going to sustain the objection.

(RETURN TO OPEN COURT.)

THE COURT: Objection sustained.

MR. DAVIS: Your Honor, could we ask the jury to disregard this last -- to be admonished to disregard---

MR. STIDHAM. Your Honor, I would object to an instruction of that nature. The witness is merely relating scientific studies and empirical studies with regard to that issue.

MR. DAVIS: In an area---

MR. STIDHAM: I would be happy to move on and ask him about how he analyzes the---

MR. DAVIS: The concern we have, Judge, is we understood he was

relating things that are outside the area of his expertise.

MR. STIDHAM: That's not at all the case, your Honor.

THE COURT: Go ahead. Move on to something else and I'll see.

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BY MR. STIDHAM:

Q. Doctor Ofshe, are certain individuals more susceptible to coercive police tactic than others?

A. Generally, it's been found that individuals who are lacking in self-confidence, low self-esteem are more persuadable and also more likely to respond to coercive tactics. Individuals who are mentally handicapped are also at risk to responding to coercive and overly persuasive tactics.

Q. Can you tell the jury what it is that you do when you analyze a `confession?

A. Ah, that -- that starts with determining whether or not the interrogation has been tape recorded, if the interrogation has been tape recorded in its entirety, then the analysis of the influence process during the interrogation is time consuming and -- is time consuming, but is fairly straightforward. When police agencies have not tape recorded the interrogation, the problem becomes much more complicated because it becomes necessary to try to reconstruct the events of the interrogation from the available information. So that in a case such as this case in which part of the interrogation was recorded and most of it was not, it becomes necessary to first try to identify what actually happened in the interrogation and the order in which things happened to then relate that to the statements that are undisputed. That is to say that parts of the interrogation which are recorded so that one can hook up the analysis or hook up the history of the interrogation as it occurred in the unrecorded part but as reported on by the police officers involved as well as the suspect, in order to try to rebuild and get a picture of how the interrogation progressed from start to step-by-step-by-step, and the changes that occurred over the course of the interrogation.

Now, in this particular case this culminates in the two recorded statements which give us a great deal of information about what happened during the interrogation and illustrate certain things about the tactics that were used and the suggestibility of the suspect in terms of how he responded to particular tactics that are -- that are simply captured in the recorded part of the interrogation.

Then because it is -- has been reported on in the literature as to the kinds of ideas that develop people's minds in response to extremely pressured interrogations, I usually---

MR. DAVIS: Your Honor, at this time, if I may-- first enter an objection. He keeps referring to "as reported in the literature". Can he be more specific about what he's referring to? I don't know if these are books he's written or if it's something from other sources.

MR. STIDHAM: Judge, that's exactly what I was trying to elicit from the witness before when he objected.

MR. DAVIS: Your Honor--

MR. STIDHAM: The scientific studies in this area that's what he was trying to testify about when the prosecutor objected.

MR. DAVIS: Your Honor, the -- if I may explain. The reason I objected was because he was going into scientific literature which as I understood it the Court has ruled was beyond his area of expertise and that's exactly why I wanted him to -- to be more specific because he keeps referring to the literature and if I don't know what it is, I don't know whether that literature is valid literature. I don't know if it's something he has expertise in, or I don't know if it's a

THE COURT: Okay, I think my ruling was that it invaded the province of the jury and that it was an ultimate question for the jury that exceeded the scope of his capabilities. That was my ruling. But that was to a narrow portion of it.

I think what you're raising now -- if you're asking about the underlying data or information or scientific research that he -- he's utilizing, I think you're entitled to know that.

MR. STIDHAM: I'd be happy to:

THE COURT: However, I think you're entitled to bring that out on cross examination. So I'm going to let you develop it on cross examination. You might have him refer to any treatise or any scientific journal or -- that he's referring to and when he says "literature", and then you can develop it further.

MR. DAVIS: Judge, one other thing. He -- he indicated -- as I understood it -- that his analysis would be based on a reconstruction of the period prior to the taped confession, and it's my understanding that that reconstruction would require him to presume facts not in evidence and to base that upon speculation and upon statements -- out of court statements made by other individuals and we would strenuously object to him being able to give an opinion or to "reconstruct" something based on such speculative premises.

MR. STIDHAM: Your Honor, there's nothing speculative about it. In fact the rule is very clear that he can base his opinion on such things. We discussed that earlier.

THE COURT: I'm not sure I'm going to allow him to reconstruct, if that's what you're referring to. I'm going to allow him to testify based upon his learning, education, publications, and so forth in the field of social -- what was the field, Doctor?

THE WITNESS: Social psychology.

THE COURT: Social psychology, Okay, and I'm not real sure what that is, but I am real sure about what I told you I wasn't going to let in because that's for the jury to decide, and I'm not going to substitute

this witness's opinion for theirs.

All right, so let's proceed. You all know where we stand.

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BY MR. STIDHAM:

Q. Let's back up to the scientific studies in this area, Doctor Ofshe, that you're familiar with regard to influence in police interrogation tactics.

You mentioned the Stanford Law Review article. Are there any other treatises or studies you can refer to?

A. Yes. The book you held up before is perhaps the authoritative work in the area at this point by Professor Gudjonsson and he cites numerous studies by himself by hundreds of other people that all contributes to the analysis of police interrogation.

Q. Are these theories and empirical studies commonly accepted by professionals in your field?

A. Yes.

THE COURT: Are they in universal acceptance?

THE WITNESS: The empirical studies are research based studies that people don't dispute the honesty of the researchers. They provide data I think the data is accepted. The theories are not particularly esoteric, so that these are very data based studies. They have to do with studying the conditions, for example, under which individuals make the decision to confess when in fact they committed a crime. In other words, when interrogation is effective and when it elicits certain sorts of decisions, and they have to do with conditions that lead to statements that are coerced statements and in particularly---

MR. FOGLEMAN: Your Honor, I would like to object to this speech that he's making, It's not responsive to what the Court's question was which is whether this is universally accepted and he never said yes or no, he just---

THE COURT: Well, I think I understand what he's saying, but I guess you're right. He didn't---

MR. FOGLEMAN: I didn't -- I didn't get -- I didn't catch him saying that, yes, it was universally accepted. I think he's being evasive.

THE COURT: Well, that might have been a real general question, too.

Can you answer yes or no and then continue with your explanation?

THE WITNESS: Yes, your Honor, they're universally accepted in the

sense that they are data based and no one disputes the honesty of the researchers who report the data. The data is accepted. I then tried to go on to explain that the theories are not particularly esoteric arise from the data. So this is a very empirically grounded line of work.

THE COURT: Is there contrary work?

THE WITNESS: Pardon?

THE COURT: Are there contrary theories and contrary empirical data?

THE WITNESS: The -- the disputes would be about explaining why something happens rather than whether or not it happens. So that there might be different theories about the impact. For example, how much is attributable to personality or how much is attributable to something else. But there are hair-splitting disputes if everyone agrees to the basic -- that the basic phenomena exists.

THE COURT: All right. Go ahead.

BY MR. STIDHAM:

Q. Doctor, I believe you stated earlier what you had to look at in this case with regard to Jessie Misskelley?

A. Yes, I did.

Q. You read the transcripts of his statement to the police -- both statements?

A. Yes, I did.

Q. You've listened to the tapes?

A. Yes.

Q. You've also heard the officers testify at a previous hearing?

A. Yes, I did.

Q. Have you formed an opinion with regard to the specific issue of the voluntary nature of the defendant's statements to the police?

A. Yes, I have.

Q. And what is that opinion?

THE COURT: Wait just a minute. Approach the bench.

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(THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH
OUT OF THE HEARING OF THE JURY.)

THE COURT: I'm not sure that's an appropriate question.

MR. CROW: I thought that's---

MR. STIDHAM: I thought that's what we--

THE COURT: No. I mean, are we going to start calling sociologists
and psychologists to second guess a court?

MR. CROW: How about, your Honor---

THE COURT: Are we going -- are we going -- I mean, that -- I've
already ruled it was voluntary. Now, am I going to let a witness get
up here and contradict my ruling?

MR. STIDHAM: Kagebein versus State, your Honor.

THE COURT: That's not what Kagebein holds---

MR. STIDHAM: Your Honor---

THE COURT: And that is a jury issue granted.

MR. STIDHAM: Yes, sir.

MR. DAVIS: And the question is, obviously the Court's given an
expert opinion regarding that and we can't bring that out to the Jury.

THE COURT: No.

MR. DAVIS: And it's based on the same thing. It's based on your
review of those facts and evidence and we can't bring that out.

MR. CROW: Your Honor, if I -- would the question be allowed, have
you reached an opinion as to whether the statement was coerced.

MR. DAVIS: That's the same---

MR. CROW: That's one of the two things we were talking about
awhile ago. I'm just trying to figure out what's going to work here,
your Honor.

THE COURT: Well, my notion of his testimony is that he can -- he
can testify as to recognizable areas of--of -- of influence, of
suggestion, but to give an opinion that would totally supplant the
jury's function in making that decision, I'm not going to allow it.

MR. STIDHAM: Judge, didn't we talk about this issue a minute ago when you said you would allow him to testify as to whether or not the statements were voluntary?

THE COURT: No. If I said that I didn't mean it because -- I don't think I did.

MR. CROW: Your Honor, it would appear to me -- I just want to make sure I understand what the Court appears to be saying -- is that he can lay out what he bases his opinion on, but not give his opinion. I mean---

MR. DAVIS: Your Honor, we were clear on this.

THE COURT: Well, I think that's what he can do. I think he can talk about the general principles that are applied, the general notion or concepts in that area in that field, but I-- I -- to allow him to testify that, in my opinion the confession was involuntary does two things.

It -- one, it -- it goes to the issue that the jury will have to decide. Two, it directly refutes the ruling the Court's already made.

MR. STIDHAM: Your Honor, an expert in a medical malpractice case testifies as to whether or not there was negligence on the part of the treating physician.

THE COURT: That's a little bit different.

MR. STIDHAM: Well, I don't see any difference at all, your Honor.

MR. DAVIS: It is very analogous to a child abuse situation where a doctor can testify, I found these factors and these factors, they sometimes exist when this happens, but they can't say, in my opinion sexual abuse occurred.

THE COURT: It's just like the Johnson case on the rape of that child. I'm going to allow him to testify right up to the point of where he's giving an opinion or inference that it was involuntary -- that it was coerced.

MR. STIDHAM: Can he use that word coercive?

THE COURT: It's the same thing.

MR. STIDHAM: Your Honor, the Jury is here to decide the voluntariness---

THE COURT: That's exactly right and he's not, and that's my ruling. .

MR. STIDHAM: This expert is here to offer an opinion with regard to that issue. It will assist the trier of fact in determining that issue. It's for the jury.

THE COURT: I'm not going to allow him to testify on that opinion. You can make an offer of proof if you want.

MR. STIDHAM: Your Honor, please -- please tell me what it was that I could ask him a few minutes ago that I don't understand I can ask him now.

THE COURT: I just told you.

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MR. STIDHAM: I can ask him what?

THE COURT: You can ask him to talk about the facts and circumstances, the conditions that he observed and that he saw these factors for what the police did, that they -- that they're suggestive techniques. Those are the kinds of things I'm going to allow him to testify to. But I'm not going to allow him to give that ultimate opinion, an I know what the rules say, and I'm saying that our Court will adopt the modification that the federal court made, and that you're trying to get this witness to supplant the Jury and to become the jury on that issue. I'm not going to allow it.

MR. DAVIS: Judge, another thing for the record his opinion on that is based in large part on what the defendant told him.

THE COURT: I understand that. That's another basis for it.

MR. STIDHAM: Your Honor, will you note our objection and allow us to--

THE COURT: Sure.

MR. STIDHAM: ---make an offer of proof?

THE COURT: Yes. You're making a record now.

MR. CROW: In that case if this is our offer, it needs to be shown on the record that his opinion would be that it was -- however the question was worded either involuntary confession or coerced confession -- that is how he would testify.

MR. STIDHAM: I want to make sure I'm crystal clear. I want to follow the Court's order to a tee. Can I ask this witness whether or not any of the tactics employed by the police in this interrogation were coercive or psychologically overbearing?

MR. DAVIS: Based on what he heard in their testimony.

THE COURT: Yes, I'll let you ask those questions. But the difference is you're asking him whether or not this was involuntary and allow him to say, In my opinion it was involuntary well, what does involuntary mean? Does that mean the State --or the officers did something impermissible, illegal -- there are a number of things in the psychological area and the sociological area that the police could do that are perfectly permissible. Psychological techniques are not necessarily improper or wrong. From a psychologist's standpoint, he might say, Well, by using these subtle techniques they caused him to -- to confess. That doesn't mean that they're involuntary. It means that they're good techniques. So it means a lot

of different things, and I'm not---

MR. STIDHAM: Am I allowed to ask the question---

MR. FOGLEMAN: Your Honor, for the record, what this person is saying from a standpoint of a psychologist it might be involuntary in the sense that the person didn't want to say it, but it doesn't mean in a legal sense that it's involuntary, and for that reason we would also---

THE COURT: Well, that's what I was trying to enunciate just a minute ago.

MR. STIDHAM. Your Honor, after I ask that question we would like to make an offer of proof.

THE COURT: I told you I would let you ask that last question.

MR. DAVIS: Judge, that is premised on what he's read in their transcript of that -- read or heard him testify to.

THE COURT: Yes, that's correct.

MR. STIDHAM:: That's what I just asked him Judge.

THE COURT: All right. I'll allow that.

(RETURN TO OPEN COURT.)

BY MR. STIDHAM:

Q. Doctor Ofshe, I need to rephrase the question for you. Do you have an opinion as to whether or not some of the interrogation tactics employed by the police against Mr. Misskelley were coercive in nature or overborne his will?

A. Yes, I do.

Q. Could you tell the jury what that opinion is?

MR. DAVIS: Your Honor, I -- wait -- wait -- wait. We -- I hate to object and I apologize for this, but the Court just told Mr. Stidham---

MR. STIDHAM: That I could ask that question.

THE COURT: Well---

MR. DAVIS: He knows---

THE COURT: ---I think the question grew, but---

MR. DAVIS: It sure did. Your Honor, we would object to that question and we would object to that response. He knew what the question was and he went ahead and extended it further beyond what the Court has instructed.

MR. STIDHAM: I -- I asked Your Honor if I could ask that question

and I understood that Your Honor said I could ask that question.

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THE COURT: Well, you lengthened it to some extent, but I'm not going to comment any further on that. I don't need to.

All right, ladies and gentlemen, you're going to be instructed to disregard the last question and the last answer.

And, gentlemen, my ruling is that this witness will not be allowed to testify as to the ultimate jury issue. That's solely and only the province of the jury. He may testify as to scientific tools, methods, notions that he may possess and it will be limited to that. I think we've outlined that enough up here that I don't need to go on any further.

MR. STIDHAM: Your Honor, can I write the question down and ask your Honor to approve it before I ask it?

THE COURT: Write it down and see if they agree to it and then give it to me, then we'll get on with it.

MR. STIDHAM: May I have a moment, your Honor?

THE COURT: Yes.

MR. STIDHAM: I can write better sitting down. Your Honor, may I approach the bench.

THE COURT: Sure.

(THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH
OUT OF THE HEARING OF THE JURY.)

MR. STIDHAM: I hope you can read my writing.

(HANDING TO THE COURT.)

THE COURT: (EXAMINING.) I'll struggle through. I think I'll go along with that.

MR. STIDHAM: Thank you.

THE COURT: Have you got any objection to that?

MR. FOGLEMAN: Your Honor, that's exactly what you told him not to.

THE COURT: Well, not really. Let me -- just a minute. Let me see what I can come up with. Let's take a ten minute recess, ladies and gentlemen, with the admonition not to discuss the case.

(RECESS.)

(THE FOLLOWING HEARING WAS HELD OUT OF THE PRESENCE OF THE JURY.)

THE COURT: Let the record reflect this is out of the hearing of the jury and it's for a proffer of proof.

MR. DAVIS: While we're here, can we see that seventy-eight page confess -- or statement that he has that's never been provided to us through discovery?

THE COURT: Well, I thank you're entitled to it, yes -- if it's going to be used.

MR. STIDHAM: Your Honor, we would object to that. It's not going to be used. The Court ruled that it wouldn't be used.

THE COURT: It will be used if he's going to use it. If he's going to refer to it and relate to it.

MR. DAVIS: Well -- well---

MR. STIDHAM: It won't be for the Jury to see and have reference to.

THE COURT: Well, I don't know.

MR. FOGLEMAN: It's part of the basis of the defense.

MR. STIDHAM: This is a proffer, your Honor, an offer of proof.

MR. CROW: The Court---

MR. STIDHAM: But the jury's not going to see it.

MR. CROW: I believe the Court ruled that he would -- basically his opinion is based on the undisputed things these officers said. So if anything ---

MR. FOGLEMAN: Well, if that's the case, if it's only on the undisputed things he's not going to have anything coercive there to do. Isn't that right, Mr. Ofshe?

THE WITNESS: No, I think you ruled -- as I remember -- you ruled that this is part of the basis for my opinion -- the interview I did with Jessie.

THE COURT: Yes, that's what I---

MR. FOGLEMAN: Mr. Ofshe, could I ask a question? Isn't it true that if you exclude what the defendant told you that you don't find anything coercive, do you?

THE WITNESS: Not true.

THE COURT: Okay. Let's -- let's do this in some order. Go ahead if you want to make a proffer of proof and let's be sure that I know

what I'm excluding and what -- that I know what you're attempting to put in and then maybe it'll change my opinion. I don't know.

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PROFFER OF PROOF

BY MR. STIDHAM:

Q. Doctor, have you formed any opinions with regard to this case?

A. Yes, I have.

Q. Could you tell the Court your opinion?

A. That the statement made by Jessie Misskelley was a product of the influence tactics brought to bear on him, and that it overbore his initial stated intention to maintain that he had nothing to do with this crime and was not there, and that it was a process of influence brought to bear represented by the interrogation tactics that progressively changed his statements about that subject.

Q. Okay. Were there any other tactics in particular that -- that you thought were important?

A. The interrogation forms a process in which one step builds on the preceding step. And so, for example, the interrogation changes dramatically prior to and then after the polygraph -- I assume it's all right at this point for me to discuss the polygraph.

THE COURT: Yes, since we're outside the presence of the Jury.

BY THE WITNESS:

A. The poly -- the polygraph as used in this interrogation---

Q. First of all, Doctor, are you familiar with Mr. Holmes' report on the polygraph?

A. Yes, I am.

Q. Okay.

A. The polygraph as used in this interrogation has two effects. One based on the opinion formed by the polygrapher -- which as I'm aware Mr. Holmes says was an inappropriate opinion -- that Mr. Misskelley was "lying his ass off." That that created the circumstances under which the interrogators could shift to a -- an accusatory interrogation, one in which maximum pressure is brought to bear on the suspect and they then did precisely that.

The second effect of the polygraph is that Mr. Misskelley was told that there existed this machine -- scientific machine that was recording that he had done something that he knew he had not

done. While Mr. Misskelley reported to me that he did not believe the polygraph the fact that -- the fact that he was told that contributed to his sense of helplessness that he had which developed over the course of the interrogation.

In conjunction with the other tactics and the other procedures of the interrogation the polygraph played an important role in swaying the influence process that was the entire interrogation and culminated with the two recorded statements.

Q. What effect did the diagram -- the circle diagram, the photographs of the body and the playing of the tapes have in your analysis?

A. Those particular techniques as testified to by the police officers and as I would understand them to fit in police interrogations so far as I -- I understand police interrogations and have studied them -- the technique of using the circle is an important technique because in this particular interrogation and consistent with what the officers say, that the technique was not being used to try to suggest that Jessie Misskelley that he was a suspect who was believed to be culpable but rather than he possessed information that was vital to the case and that the offer that was communicated through that was an offer to join the police.

Mr. Misskelley in my interview with him when I asked him about the impact of the circle technique, did not fully comprehend what would follow if you could not get out of circle. He simply did not understand what the consequences would be. The extent to which he could understand that was characterized by him in the interview I did. He knew that it was bad. He knew that it was a place where he did not want to be. And he knew that if he simply conformed -- and that is to say to agree with the police -- that they would take him out from the center of the circle and they could join him.

Over the course of the interrogation as the interrogation became accusatory and the offer for safe harbor was made using the circle technique as what then happened after the circle technique was used and based on my analysis of the sequence of the interrogation, based on the notes -- the contemporaneous notes of the interrogation by Detective Ridge together with the testimony of the police officers -- it's my opinion that that circle technique probably occurred early in the interrogation. It was then followed by an hour and a half of intense pressure brought to bear on Mr. Misskelley in which he was told repeatedly when he said -- first he would often say that he wanted to go home and he was told he could not go home, that's what Mr. Misskelley reports, which for my purposes contributed to the sense of helplessness that there was no way to escape these pressures.

Over the course of this hour and a half we have Detective Ridge's notes which indicate that Mr. Misskelley was now beginning to talk about the existence of a satanic cult, was giving the detective the kinds of statements that would implicate Damien and Jason which it is my opinion that the purpose of the entire interrogation and particularly the use of the circle technique. The contemporaneously notes illustrate the statement that Mr. Misskelley was successively giving that were statements that were damning to Damien and

Jason. This according to Mr. Misskelley was coupled with repeatedly being asked questions about the facts of the crime and every time he would guess something and it would be an incorrect guess even what was known about the facts of the crime, Detective Ridge would be sitting there shaking his head no indicating that this was the wrong answer.

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This was repeated on several subjects and Mr. Misskelley was continually pressured in this way. Mr. Misskelley describes that what he learned to do was to feed back to the interrogators what they were telling him happened and he sought to avoid making mistakes because when he made mistakes they would make him go back through the entire story and they would not believe him when he repeatedly told them that he was working with Rickey Deese that day and he knew nothing about the crime.

Those repeated refusals to believe his statements about where he was contributed again to his sense of helplessness. Then the picture technique and the tape recording was used. According to the testimony of Detective Gitchell and Detective Ridge the purpose of using -- at least Detective Gitchell on this point -- the purpose of using the picture was to get a response from Mr. Misskelley. The object in the course of an interrogation would have been -- and this is still at this point -- for someone whose principal interest to the interrogators to obtain statements against another, the -- the technique is showing a group of photographs of a murdered boy was designed to put additional pressure on Mr. Misskelley and it succeeded and there are descriptions in the testimony of Detective Gitchell and Detective Ridge and the description that I obtained from Mr. Misskelley about his reactions to the use of the picture. All of those descriptions include Mr. Misskelley's becoming transfixed, terribly upset by the picture, staring at it, not responding to other questions, Mr. Misskelley adds that it was a horrible picture and he began to cry. He became increasingly upset in immediate response to the use of the picture. That was followed by the audio tape of a little boy's voice saying the words that the little boy said.

Subsequent to that, Mr. Misskelley stated that -- in effect he stated -- and the very words are quoted by Detective Gitchell and similar words are used by Detective Ridge -- "I want out." I have the exact quote and what I just quoted is not exact either, but the statement that was made, was the statement "I want out." A reference to the offer contained in the circle that, I'll do what you want in order to escape this continuing relentless pressure of the interrogation.

Subsequent to that and immediately following that according to Detective Gitchell he got the tape recorder and would get the first recorded statement. The person -- it's possible now to analyze the influence process contained in the first recorded statement. We now have the first undisputed record in the case and in that part of the interrogation it's possible to demonstrate how relentless, the leading, suggestions, and an unwillingness to accept anything other than what the police knew the facts of the crime to be. This was continually suggested to Mr. Misskelley and we can chart his moving step-by-step-by-step from an inaccurate statement to a statement that was put in his mouth by the police and the tape recorded part of

it illustrates that. And I'm prepared to go through that step-by-step to illustrate how that happened.

Even then there were still gross inaccuracies in the statement. The next thing that happened is that Mr. Misskelley is left alone and Detective Gitchell meets with Prosecutor Fogleman and some of the specific gross inaccuracies in the -- the recorded statement are now discussed and according to Detective Gitchell's statement, Prosecutor Fogleman sends him back in to work on these particular statements.

And then we can look at the second statement and show how precisely that happened and how again Jessie Misskelley is conforming to the demand placed on him and is changing his statement from direct response to suggestions and direct instructions by Detective Gitchell. There are illustrations of interrogation tactics in the second part of the statement that illustrate what I'm talking about and also illustrates Mr. Misskelley's strategies of simply parroting back to the police what they told him in order not to displease them and not to be subject to additional questions.

That's the outline of my testimony and analysis of the process of influence in this interrogation.

Q. And you are prepared to go through step-by-step and cite page numbers of the statement to demonstrate this?

A. Page numbers of every statement, on every point, statements made by the police officers, statements made by Mr. Misskelley. These are the facts that I deal with.

Q. Have you also formed an opinion as to the classification of his confession?

A. I would classify this confession as a coerced compliant confession and for a number of other reasons having to do with other specific statements in the confession statement and gross inaccuracies in the scenario that Mr. Misskelley produces, I would reach the opinion that this interrogation was far more -- these statements are far more likely product of influence than they are based on any memory that Mr. Misskelley has of the crime.

THE COURT: You want to ask him more?

MR. STIDHAM: Yes, your Honor, I---

THE COURT: Go ahead.

BY MR. STIDHAM:

Q. Are there any other opinions you have, Doctor, with regard to the interrogation itself?

A. I don't believe so. I have a lot of specific illustrations that I've been talking about.

Q. I understand that you also have some experience and training

with regard to cult---

A. Yes, I do.

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Q. ---and you won a Pulitzer Prize with regard to working in cults?

A. Yes, I did. I shared one, yes.

Q. And is it true that you have worked internationally with regards to satanic cult homicides or -- or let me rephrase that -- to allegations of satanic ritualistic abuse or homicides?

A. I've consulted internationally, if Canada counts, ah, specifically on an occult inspired murder which was a real occult inspired murder.

I've consulted on other cases in which there had been allegations of the existence of a baby murdering satanic cult of the sort that is based on all the available evidence, based on the studies done by the F. B. I., appear to be totally without foundation insofar as there have now been over three hundred separate investigations of allegations of child murdering, child sexual abusing, secret satanic cults. None of these allegations have resulted in any evidence that suggests that these groups exist. This is a conclusion by Kenneth Lanning of the F. B. I.

On the other hand, there are in my experience what I would call youth culture groups that get interested in the occult and these are the groups that are responsible for graffiti, responsible for the undisputed animal mutilations that sometimes occur.

The dividing line is between the murderous baby killing satanic cults and the youth culture groups and the occasional occult inspired criminal groups that in fact do exist. So there's both a reality to it and then there's a mythical level to it.

Q. Have you -- do you have an opinion of whether or not the homicides in question Mr. Misskelley is charged with or have anything to do with satanic rituals or anything of the occult?

A. As far as I am able to tell from what I know of the evidence, there is no evidence that suggests that there is an occult element to this and as far as the satanic panic tips that are given to the police, my understanding is that none of them have panned out. None of them has produced corroboration and that they have been investigated and this is what one would expect if this is an example of a satanic hysteria that it's picked up by the police. This sort of thing happens, when it happens, when there is a particularly heinous crime for which there is no obvious explanation. This is when these sorts of allegations are likely to surface.

Q. What are you basing your opinion on in this case -- that opinion with regards to this not being a cult killing?

A. What I know about the follow-up, the lead that suggested that there existed some cult, that Jessie Misskelley or anyone else was a member of. For example, during his interrogation, Mr. Misskelley provided a list of people who were supposedly members of the cult, and according to the testimony of Detective Ridge who followed that up was knowledgeable at the time of the deaths, none of those people confirmed the existence of a cult.

Apparently there is one individual who claims to have attended a cult meeting. Apparently her testimony also -- or her report is equally unconfirmed. As far as I can tell there is an absence of hard information suggesting that such a satanic cult exists in this area and in addition, I know of nothing about the crime scene that suggests that this is an occult ritual killing.

Q. Thank you, Doctor.

THE COURT: Do you want to add anything?

MR. DAVIS: Judge, my concern at this point and I got lost in that monologue there---

THE COURT: Don't feel too bad.

MR. DAVIS: ---Okay. I got lost back there about the time he got to the first taped confession, but at least prior to that time what I heard was Mr. Ofshe talking about what Jessie told him in a statement. And, Judge, there are two things about that.

Number one, what he has done is taken these-- a statement that we've never seen, we weren't privy to, and he is now going to paraphrase that statement -- or so-called statement -- to the jury coming from a so-called expert in some official capacity to be the basis for why he finds police coercion.

Now, number one, we -- we objected to him coming in as an expert in the first place, but assuming he is an expert, if he can limit his -- his testimony to what he heard the officers say in their testimony, of what he read in a transcript about what the officers said, but when he starts saying, "Jessie told me at this point the officer really bore down on him and they spent another hour and a half with him. This made him increase his feelings of helplessness."

Now, your Honor, we can't cross examine Jessie if his voice is coming through the body of Doctor Ofshe, and that's what they're basically trying to do and that's clearly inappropriate. He -- there is no possible way that a person in his position can rely on a statement he took from a person and then paraphrase it and translate it to a jury. That's hearsay. It doesn't matter whether it comes from him or whether it comes from someone else. That's hearsay testimony.

He can say what he observed. He can testify how that affects his opinion. He can list the facts that indicate coercion. If he goes beyond that, your Honor, the State feels that he's clearly gotten into a province that's -- that's the sole province of the jury -- in the area that's the sole province of the jury.

THE COURT: All right, I've heard the proffer of proof and it can be submitted as a proffer of proof, and it would be my finding that the information elicited and the testimony proffered not only embraces the ultimate issue or facts for the jury to consider, that it in effect tells the jury what their finding should be.

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And I'm -- I'm going to apply the rule in Gramling versus Jennings, 274 Ark. 346. I'm going to apply the additional phrasing adopted by Congress in nineteen eighty-four to Rule Eight Oh Four that says explicitly, "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereof."

And I think that applies here and I think the term -- just reading Rule 704 alone, it says, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of the fact."

The question is: What does embrace mean and our court tried to define it in two or three cases. One of them was that Gramling case. Another one is Aetna Casualty -- that was a civil case.

I just think under the facts and circumstance of this case, to allow him to testify in the fashion tendered would be eliminating the jury and accepting an expert's opinion. So the opinion of the jury is what's significant to me.

There are some things that he testified to such as the occult activity that he might properly testify to. There are other things that I would allow him to testify to that would be in the general nature of his expert knowledge, but to give that final and conclusive opinion in -- in the fashion that it's elicited -- says, Jury, you must find this way - and I'm not going to allow it.

I -- I -- everything -- everything you've just said, however, I submit would be an appropriate argument that you may make to the jury at the proper time, and that an expert in his capacity normally is employed to consult with and discuss trial strategies and techniques with counsel. And if I allowed him to testify based upon a -- you say a seventy-five page statement taken from the defendant would be doing just exactly what the prosecutor says -- allowing him to testify as a surrogate.

MR. STIDHAM: That's why we did it as a proffer, your Honor.

THE COURT: Yes Well, I'm not going to allow that.

MR. STIDHAM: Your Honor, I understand your ruling and we would just ask the Court to note our objections pursuant to Rule Seven Oh Four with regard to our interpretation as we discussed earlier with regard to Rule Seven Oh Four.

THE COURT: We just made a record.

MR. STIDHAM: Thank you, your Honor.

MR. CROW: Thank you, your Honor.

MR. FOGLEMAN: Your Honor, we would like to make as a part of the record State versus Luff, 621, N.E. 2d 493, which is an Ohio case in which the defendant (sic) was found not qualified to testify and also United States versus Fishman it' s---

THE REPORTER: You said, "defendant." Did you mean witness?

MR. FOGLEMAN: He was found not qualified to testify as a witness, right. And also State versus Fishman, which is in the Northern District of California 743 F. Supp. 713.

THE COURT: Okay.

MR. STIDHAM: Your Honor, likewise, we would like to offer two examples of when Doctor Ofshe was allowed to testify as an expert in this exact area and we would like to submit those exhibits.

THE COURT: All right, they may be received.

(DEFENDANT'S EXHIBITS NUMBER EIGHT AND NUMBER NINE ARE RECEIVED AS A PROFFER.)

(STATE'S EXHIBITS NUMBER ONE HUNDRED SIX AND NUMBER ONE HUNDRED SEVEN ARE RECEIVED AS A PROFFER.)

MR. STIDHAM: I'm going to make some copies and have---

THE COURT- Sure, you can do that later if you want to.

MR. STIDHAM: Thank you, your Honor.

THE COURT: Where do we stand now?

MR. STIDHAM: Your Honor, I think that we're at the point where I can -- we can ask the Jury to come back in and I can read the question that -- that the Court permitted. At least that's my understanding of where we're at .

MR. FOGLEMAN: Your Honor, my only concern is whether or not this gentleman is going to base his opinion on -- on what this defendant told him because from what he testified to in the proffer he adopted the defendant's version versus the officers' version.

THE COURT: I think that's what he said.

MR. FOGLEMAN: All right, and I think that that's an improper basis of his opinion and if he's going to purport to testify now about coercive tactics and adopt what this defendant's told him and say things that aren't in accordance with the evidence, I think the jury is going to be---

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THE COURT: I don't think that's the way I worded it. I -- I allowed him to ask a question using the two statements, the files and testimony that he reviewed and whether or not he had an opinion as to whether or not the tactics employed were suggestive or that would lead Misskelley to make a statement.

MR. STIDHAM: And the basis of his opinion is the statements and tapes that he's heard of the defendant's statements to the police.

THE COURT: I'm going to allow him to do that. And, of course, everything he just said you may use in an argument to your jury if you want to.

MR. STIDHAM: Thank you.

MR. CROW: Thank you, your Honor.

MR. DAVIS: But the question would be restricted and would not include whatever statements -- his opinion would have to be based on everything except those statements he received from the defendant.

THE COURT: I think he said he could do that.

MR. DAVIS: I want to be sure of that because then in cross examination when I ask what specific police misconduct or police coercive tactics are you talking about, I don't want him to go back and say, Well, Jessie told me -- or -- or even through the back door because, your Honor, at least the last few hours I've come to respect the witness. I know he can certainly catch you when you make questions that give---

THE COURT: Tricky, isn't he.

MR. DAVIS: ---give him an opportunity to answer, and--

THE COURT: He's an expert, you know.

MR. DAVIS: If he doesn't understand very clearly that he is not to refer to that statement as a basis of his opinion, then I think we're going to end up getting it in one form or another.

MR. STIDHAM: Do you understand, Doctor Ofshe, that you're not to refer to the defendant's statement.

THE WITNESS: I understand.

(RETURN TO OPEN COURT.)

MR. STIDHAM: May I proceed, your Honor?

THE COURT: Yes.

BY MR. STIDHAM:

Q. Doctor Ofshe, do you have an opinion based on the transcription of the statements made by this defendant to the West Memphis Police Department and listening to those tapes of the statements made to The West Memphis Police Department by the defendant or the testimony of the officers that you've heard as to whether any of the interrogation tactics used by the police against the defendant, Jessie Misskelley, were suggestive or led Misskelley to make that statement?

A. Yes. I would add to that that I would also rely on the notes that were produced by the officers and also certain other facts I've been informed have been testified to by various witnesses in this courtroom.

Q. So if I understand your testimony it is your opinion that those tactics did---

MR. FOGLEMAN: Your Honor---

THE COURT: If he's talking about testimony, that's fine.

MR. FOGLEMAN: Was he here to hear this testimony in the courtroom?

THE COURT: Well, if it was made known to him, he doesn't have to be here.

MR. FOGLEMAN: But how do we know it was made known to him accurately, your Honor? If somebody told him that so and so testified---

MR. STIDHAM: Judge, I asked the Court Reporter to give me a transcript and that's what he looked at.

THE COURT: All right.

MR. FOGLEMAN: Well, if that's the case, that's all right.

THE COURT: All right. Is that the case?

MR. FOGLEMAN: Is that the case?

THE WITNESS: I have not seen a transcript of this hearing. I've seen a transcript of a prior hearing and was informed as to certain specific testimony given and presented by the medical examiner and I'll identify the particular facts that I'm using if that would be helpful.

BY MR. STIDHAM:

Q. Well, if I understand your testimony, it is that the tactics used by the police were suggestive and led the defendant to make a

statement?

A. Yes, and that the statement- the contents of the statement was shaped by these techniques.

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CROSS EXAMINATION

BY MR. DAVIS:

Q. Now, Mr. Ofshe, earlier in your testimony you referred about -- you were telling us about this scenario where you have claimed to have obtain a false confession in a case you worked on?

A. That's correct.

Q. Is that the case out in Washington State?

A. That's right.

Q. Okay, and in that case the scenario you presented to the defendant in that case that you said you created and he -- he agreed with, that scenario was similar to the allegations in the actual case, correct?

A. No. The scenario was specifically designed to be different from any of the allegations in the case. I invented it to make it in the same area, otherwise it would be meaningless, but I made it specifically different from any allegations in the case and then I verified with one of the people who was supposedly involved in it that in fact it never happened just to double check that in fact it did not happen.

Q. Well, isn't it true that in both instances the allegations involved child sexual abuse?

A. This was a case about child sexual abuse and when I told him the specifics as to a particular event which I made up -I made up peculiar circumstances for that event and he then produced a very detailed confession specific to that event including dialogue and then I verified from one of the victims that no such event had ever occurred.

Q. And isn't it true that in that particular scenario that both daughters of that defendant had testified he had sexually abused them?

A. I don't believe they ever testified to that. I believe they made allegations as to that effect. I don't think their formal testimony was ever taken. They also made allegations to the fact that their bodies were covered with scars which were then subject to examination and -- a court ordered medical examination and there were no scars on their bodies. So they made a lot of allegations, none of which proved empirically correct.

Q. Those were two adult daughters, correct?

A. That's correct.

Q. Okay, and also the wife also made allegations that he sexually abused the daughters, correct?

A. The wife was being threatened with having her-

MR. DAVIS: Your Honor, could you ask him -- if he has an explanation we can hear that, but would he answer the question on the front end before we go through the five minute---

THE COURT: --Try to answer yes or no and then -then if you need to explain, I'm going to let you.

THE WITNESS: Thank you, your Honor.

BY THE WITNESS:

A. Yes. The wife during the period when she was being pressured by the police and threatened with having her one remaining child taken away from her if she did not come up with accusations against her husband, proceeded to come up with such accusations and some of those accusations included being present at a satanic cult ceremony where blood flowed out of a book and flowed uphill over her arms -- over her body.

I was asked to evaluate her by the prosecution to help them make a determination as to whether or not to charge her or whether or -- or -- whether or not to charge her and it was my recommendation not to charge her.

Q. And in fact her husband had pled guilty to these sexual abuse charges, correct?

A. No. In fact her husband pled guilty to six counts of third degree -- entered pleas to six counts of third degree rape when he was told that if he did not enter that plea---

MR. DAVIS: Your Honor, would he be responsive to the question?

BY MR. DAVIS:

Q. Did he enter a plea of guilty to charges of rape or sexual abuse?

A. He entered -- yes -- he entered a plea to six counts of third degree rape.

Q. Did he maintain his guilt for a period of five months prior to entering that plea of guilty?

A. Oh, yes.

Q. Okay, and isn't it true, Doctor, that he did not decide that he was not guilty until he talked with you?

A. After he talked---

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MR. DAVIS: Your Honor, could he be asked to respond yes or no?

THE COURT: Yes or no and then---

BY THE WITNESS:

A. Yes, that's technically correct. However, the discussion that I had with him which was tape recorded was not a discussion that precipitated his changing his mind. He changed his mind subsequent to that after he independently began to look at the things that he had confabulated and after the pressures that he had been under during this five month period were withdrawn, after which he had been gotten to enter a guilty plea. So his decision -- his realization that he in fact committed none of these things -- was done independent of any conversation I had with him.

Q. And despite your opinion that his confession was coerced or involuntary in that case, the jury and the court found otherwise, correct -- or the court did?

A. The court found based on statements made prior to the statements that I analyzed -- found that it was sufficient to accept -- or not to accept his request to withdraw his guilty plea and go to trial.

Q. So in that scenario with the husband saying for five months he's guilty, with the wife saying that he's guilty, and the two daughters giving statements as to his guilt, you met with him and convinced him that he was not guilty, correct?

A. Incorrect.

O. Well, after you met with him is when he decided that he was not guilty, correct?

A. A month after he met with me after going through his own analysis of what happened -- after he was no longer being constantly coached by the interrogators, by the psychologists, and by his minister, he realized that the beliefs that he had formed made no sense whatsoever and he realized that he -- he had come to believe something that was not true.

What he came to believe was that he was the leader of a satanic cult that had been in operation for seventeen years, that had killed hundreds of children for which there was no evidence. That's what he came to realize made no sense.

Q. And you testified in his behalf in a hearing designed to get that guilty plea set aside, correct?

A. I test -- that's correct, and the result of that was that the judge chose to maintain the guilty plea based on statements that he had made prior to the matter that I testified about, and that was the justification for not allowing him a trial.

Q. What exactly -- based on the testimony that you heard from the officers at the prior hearings and based upon your examination of those taped statements -- what coercive tactics do you allege that the police made in this case -- or did? .

A. In order to answer your question, first I need to break the interrogation down into its component part so that I can cut out parts of it and focus on a particular part.

Q. Well, one thing I want you to assure me, Doctor, is that you're referring to either testimony you've heard, or to the taped statements of the---

A. That's correct, and the notes.

First---

Q. When you say "the notes", what notes are you talking about?

A. The detectives' handwritten notes and typed notes and also I may refer to a fact I've been informed that was testified in this courtroom and I'll specify exactly what that was when I do.

Q. Let me -- let me back up just a minute. Did you find any evidence in any of those things you refer to as to physical coercion.

A. No, I did not.

Q. Did you find anything in any of that evidence to indicate that any of the officers yelled or used a loud voice or were degrading to the defendant in those tapes or in that testimony that you reviewed?

A. No, the officers testified they did not do that.

Q. Okay, and in those tapes that you observed, you didn't hear anything of that nature, did you?

A. No, I did not.

Q. Okay, and there is nothing in the notes prior that would indicate there was any undue influence, pressure, or loud voices and demands made on the defendant, was there?

A. Not in the limited set of materials you're allowing me to testify on.

Q. So as far as those type of tactics you would have to agree that what you reviewed is devoid of any evidence of that, correct?

A. I would have to agree that based on the set of materials on which I am now testifying, I can find no example of that.

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Q. And those things that you refer to that you're testifying to are based on your review of testimony and your observance of that confession? You've read it and listened to it, correct?

A. That's correct.

Q. And is what you term or what you find in there coercive that the officers asked at times, leading questions -- is that one of the things?

A. The questions were more than leading. The questions were very directly specifying what the answers should be.

Q. Did you find anything in your review of the officers' testimony, in your review of the statement of the defendant or either of the statements of the defendant to indicate that the officers gave him the information about which boy was castrated?

A. In their statements? No.

Q. And in their notes?

A. In their notes? No.

Q. In the taped confession?

A. Other than I seem to recall that he was being shown a picture of one of the boys and that happened to be the boy that was castrated and I believe that, if memory serves, that he then identified that boy as the one that was castrated, but I believe -- and perhaps I'm wrong -- but I believe that he was being shown a picture of that boy at the time.

Q. Do you know where that is in the transcript?

A. No, that's not something I'm sure of at this point.

Q. And if that turns out to be inconsistent with what the testimony at trial has been, then you certainly wouldn't disagree with that?

A. My memory may be defective on that.

Q. And those facts that -- in fact -- let -- let ask you this: In fact after this defendant makes the statement and identifies the one that's castrated, the next question is, "Are you absolutely certain that's the one?" Isn't that the next question in the interview?

A. Can you direct me to that?

Q. Yes, sir. It's in the first statement. It's on page seven. Let me see

which statement you have. (EXAMINING.) Okay, it's that transcript on page seven.

A. (EXAMINING.)

Q. Down at the bottom of the page. Where the officer asked, "Which boy was that?"

And the defendant said, "That one right there"

And Officer Gitchell said, "You're talking about the Byers boy again?"

And the defendant said, "Yes."

Then what was the next question that Officer Ridge asked?

A. (EXAMINING.) "Are you sure that he was the one that was cut?"

Q. Okay. Now, Mr. Ofshe, if the police are coercing him when he has just given them the accurate information and has just told them the Byers boy is the one who was castrated, are you saying that it's coercive for Officer Ridge to then ask, "Are you sure that he was the one that got cut?"

A. Well, judging from this statement apparently there was a photograph of the Byers boy because he was able to say, "That one right there."

Q. So you're presuming those facts?

A. I think -- it says, "Which boy was that?" And then Mr. Misskelley responds, "That one right there." I read that as indicating he is identifying some representation of that boy right there.

Q. Okay, and do you know how many photographs were there?

A. No, I don't, and I don't know how those photographs were being manipulated at the time.

Q. But---

A. I'm just pointing out that that's a possibility.

Q. You don't know anything as far as from the testimony or from the taped confessions and anything to indicate that those photos were manipulated, do you?

A. No, I don't.

Q. Okay, so you would have to presume that fact if you were not to take some -- place some significance on that particular statement, correct?

A. It's a possibility. If the record is not clear as to one way or the other as to whether or not this is being suggestive. This is an area that in my mind is unclear.

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Q. Well, explain to me how it's suggestive or if -- if the police are trying to coerce someone into giving them incorrect or a specific scenario, why would they go back and ask them, "Are you sure that he was the one that was cut?" Why wouldn't they leave it alone when they had the answer they wanted?

A. Because when they got the answer that they wanted, then they emphasize it in order to stabilize that so that when you get somebody here you want them, you emphasize that's what you're trying to do.

Now, I can show you other examples of very direct leading suggestions that shows that in the course of this interrogation these officers were capable of doing that and I know there was a picture there and it may have happened that they indicated which picture should be selected.

Q. Well, gee, Doctor, to say it may have happened you would have to assume and presume certain inappropriate police conduct, wouldn't you?

A. I would have to assume there are other inappropriate police conduct which I can specify might also have expressed itself here and I might point out that you brought up this point, I didn't. This is not one of my examples. This is something that I would judge to be unclear.

Q. And that's why the answer to that -- is that not clear to you that when the officers have the answer that's consistent with the evidence and they keep on going and they say, "Are you certain that's the one?" Doesn't that indicate to you that those officers are trying to get an accurate statement rather than coerce him into saying something?

A. Well, if we -- we're looking at an interrogation that was free of the kind of gross leading and suggestion that characterizes this interrogation---

Q. Is -- wait, let me -- let me stop you. The question, "Are you certain that is the one?" -- are you characterizing that as a gross leading statement?

A. I'm suggesting that if---

Q. Could you answer that question for me, please?

MR. STIDHAM: Your Honor, he's trying to answer the question and the prosecutor won't let him.

THE COURT: Answer the question.

BY THE WITNESS:

A. Under some circumstances that could be and that would be under some circumstances a gross leading suggestion if it were done in a particular way.

Q. Do you have any actual facts or knowledge from that transcript and those tapes and you're hearing the officer testify that there was anything that would contribute with that statement to make it a gross leading statement?

A. As I said, this is your example I think it's unclear because I don't -- I don't believe the record is clear in my mind as to the circumstances under which this occurred and I'm simply pointing out that there are other examples of gross leading, highly suggestive, if not demanding statements on other points that illustrate that as an operating procedure this is present in this interrogation and, therefore, there is a possibility -- and I don't know the particular circumstances of this particular presentation of the photograph. You brought it up, I didn't.

Q. Okay. When you say, "It's my example", it's his voice, isn't it true, Doctor? I mean, you heard the tape.

A. It's also -- yes, it is his voice. It is also his voice that says that he arrives at the scene at nine-o'clock in the morning, which is the very first statement that he makes about the time that this all began, and that statement is a statement that because it is not the statement as I analyze the influence process of this interrogation, because it is not the statement that fits with the facts. The statement about the time at which this crime occurred is a statement that comes up and is manipulated eight different times over the course of this interrogation and over the course of those eight manipulations one sees a pattern of unrelenting pressure on Mr. Misskelley.

Q. When you talk in terms of general valid---

A. May --may I finish?

Q. Mr. Ofshe, when you talk in terms of generality--

MR. STIDHAM: Your Honor, may the witness finish answering the question?

MR. DAVIS: Your Honor, he hasn't answered my question yet.

MR. STIDHAM: He hasn't answered the question the way he wants him to.

MR. DAVIS: Well, your Honor, I asked him the question about part of the statement and he starts off talking about something that's on page twenty-four.

THE COURT: All right, answer yes or no and then if you need to explain I'm going to permit it.

THE WITNESS: May I have the question again, please?

BY MR. DAVIS:

Q. I don't know what the terminology is in Berkeley, California, but is it different when somebody says, "Are you sure that he was the one that was cut?" Is that a leading statement in California?

A. No, it's not a leading statement in California and may I explain?

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Q. Is it a leading statement in Arkansas?

A. If it is a state -- I never said it was a leading statement. I think what I tried to explain and what I would like to explain is---

Q. Well, are you -- are you going to confine your remark to that statement, Doctor, or are we going to roam around the entire tape recording?

MR. STIDHAM: Your Honor---

THE COURT: Yes.

MR. STIDHAM: He's asking questions and he didn't get the right answer he wanted---

THE COURT: You're making a statement. Make an objection if you've got one.

MR. STIDHAM: Your Honor, my objection is that the witness should be allowed to answer the question and explain his answer.

THE COURT: All right, I'm going to allow him to answer the question yes or no and then give your explanation. Were you through?

BY THE WITNESS:

A. No, that is not a leading statement in California and I think the point I was trying to make was if following manipulating a suspect to a statement that the interrogator likes, the interrogator is likely at that point to try to reinforce that particular statement and will, therefore, because it's very likely that if the person has immediately said, "That's the one," however, that was accomplished.

To stabilize that, one would then reinforce it by allowing the person to restate it, yes, I'm sure, because it's a very very low likelihood that the person is not going to immediately continue. That's a good tactic for stabilizing an answer that you like.

THE COURT: Doctor, excuse me, are you assuming that a single photograph of one individual was exhibited?

THE WITNESS: No. I am -- I am assuming that I don't know how the photographs were placed, that I don't know what prominence it might have been given, and I don't know what indication might or might not have been given, and therefore, I don't know what surrounds that is not included in this record in this particular choice---

THE COURT: --Have you read the officer's description of the

showing or viewing of the photographs or photograph?

THE WITNESS: Yes, I have.

THE COURT: Have you seen the photographs or photograph?

THE WITNESS: No, I have not.

THE COURT: Show them to him.

MR. DAVIS: Your Honor, for the record I believe it's marked as State's Exhibit Number One Oh Five.

(HANDING TO WITNESS.)

THE WITNESS: (EXAMINING.)

BY MR. DAVIS:

Q. Doctor, if that -- if that -- if those three photographs are laid out on the table and he makes the statement that one of them was cut on his bottom and is pointing to his private parts at the time he does that and the officer says, "Which boy was that?" and he points to the picture and says, "That boy right there," are you saying that that's unduly suggestive?

A. Or if he responds to an officer whose finger is on the picture and says, "That one there." If that happened, that would be a way of accomplishing that identification.

Q. But we're in a court of law and we deal with evidence and if there's no testimony or evidence in the record or in anything you've looked at to indicate that that happened, then there's nothing suggestive about that question or there's nothing that indicates that that response was coerced, is there?

A. And all I said was, "That's a possibility. I don't know all the facts."

Q. Okay. But you have to presume facts or assume things in order for you to reach the conclusion that that indicates coercion, isn't that correct, Doctor?

A. If I were to reach that conclusion about that particular statement, I would agree with you. If I say, "I don't know" on that particular statement, then I'm trying to say I don't know.

Q. And, also, on that same page the defendant indicates that one of the boys was being cut in the face. Isn't that correct? Page seven.

A. Yes.

Q. And the question before that was, "Where did he cut him at?" And Jessie's response was, "He was cutting him in the face." Is there anything coercive or suggestive about the question, "Where did he cut him at?"

A. No, my Judgment is indeterminate because I don't know the facts

surrounding it.

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continued...

Q. So when the defendant identified who it was who was castrated and he indicated that one of the boys was cut in the face, you don't know and you can't give an opinion that any of those questions were coercive in nature, can you?

A. And the record -- no, I can't because the record that we are dealing with is very incomplete because this part of the record is preceded and everyone agrees by over two hours of interrogation in which many subjects were discussed and in which we do not know what was said on the subjects because we have two hours of interaction about this for which we have no record.

Q. And your speculation on what might have happened during that time and your guess as to what occurred and what transpired and what happened after reading this testimony, you can't speculate any better than any of these people can, can you?

A. Not on this particular point, no. There are other points about which the record is quite clear, about which I'm happy to be helpful.

Q. How many cases in the past twelve months have you provided expert testimony on?

A. Perhaps five or six.

Q. What percentage of your income last year was derived from the providing of expert testimony?

A. I don't know what the percentage was. I can tell you the number if you'd like.

Q. What's that number?

A. In my -- I -- I earned Forty Thousand Dollars last Year out of this part of my professional life for which I take half time leave from the university every year to free up my time to do it.

Q. And is your going rate--- **A.** Half time unpaid leave from the university.

Q. Is your going rate approximately Three Hundred Dollars an hour?

A. No, it is not.

Q. What is it?

A. My rate is a hundred and fifty dollars an hour for consultation and Three Hundred Dollars an hour for time spent in court or in depositions.

Q. Okay. So---

A. Because time sent in court or depositions is very, very hard work.

Q. Okay. I will agree with that, Doctor.

So it's Three Hundred Dollars per hour in court and you're asked -- when you're initially asked to evaluate a case, you don't get the Three Hundred Dollars an hour unless you give an opinion that's consistent with what the person asking you wants to hear. If they don't call you as a witness, you don't get your Three Hundred Dollars an hour, correct?

MR. STIDHAM: Judge, that's a ridiculous question. It has an inference that---

THE COURT: --Are you -- again, you're making a statement. How many times have I got to tell you, Dan. Stand up first of all and say, "I object", okay?

MR. STIDHAM: I object, your Honor.

THE COURT: All right. What is your objection?

MR. STIDHAM: My objection is it's not a proper way to impeach the witness. It's very -- it's -- it's speculation and it's -- the witness has testified, your Honor, that he is a consultant--

THE COURT: Well---

MR. STIDHAM: ---to the prosecuting attorney's office in several areas throughout the United States.

MR. DAVIS: Your Honor---

THE COURT: Okay. Again, that gets into statement. My -- my ruling on your objection is it's common and customary practice to ask an expert what their compensation for their testimony is, and I'm going to allow it to that extent.

MR. STIDHAM: To ask him -- if he doesn't say what he's supposed to say he's not going to get paid? That's what the prosecutor asked him.

THE COURT: Well, I'll let you rehabilitate him then, although I think he don't needs much help.

MR. STIDHAM: Thank you, your Honor.

BY MR. DAVIS:

Q. Isn't it true, Mr. Ofshe, that you actually formulated an opinion before you ever heard or examined any testimony from the police officers?

A. No. I -- I had an idea about what might have happened, but I

needed to hear the testimony from the officers to find out much more information about what did happen. In fact in order to try to get that information I tra -- I tried to travel to Memphis to meet with the officers to interview them about what happened so that I could have a fuller basis for it, but that meeting was in part unscheduled because of the airplane problems and in part apparently because they were going to refuse to talk to me in any case.

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And so at the hearing that I attended, I observed the officers and listened to their testimony and in fact my opinions changed very substantially because of the testimony that I heard.

Q. Isn't it true that you had advised Mr. Stidham that you had an opinion as to the coercion that was used in this case prior to the time you ever heard the police officers testify?

A. Uh -- the opinion that I had at that point was based on the materials available to me which included my having interviewed Jessie Misskelley.

Q. Well, my question I have for you is: Didn't you formulate an opinion before you ever heard the officers? And you just indicated, "My opinion was" so you had formulated an opinion, correct?

A. I had formulated a tentative opinion and I was aware that there was much that I wanted to know about the interrogations that I could not know from just the records, and so the hearing that I attended was an opportunity to hear answers to specific questions that I wanted to know from the officers which allowed me to refine my opinion about what happened.

Q. Was your opinion before that that the officers had not coerced anyone?

A. Well, the opinion that Mr. Misskelley's statement was a coerced statement can be supported from the records that were available---

MR. DAVIS: --Doctor -- your Honor, would he--would you ask him to answer the question?

THE COURT: Answer yes or no and then if you need to explain you're going to be permitted to.

BY THE WITNESS:

A. Could you repeat the question, please?

Q. Prior to hearing the police officers testify or either reviewing their testimony in the form of a transcript, was your opinion at that point that the police -- that the police officers didn't coerce anybody?

A. No, that was not my opinion.

Q. Okay, so your opinion prior to that -- granted tentative but before you even heard or sat -- saw or read anything about what the police officers did -- you already formulated an opinion that this was -- this confession was coercive in nature, correct?

A. That is correct because there is adequate evidence as to the coercive nature of it contained in the materials that I already saw, but there were many questions that I had about the specifics of it that were very unclear until I heard the officers and what they said caused me to modify substantially my analysis of what led to the materials that I already had seen.

Q. How many cases in the last twelve months have you testified to and indicated that there was coercion on the part of police in obtaining a confession?

A. I can recall one that I testified to that most of my work consists of evaluating the interrogation and feeding back opinions to attorneys and, more than half the time those opinions do not lead me back into the courtroom because I tell the attorneys there is nothing for me to testify about because I don't find in materials that have been provided to me suggesting that there is coercion.

Q. How many times have you testified at the rate of Three Hundred Dollars an hour that a confession was coerced?

A. To the best of my knowledge, never.

Q. How many times have you testified for hire and testified that a confession was coerced or as a result of police coercion?

A. I think that number is -- over the years I've done this -- I've testified -- I've testified to coercion thirteen times. Of those thirteen times at least once I was testifying without fees and in no case was I paid Three Hundred Dollars an hour because -- while that's my standard fee, to the best of my recollection all of the other cases involved indigent defendants and the State rarely pays very much money for one's time to do this work.

So in no case has anyone ever paid me my customary rate and I do it for whatever rate is appropriate once I reach the conclusion that this is what the facts tell me and I have done it for nothing and would do it for nothing again.

Q. But the truth of the matter is that the more you do it and the more high profile cases you do it in, the more attention you get, correct?

A. The more what?

Q. Attention. --

A. I suppose.

Q. If it's my understanding, Doctor, you didn't find anything coercive about the statement that Jessie Misskelley made about the injuries of Stevie -- or of Christopher Byers. Is that correct?

A. No, that is not correct. I didn't reach any conclusion about those statements because I don't believe that the record is sufficient for me to reach a conclusion one way or the other.

Q. And the remainder of it is basically because you found some questions that you determined to be leading?

A. Oh, no, not at all.

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continued...

Q. Is that not what your testimony was earlier?

A. I don't believe I said that the remainder of it was because I merely found the questions to be leading. My recollection of my testimony was that it was much more than that which I would be happy to explain to you.

MR. DAVIS: Your Honor, wait just a second. Your Honor, we'll pass the witness.

REDIRECT EXAMINATION

BY MR. STIDHAM:

Q. Doctor Ofshe, you mentioned that sometimes you will testify for indigent defendants. Is that correct?

A. I believe every time I've testified in a confession case it has been for an indigent defendant.

Q. Were you told that this particular defendant over at counsel table was indigent?

A. I believe so.

Q. Have you received any money in this case so far?

A. I haven't even received my expenses for the three trips I've made to Arkansas. No, I haven't received any money.

Q. Do police officers usually yell at suspects when the tape recorder is on?

MR. DAVIS: Your Honor, I would object to that question because this individual doesn't have any expertise in the field of police interrogations as far as his personal experience of being there to make that determination.

MR. STIDHAM: I'm not sure I understand his objection.

THE COURT: Well, I'm not sure it takes an expert to answer that question, so I'm going to allow him to answer it.

MR. STIDHAM: Thank you, your Honor.

BY THE WITNESS:

A. No, when the tape recorder is on, one gets behavioral statements that are tailored to the fact that the tape recorder is there and so one

would, not expect the yelling to happen.

In my experience the yelling and the other improper activities happen when the tape recorder is off.

Q. Is there any difference between cops yelling at people in Los Angeles or Corning, Arkansas, when the tape recorder is on or off?

A. I don't see why.

Q. The prosecutor kept wanting you to ask question -- or asked you questions about the coercive nature of the statements on -- the questions and answers on page seven that he pointed out to you on the transcript, and I kind of got the impression when I was sitting over there in that chair that you wanted to talk about other examples of leading and suggestion that was employed by the police. Would you like to talk about those?

A. Yes, I would.

THE COURT: How long are we going to be talking about them?

MR. STIDHAM: We're all tired and we know you're tired and the jury looks tired---

MR. FOGLEMAN: Your Honor---

MR. STIDHAM: ---so we won't be long.

MR. FOGLEMAN- ---we don't mind Mr. Stidham asking questions but to try to elicit some narrative, we don't think that's proper.

THE COURT: I'll object -- I mean I'll sustain your objection to the invitation for a narrative. This witness is capable of answering questions in question form and answer rather than a narrative and that objection will be sustained. The Court Reporter is not going to be able to go much longer.

MR. STIDHAM- May I have just a few more minutes, Judge?

THE COURT: Sure.

BY MR. STIDHAM.

Q. Doctor Ofshe, could you point to a few areas of the interrogation which you feel are leading and suggestive?

MR. STIDHAM: Your Honor, may I use the word coercive like the prosecutor used?

THE COURT: I guess that's the goose and the gander thing, isn't it? Go ahead.

BY MR. STIDHAM:

Q. Could you give some examples of the police being coercive and leading or suggestive during the course of the interrogation?

A. Yes, I can. Perhaps the most powerful example in my opinion is the example of the eight revisitings of the question of the time at which the crimes occurred.

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The first example occurs on page -- in my numbering -eleven -- which I believe is page three -- and this is the point at which Detective Ridges says, "All right, when did you go with them?"

Mr. Misskelley says, 'That morning.'

Detective Ridge says, 'Nine o'clock in the morning?'

Jessie says, "Yes, I did. I went with them and then"--

Then they talk about walking. At that point Jessie is now saying he went there at nine o'clock in the morning. I believe that there is a mistyping here. I believe it's Jessie said, "Nine o'clock in the morning." But this transcript does not say that and I'll point that out. That's my recollection.

In any case he agrees or says that it was nine o'clock in the morning. There is no follow-up at that point. The tape recorder is on. Nine o'clock in the morning is grossly inaccurate as everyone knows.

Detective Ridge has testified in hearings that that was the first time that any time for this occurring happened and in his hearing testimony at page ninety-nine of the transcript. The next time the subject of the time at which the events occurred comes up is on page nine of the first transcribed interrogation and, at this point without reading it, I'll just point out that Detective Ridge asked Mr. Misskelley -- he's now revisiting the subject. He asks Mr. Misskelley, "I'm not saying when they called you. I'm saying what time was it that you were actually there in the park?" Mr. Misskelley says, "About noon."

Ridge says, "About noon? -- and it has a question mark.

Jessie says, "Yes."

Ridge now says something that in my opinion was an attempt to manipulate Mr. Misskelley's statement about the time because Detective Ridge now says, "Okay, was it after school had let out?" This is immediately after Jessie saying, "It's at noon." He's now suggesting it must be later by saying, "Is it after school let out?"

Jessie says, "I didn't go to school."

Ridge now has to clarify and say, "These little boys."

Jessie says, "They skipped school."

Ridge says, "They skipped school?" -- with a question mark.

Then there was more discussion about their bikes and so on. Again, there is an error. We know it's impossible for these boys to have been there at noon.

Going on to the third example on page nineteen. Now, it's Detective Gitchell who revisits the question of time still because the time is inaccurate and he raises -- "Now, did you say the boys skipped school that day? These little boys did?" Said in that way, it's a suggestion that you change your answer indicating, I'm displeased with this. This isn't the right answer. Did you really say would be the emphasis on that.

Jessie then answers. He asks -- Gitchell now asks, "What time did you get there?"

Jessie again repeats, "I got there about nine."

Gitchell says, "In the morning?"

Jessie says, "Yes." So Jessie now attempts again to say he got there at nine in the morning.

Now, I am of the belief that there has been testimony that Jessie was roofing that morning. I believe that that was testified to. So that would be an example if I'm correct in that belief that Jessie was somewhere -- says he was somewhere else and someone confirms that and he is now saying he got there at nine o'clock in the morning. Clearly a contradiction.

Q. Doctor Ofshe, is there another example in the second recorded statement?

A. Yes. This goes on and is repeated several times. If I can just illustrate one other point in the first statement. **Q.** Certainly.

A. There is a very important example of the way in which the detectives refuse to allow Jessie's inaccurate statement to stand and directly manipulated Jessie's statement through skillful interrogation tactics.

So for example, on page eighteen of the transcript at the conclusion of a discussion about the supposed cult, Detective Ridge now changes the subject. There is nothing that precedes this about the timing, but now for the fourth time revisits the timing and this time Detective Ridge says and I quote "Okay. The night you were in the woods, had you all been in the water?"

Jessie replies, "Yeah, we'd been in the water. We were in it that night playing around in it.

This is the first time in the record according to my analysis of it and according to Detective Ridge's testimony that it is directly suggested to Jessie that the correct answer is, "This happened at night."

Immediately upon that being suggested Jessie is -- responds by accepting and now he starts to use the word "at night", where he had never used it before, where he had consistently said it was during

the day. It is in direct response to Detective Ridge's substitution and introduction into the interrogation the correct fact that this happened at night so Jessie now adopts that. That is an influence tactic. It is a way of getting someone to accept something out of pressure and out of suggestion.

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Detective Ridge follows up with his victory on page thirty -- page twenty-four of the transcript at the bottom where Detective Ridge now capitalizing in my opinion on his victory at getting night into the story now seeks to do what I was describing before -- stabilize that -- by saying the following -- and again, this is introduced by Ridge and there is nothing preceding it from which this follows. He is choosing to return to this subject and he says, Okay they killed the boys. You decided to go. You went home. How long after you got home before you received the phone, call-- thirty minutes or an hour?"

Now there has been previous testimony about a phone call to Jessie at home at nine P.M. That's what Detective Ridge is referring to. But Detective Ridge now links this up with Jessie going home and gives Jessie the choice of having arrived home either thirty minutes or an hour before the phone call occurred, which would mean he's now suggesting to Jessie and elaborating on the story and getting Jessie to--as he next does -- Jessie says, "Uh" -- there's a silence and then he says, "An hour."

So Ridge had given Jessie a choice. You can either say you got home a half hour before the phone call or you can say you got home an hour before the phone call. Those are the only choices he's got. Jessie now chooses an hour.

Again, that's a tactic of influence. That is posing the question in such a way that you only have two choices. Either one of those choices, I win. Detective Ridge is using that technique.

Then we get to the second interrogation. That's the last time that the time subject comes up in the first interrogation. As we know at two forty-four in the afternoon -- at three-eighteen in the afternoon the first tape was finished. According to Detective Gitchell no one spoke with Jessie between then and the time that Detective Gitchell-- after meeting with the Prosecutor Fogleman-- went back in to get the statement that is labeled "Interview of Jessie Misskelley, Junior, Second Interview Conducted to Clarify Previous Statement."

The last two times you will recall that Jessie said that anything was brought up about time, Jessie had been successfully moved to talk about the events happening in the evening instead of in the morning which is where he started. So now Gitchell comes in and on page one of the second transcript begins with, "Jessie, uh -- when you got with the boys and with Jason Baldwin when you three were in the woods and them little boys come up, about what time was it when the boys come up to the woods?"

Jessie replied, "I would say it was about five or so five or six."

So Jessie is now moving in the direction of later but it's as if there is

the original statement that he made about the morning and he's being slowly moved towards the evening but clearly in this statement he has not gone far enough because five or six I gather from what I've been informed about the testimony is too early for the boys to have shown up at the woods.

Now, we have---

MR. FOGLEMAN: Your Honor, I'm going to have to object to that Statement by this witness. There is no basis for him concluding that five or six is too early for this defendant and the defendants to show up in the woods. There is no basis for that.

THE COURT: Well, he's been talking for ten minutes. I guess that's been in response to a question. I don't know. What is your objection?

MR. FOGLEMAN: Your Honor, my objection is that he is testifying on things that are not in the record and have not been testified to.

THE COURT. Doctor, I'm -- I'm assuming that all of your testimony is based upon the testimony you've heard, the statements you've read and listened to, and the notes given by the officers.

THE WITNESS: Absolutely, your Honor, and specifically on this point the transcript says when the little boys come up. It is a specific statement about when the children arrived.

THE COURT.. All right. Mr. Stidham.

BY MR. STIDHAM:

Q. Your last example, Doctor?

A. The next after failing to get the time moved to the proper time, Detective Gitchell uses another interrogation tactic. He now says -- and I quote from page one of the second transcript -- "All right, you told me earlier around seven or eight. Which time is it?"

And there are two important things about this. The first one is it's obvious that Detective Gitchell is doing the same thing that Detective Ridge has done earlier -- giving Jessie a choice. Pick one and I win or pick two and I win -- either seven or eight.

Gitchell can live with either answer and he's giving Jessie only those two choices. But what's even more important about this is that nowhere in the record, including the record of what the detectives say, the notes, the specific statements by Detective Ridge, the transcript of the first interrogation, is there any indication that Jessie ever said -- as Detective Gitchell says, "You told me earlier around seven or eight." There is an absolute absence of anything indicating that.

That's extremely important to me because what this illustrates is the legitimate interrogation tactic of making up evidence, of overstating, inaccurately stating the evidence. This is something that happens in police interrogations all the time. It is not something that it is my

understanding is improper in police interrogations. It is something I see all the time and it is a tactic for manipulating the suspect and, in this case, based on my review of the evidence there is no place at which Jessie told Ridge ---told Gitchell that they had arrived there at seven or eight, And in fact Detective Ridge in his testimony in the hearing makes very clear that the very first time any time came up was when Jessie said, "Nine o'clock in the morning." And we have a complete record of every utterance from that point forward. So Detective Ridge who was present with Detective Gitchell says prior to the beginning of the tape no time was mentioned and we note every mention of time prior to that.

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So it's my opinion that this is a tactic and it's a very effective tactic because Jessie now simply repeats back to Detective Gitchell what Gitchell told him. He says, "It was seven or eight." Jessie doesn't even make a choice. He just tells Gitchell everything that Gitchell told him. That's an indication of someone who is willing to comply and does not want to take any chances of making a mistake and therefore being punished for it through pressure.

Then there's some more discussion of that and -- and it changes again. But that's one example. There are many other examples of -- of illustrations of manipulation on important points throughout this record.

Q. Thank you, Doctor.

MR. STIDHAM: Pass the witness.

RE CROSS EXAMINATION

BY MR. DAVIS:

Q. Doctor, Just one question. It's certainly option for Jessie Misskelley to make the statement, I wasn't there. I didn't kill anybody. I didn't see anybody killed. I don't know anything about that. That is certainly an option that he could have used in talking to the police officers, is it not?

A. Yes, it is and may I explain?

MR. DAVIS: Your Honor, I -- I have no further questions.

MR. STIDHAM: Your Honor, I would like to give the witness the opportunity to explain that since the prosecutor brought it up.

MR. DAVIS: Your Honor, I don't think that question calls for a response.

MR. STIDHAM: Well, then it wasn't a question.

MR. DAVIS: Other than -- other than a yes or no response.

MR. STIDHAM: Your Honor, may the witness please explain his answer?

THE COURT: What -- what is the -- what explanation is necessary to that -- your answer?

THE WITNESS: The presumption that that's an option presumes that the person does not feel pressure and in fact the scientific literature

on the subject of when one gets a coerced compliant confession is when the individual feels that they have no choice, cannot escape the situation---

MR. DAVIS: Your Honor---

THE WITNESS: ---and can no longer resist and therefore simply give up resisting and comply.

MR. STIDHAM: Nothing further, your Honor.

REXCROSS EXAMINATION

BY MR. DAVIS:

Q. Doctor, just one more time. When the person is being asked questions and they don't know anything about it, and they don't know any of the details, they can always say, I don't know. I don't know anything about it. I don't know the details you're asking me about. They can always say that, can't they?

A. They can and sometimes they get to the point at which they can no longer do that and so they simply give up.

THE COURT: All right, anything else?

MR. STIDHAM: No, your Honor.

(WITNESS EXCUSED.)

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

STATE OF ARKANSAS

PLAINTIFF

NO. CR-93-47

5813 LLOYD MISSELLEY, JR

DEFENDANT

PRETRIAL AND TRIAL PROCEEDINGS

CORNING, ARKANSAS

VOLUME 9

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11013 THE HONORABLE:

DAVID BURNETT, CIRCUIT

JUDGE

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□

~ Q. But you're telling this jury that you know positively
2 where you were on May the fifth?
~ &. May the fifth.

~ '2. And you didn't talk to anybody about it until this past
~ Sunday?

.6 ~* Right.

7 RUDIRUCT UXAI4INAT ION

8 ~ ~ SYIDNAN:

~ '2. Was Tessie Miuskeltev with you on May the fifth in Dyes.,

10 Arkansas?

- ~ A. Ho sure was.

12 Q* Between the hours of seven-thirty and eleven-thirty P.

13 N.?

14 ~* He was.

15 (uLYNUSS UCUSUD. 1

16 DOCTOR UTCHARD 01993

17 havinq been fhst duly sworn to speak the truth, the whole

18 truth. and nothing but the truth, then testified as follows:

19 DIRECT UXAMfLIAYION

6%

20 BY MR. S'PIDWAM:

21 0. Please state your name for the Court.

~ A. Richard Of she.

23 0. And what do you do for a living. Mr. ofahe?

n A. I'm a professor of sociology at the University of
a California at Berkeley.

9 - yr

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1323

1 ~. Thay. Can you tc~i2 the Court and the jury a
little bit

2 about yc~ur c'~uza:~on arzc~ background?

3 A. received a 3achelor~s Degree in psychology from
Queens

s~* r~

4 Collec~o oC the C ~ UL~LV~r31tj of New York, and tnen a

5 ~astcr 's ~egree in socio.ogy from the same institution,

and

6 then a Th.D. in the psychology Department of Stanford

social

7 University with a speciality in a sub-field called

8 social psychology.

social

9 C. I. Hovav: I would like to tell the Court and the jury what

10 social psychology

found both

11 A. Social psychology is a social area that is

12 within psychology and within sociology. It has to do

in --

13 primarily with the part that I specialize

and

14 it has to do with influence, decision making, belief,

I

15 attitudes, techniques of persuasion and coercion and

control

16 especially in extraordinary techniques

o

17 and influences.

area of

18 Q* A: you have any experience or training in the

influence with

19 influence and especially specifically in the area of

20 regard to police interrogation

o

been on

21 A. All my work for the last thirty years or more has

o

22 been on the subject of influence starting out doing work in

problems in

23 traditional -- the traditional

group

24 social psychology having to do with decision making,

25 influence, interpersonal influence.

TT

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Then starting about the early part of the nineteen
2 seventies I became interested in complex real world
systems of
3 influence. That is to say not laboratory research, but
rather
4 studying on-going very complicated influence environments
and
5 particularly those kinds of environments that have
massive
6 effects on individuals.

7 So initially I did a lot of work for about ten or
twelve
8 years studying what are called cult groups. That is to
say
9 groups that are very strongly organized, that exert
enormous
10 pressure on individuals and that can lead individuals to
11 change the way in which they see the world and be willing
to
12 take part in activities that they otherwise would
ordinarily
13 not take part in.

14 During -- and I specialized in studying cult groups
that
15 generate violence. During that ocriod of time I did a
great
I
16 deal of work often involving the analysis of groups that
led
17 their followers to coitmiit murders. I did a lot of work
for
C,
18 prosecutorial agencies, analyzing and prosecuting such
crimes.

19 Then my interest in influence continued and I~began
to

Ah,
0 20 become interested in the study of police interrogation.

various 21 police interrogation is the root of -- out of which
22 studied round the world procedures of influence groups --
23 particularly techniques that have to do with coercing
24 confessions from individuals and generally manipulating
them
25 in extraordinary ways.

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1525

and 1 .~nd that work began in the late nineteen eighties
about 2 since then I've done a great deal of work and written
3 police .nterrogation tactics, in particular police
false 4 interrogations that can and does lead to coerced and/or
5 confessions.

6 Q. Has any of your work been published, Doctor Ofshe?
or 7 ~. Yes. I've published four or five books, and thirty
Dapers at 8 more articles in scientific journals, and presented
of 9 dozens of conferences over the years. The work on all
10 these subjects have been published.

11 Q* Are you familiar with a Doctor Gudjonsson?

12 A. Yes, I am.

13 Q* And how are you familiar with his work?

14 A. He's one of the other peoDle who is a soecialist in

15 techniques of interrogation and influencing police
16 interrogations.

17 MR. DAVIS: Your Honor, at this time if I may
a

18 interrupt, as I understood it he is qualifying him
as --

19 or in the process of qualifying him as an expert.

20 They're moving on to another area and I'd ask that
I'd

a
21 have an opportunity to voir dire the witness
regarding

a
22 his special qualifications.

a-
23 THE COURT: Well---

24 MR. STIDHAM: Your Honor, I asked him about
what has

25 been published.

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15

1 THE COURT: You're asking about somebody else's
2 work.

3 MR. STIDHAM: Your Honor, I was---

4 THE COURT: Right now if you're qualifying him,
then

5 -- then go through his qualification, his vitae, and
then

6 pass him, and then if they've got any questions,
then i'm

7 going to allow them to voir dire.

8 MR. STIDHAM: I think my next question will
clear

this up, your Honor.

10 THE COURT: Airtight.

~1 BY MR. STIDHAM:

12 Q* Are you mentioned in Doctor Gudjonsson' s book, wThe
13 Psychology of Interrogations, Confessions, and
Testitnony""

14 A. My work is discussed in that book, yes.

15 ~* Did you contribute to the book in any form or
fashion?

16 A. Well, he asked me to review certain chapters of the
book

17 and I reviewed them, and made comments, and then he
thanked me
0

a
18 in the introduction for doing that, and then he also
discusses

19 my work in the substance of the book.

20 ~* I also understand, Doctor Ofshe, that you've won a
0

21 Pulitzer Prize?

22 A. I shared in the nineteen seventy-nine Pulitzer Prize
for
0

23 ~ub lic service, yes.

24 ~ And what was that for -- I mean, what was the
subject of

25 your---

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527

1

1 A. That was for work I did with the publisher of a
small

2 weekly newspaper in West Mann County, California. We
did an

drug
cult
in
that

3 expose of a group called Synanon which started out as a
4 rehabilitation organization and turned into a violent
5 group that was assaulting and attempting to murder people
6 the immediate area. It became quite a major subject and
7 year we were lucky enough to be awarded a Pulitzer Prize.

8 Q. Are you a member of any professional associations?

9 A. Yes. I'm a member of the American Psychological
10 Association, the American Sociological Association, the
11 American Psychological Society, the Sociologic Practice
12 Association, and the Pacific Sociologic Association.

13 Q. Have you ever served as a consultant to any law
14 enforcement agencies?

I
and

15 A. Oh, yes, I have. Starting in nineteen seventy-nine
16 served as consultant to Mann County Sheriff's Department

o
General of
0
0

17 then subsequent to that the office of the Attorney

General of
Justice

18 the State of California, the office of the Attorney

19 the State of Arizona, the United States Department of

a

20 -- both the tax division and the criminal division -- the

the

21 Prosecuting Attorney of Jefferson County, West Virginia,

that's
0

22 Los Angeles District Attorney's office, the Internal --

23 not a law enforcement agency, I guess. The United States

24 Attorney's office in West Virginia, the Thurston County,

25 Washington, prosecutor's office, currently the State's

□

for 1 Attorney's office in Fort Lauderdale, Florida, aaid again

2 the United States Attorney's office in West Virginia.

3 Q. Have you ever testified on behalf of the
prosecution in a

4 criminal case?

5 A. I don't believe -- I'll have to look at the list of
cases

6 in which I've testified.

7 Q. Well, I'll go on to the next question.

8 Do you lecture to groups regarding the influence of
9 police tactics in false confessions?

10 A. Yes, I do. I'm -- in fact I've been asked to -- in
May

11 of this year to -- at the request of the Supreme Court of
the

12 State of Florida -- been asked to address for a half day
a

13 judicial conference in Florida on the subject of false
14 confessions.

15 Q. Have you been involved in both civil and criminal
cases

16 dealing with false confessions and confessions in
general?

17 A. Yes, I have.

18 Q. How many -- excuse me -- how many cases dealing
with

19 confessions have you been involved in?

20 A. Confessions specifically thirteen -- I've testified
0

21 thirteen separate times. I've been involved in many more

22 cases. Much of the work that I do is consulting work

that

0

23 doesn't necessarily culminate in testimony. That's why

I

24 wasn't certain whether I had actually testified in this

25 criminal matter. I'm scheduled to the week after next,

but I

7Y

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r

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529

1 can't at this moment think of another example where I

already

2 have.

3 Q. Okay. Have you testified in court with regard to any
4 confessions taken on the defense side?

5 A. Yes. Most -- most of the confession cases in which

I've

6 testified have been cases involving coerced or coerced

false

7 confessions and, therefore, my testimony has been

principally

8 for the defense in those cases.

9 Q. How many times have you been qualified as an expert

in

10 the area of influence and police interrogation?

11 A. Twenty-five times.

12 Q. Twenty-five times? In both state and federal courts?

13 A. Yes, sir.

14 MR. DAVIS: Your Honor, if I might -- the

question

15 was± Qualified as an expert in the area of influence

and

16 police interrogations -- can we break that down? I

o
police
U

17 didn't hear anything in the background as far as

S

'0

18 interrogation.

a
0

19 THE COURT: Can you break it down?
20 BY MR. STIDHAM:

the

21 Q* Have you been qualified as a expert by any court in

C
0

22 area of police interrogation tactics and influence on

23 individuals during police interrogations tactics?

particular

24 A. Yes. On influence in police interrogation in

in

25 I've qualified and testified thirteen times. On influence

<<< Page 9 >>>

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1

twelve

1 general I've been qualified and testified an additional

2 times making a total of twenty-five..

courts?

3 Q. Okay. Have these been in both state and federal

4 A. Yes, they have.

5 Q. Have you ever testified in the State of Arkansas?

6 A. Yes, I have.

7 Q. And where was that at?

Alamo who

8 A. In Fort Smith in federal court in a case brought by a

9 young man and his family against a person named Tony

to do

10 ran a cult group located in Fort Smith, and the case had

11 with the beating of this child.

ask 12 MR. STIDHAM: Your Honor, at this time we would

area of 13 that the witness be qualified as an expert in the

14 police interrogation tactics and influence of people
15 involved in police interrogations.

16 ~4R. DAVIS: Whether or not he's qualified as a
17 expert is what we would like to address in voir dire.

'0 18 THE COURT: Alright.

19 VOIR DIRE

0 20 BY MR. DAVIS:

the 21 Q* Doctor Ofshe, you are a social science professor at

o 22 University of California at Berkeley. Is that correct?
0

23 A. I'm a professor in the sociology department.

24 Q* Okay. And what -- so you teach sociology. s that
25 right?

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1

and 1 A. I teach specifically courses in social psychology

police 2 courses on extreme techniques of influence including

3 interrogation.

4 Q. You are not a licensed psychologist, correct?

5 A. Ah, that's correct.

6 O* Okay. You can't practice psychology in California

or any

~ other state, can you?

which is

8 A. Ah -- no, I don't practice clinical psychology

-- what is ~enerally licensed.

10 ~ Okay. And would it be a fair statement to say that

11 psychology is different from social -- sociology in that
12 sociology deals with group activities?

13 A. No, that's a very general and unhelpful definition.

area

14 Social psychology which is an area that I work in is an

of the

15 that's represented in both disciplines and I'm a member

o
and
U

16 professional association of both disciplines. Both
17 disciplines maintain sub-sections called social psychology

0

that

18 social psychology deals with a very special set of topics

19 has to do with influence on individuals, decisio~ making,

20 attitude change, interpersonal and group pressure.

21 ~ Are you a licensed social psychologist?

o
0

22 A. It's not necessary to be licensed to be a social

23 psychologist because I don't treat anyone.

24 ~* Is there such a thing as a licensed social
psychologist?

25 A. No.

cn--~

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532

1

1 Q* Okay. In other words---

people 2 ~. Because it does not engage in the treatment of
3 it's generally not licensed.
~ Q. Okay. So there are sociologists and there are people
5 that hold themselves out to be social psychologists,
correct?
6 ~. People who are members of the requisite professional
7 associations and members of the sub-sections that are
8 specialities in social psychology and I'm a member of
both and
~ in each case as a social psychologist.
10 Q* How many states and how many courts have refused to
11 accept you as an expert in this work?
12 A. No state has ever refused to accept me as an expert.
13 Q* How many courts?
14 A. There's one case in which a line of testimony to
which my
15 testimony would have been foundational was rejected. It
has
16 to do with whether or not a certain theory---
o 17 Where was that?
C-,
C-,
18 A. That was in California.
19 ~* Okay.
20 A. That had to do with whether or not a certain line of
0
21 testimony was appropriate for the insanity defense and in
that
0
22 case the judge barred that line of testimony.
23 ~ ~s far as -- what is it that you studied in
relationship
24 to this case?
25 A. In this case in particular I have studied the
following

□

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1 materials: The ~o,Lice reports and notes of Detectives
2 Gitcheil, Ridge, and Durham, the transcript of the first
tape

transcript of rccorcicc~ ~i e~rcgazi~n of Jessie Misskellcy, the
the securi~ tape recorded interrogation of Jessie
~4isskelley.

~ I've listened to che tape recoraings of both
interrogations.

6 I studied the transcript and th~ video recording of an
uizerview of buddy Lucas. I've studied the treatment
records
8 oi Jessie Misskeliey at East Arkansas Mental Health
Center.

The traiiscrip-c of a hearing ~ which Detective Ridge
sought
10 his search warrants from Judge Rainey. I attended a
hearing

in this case on January the thirteenth, nineteen ninety-
four
12 at which I heard and saw the testimony of Detectives
~llen,

13 Durhaxa Ridge, and Gitchell with respect to what occurred
14 during the interroqation. And l subsequently reviewed
the

15 transcriDcs o~ that hearing and then I interviewed Jessie
16 Uisskelley on &ece~nbez the fifteenth, nineteen ninety-
three,
17 and have su~sequently carefully reviewed, and studied,
and
C,

18 analyzed ~he transcript of chat interview.

19

~. ~iow lor~g ~as tnat interview'?

20 Three hours, more or less. It may have a bit more.

It
o

A.

21 may have cccii a bit less. I don't have the -- I don't
have 22 ehat -- it might be helpful. It worked out to an
eighty-seven 23 age transcript.
Is 24 ~* You talked with Jessie Niisskelley for three hours.
25 that right?

T

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4

1 ~. No. I talked with Jessie Misskelley for the length of
2 time it took to produce this transcript here.

SQ. And yc.u revic~wvd testimony of the police officers?

4 ~. I rcAewed cIte 1: reports. I reviewed the actual
or the 5 trans ~r ipt. of the one part of the interrogation that -
~ two parts of the interrogation that were tape recorded. I
7 3tLldied arid a~~alyzed their motes, studio4 and analyzed
their 8 testimony.

9 2. And wI~aL svitentlfic basis La It that vu intend to
give 10 an opinion on?

11 a* Well, the first thing that's necessary is to try to
get a 12 clear picture 0:!! the history of the interrogation of
exactly ~ what happened step-by-step. Subsequently, that---

14 a
*". --IE you could---
15 ~

a

6

a

a

you

U

d

C.

d

II.

16 2. tCtat sclentfic basis anti what scientific tests are

17 basin'; your ipiaion an chat you - that the defense is

U

18 proposing that you testify to?
19 A. It is based on the literature on the subject of

S
U
ma

~ influence, and particularly what is known about techniques

of
I
U

21 influence, the conditions that lead up to coerced
confessions.

a
a
U
C

~ The analysis that I will do on this involves specifying the

0

~ pattern, what happened during the interrogation---
24 O~ --What scientific basis is it based on? Not what your
procedure is, but what scientific basis is your opinion

- -

r

--

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□

1S35

1 grounded in?

2 ~'. The evidence in the research on
what is known

3 That the evidence led up to coerced confessions.

4 There are patterns of conduct that are known to lead to

5 coercion. There are consequences that
follow from

6 those patterns that are commonly used to identify ~

coerced

7 evidence. There are criteria that are used to judge

whether

8 whether a confession is coerced or is not coerced, and

whether

9 that is not evidence that appears to be the product of

influence

10 or appear to be the product of memory.

11 Q. Main -- is that -- is that based on empirical studies?

12 . h , ee.

13 Q. And those empirical studies would have to determine which

14 confessions were coerced and which were not coerced in order

15 for those confessions to have any validity, correct?

16 Yes. Yes, they are studies of confessions --

17 . Yes. Answer the question in case, sir?

o
 ~cu would --
 U

0

18 you might think someone would have to determine

19 was a confession coerced or was it voluntary before those

20 studies would have any validity?

0
 0.

21 A. The studies of confessions are often broken down into --

--

22 1. Direct: either the person, could you ask him --

23 Yes. Yes. Answer yes or no and then --

then I'm

24 ;oans- to allow you to explain your answer.

25 Yes. Yes.

T

--

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□

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1 THE COURT: If you can, answer yes or no. If

you

2 can't, just say, 'It's not capable of being
answered yes

3 or no."

4 THE WITNESS: It's not capable of being
answered yes

5 or no. I could probably answer your question if
you'll

6 allow me to explain why it's not capable.

7 THE COURT: Well, I don't want to allow a long
8 narrative discourse. If you can answer the
question

9 concisely then proceed.

10 BY THE WITNESS:

11 A. The validity -- the truth or falsity of a
confession is

12 certainly important and sometimes it's possible to know
13 whether a confession was in fact true or false. There
have

14 been studies -- a lot of studies are done on what are
called

15 disputed confessions as opposed to undisputed
confessions, and

16 the undisputed confessions are more important because it
is
17 known whether or not the confession was true or false.
o
U

C,

18 Q* Well, if your studies are based -- is there
empirical

19 data that you're basing your opinion on?

20 A. Yes.

21 Q* Okay. Those studies would have to say -- you would
have
'0
0

22 to presume that a confession was coerced for those
studies to
0

23 have any validity, correct?

and 24 A. No. Sometimes one knows that a confession is false
such 25 therefore coerced because of -- *of independent factors,

- T

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might 1 as knowing -- eventually identifying who the real killer
2 be.
all 3 Q. But in those studies for those to have any value at
the 4 scientifically, somebody has to make a determination that
5 confessions were coerced or not, correct?
lead 6 ~. Not necessarily because we know the conditions that
give 7 up to confessions that are undisputed where individuals
under 8 true confessions and do not recant them, and we know
which 9 other circumstances when people give false confessions
perpetrator is 10 are subsequently proven to be false because the
~ in fact caught.
characterize 12 Q* Well, let me ask you this: How would you
and a 13 the situation where you said it was a false confession
where 14 court determined that it was not a false confession,
15 would you categorize that?
16 A. I don't know that I've ever said that something was a
17 false confession. I know I've testified as to whether

0

18 something was coerced or not.

19 Q* So you -- as far as this talk previously ab~ut false
20 confessions you don't deal in that area?

21 A. No. I -- the question suggested to me, you're asking
me

o 22 about a time when I testified in a court that a
confession was
0

23 false, and it was judged the other way and I don't
believe

24 that that's ever occurred.

25 ~* Have you not testified as to inaccurate contents of

T

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ruled confessions in a court and the jury disregarded that and

2 another way?

3 A. I testified I believe in on~ case in which I
testified

4 that in my opinion a particular confession was coerced
and the

5 confession was not suppressed and I've testified in other
6 cases where it is my opinion that a confession was in
fact

7 coerced and the court found that way.

8 Q. Okay. Well---

9 MR. CROW: May we approach the bench, please?

10 THE COURT: Airtight.

11 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH
OUT

12 OF THE HEARING OF THE JURY.)

witness 13 MR. CROW: Your Honor, is he qualifying this

14 or is he cross examining him?

15 MR. DAVIS: Your Honor---

gentlemen, 16 THE COURT: Well, I~m going to be honest,

o 17 I'm real interested in knowing what a sociologist is

0

0

jury 18 going to testify to that would aid and benefit the

It 19 and is scientific of "~~"

(0 what the basis that ~

an 20 seems to me that you've called this witness to give

21 opinion that the confession was coerced---

(0 22 MR. STIDHAM: That is---

a 23 THE COURT: ---and that it was involuntary.

24 MR. STIDHAM: That's exactly right, your Honor.

question 25 THE COURT: And I think that -- that's a

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1 for the jury to decide and I'm not sure I'm going to

2 allow him to testify in that narrow framework. I can see

3 him having value testifying that these are common

4 techniques employed by the police overrides one's free

5 will. I found such and such of these conditions

6 prevailing here and things of that nature, or maybe group
7 dynamics of a cult.

8 MR. CROW: Your Honor---

9 THE COURT: ~ut I'm not sure I'm preDared to allow
10 him to testify that in his opinion it's coerced and
11 therefore invalid.

12 MR. CROW: Your Honor---

13 THE COURT: I mean, what the hell do we need a jury
14 for?

15 MR. STIDHAM: Tie's not going to testify whether or
16 not the confession is~false or true or whether the
17 defendant is guilty or innocent. He's going to testify
18 to the voluntary nature of the confession -- statement to
19 the police -- whether or not it was coerced. That's an
20 issue that the jury has to decide and that's what an
21 expert witness is for, to help the jury decide these
22 issues.

23 MR. DAVIS: No. No, Judge, that's where -- that's
24 the real crux of the matter -- whether the confession was
25 coerced or not, doesn't make -- whether it was the truth.

- T

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get 1 It's whether it was the truth and they're trying to
the 2 through the back door what they can't get through
3 front door.

4 MR.. CROW: Disagree, your Honor. I---

5 MR. STIDHAM: Your Honor, that's not the
correct

6 statement of the law.

7 MR. CROW: The law recognizes---

8 THE COURT: No. The -- the -- the -- I mean,
of

9 course, I've ruled that it was voluntary. The
jury, I

10 guess, could go back and decide that it wasn't. If
11 that's the issue you're talking about---

12 MR. CROWS That is what Arkansas law---

13 THE COURT: ---but the question of whether or
not

14 psychological ploys or tools were used to get a
guilty

15 person to give a true statement, now that's another
16 issue.
o
going
U

17 MR. STIDHAM: Your Honor, that's not what he's
0

18 to testify to.
Co

19 THE COURT: I don't know what you've got him
here

20 for. What is he going to testify to? I want to
Co
know.

21 MR. STIDHAM: Your Honor, he has an opinion as
to

22 whether or not the statements made by Mr. Misskelley
to
Co
0

23 the West Memphis Police Department were voluntary.

24 THE COURT: Is that the way you're going to
couch

25 the question to him and is that the way he's going
to

□

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involuntary.

1 give his opinion. In my opinion they were

2 MR. STIDHAM: Yes, your Honor.

techniques

3 THE COURT: That the police used subtle

4 to cause an innocent man to confess -- to confess.

5 MR. CROW: He's not going to say whether he's
6 innocent or not, your Honor.

to

7 MR. STIDHAM: Your Honor, that's for the jury
8 decide.

trying

9 MR. DAVIS: Judge, what we've got -- they're

through

10 to get through the back door what they can't get
11 the front. It's the same way.

12 MR. STIDHAM: Your Honor---

able

13 THE COURT: Well, unfortunately they might be
14 to do that under the status of our law.

here

15 MR. DAVIS: Your Honor, the concern that I have
16 is that for there to be any empirical data and for

him to

o
somebody
C

17 actually claim to have any scientific basis,

0

18 somewhere has to categorize these cases as false

saying 19 confession cases or coercion cases. And what I'm
have 20 is that this man along with his cohorts in the field
0
substantiate 21 -- they label things to -- to back up or
o 22 their particular theories, and -- and---
0
the 23 TEE COURT: Well, I think all of those go to
24 weight of his -- weight of his testimony.
25 MR. STIDHAM: That's what -- that's what
experts do.

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they If they want to bring an expert to counter them,
in 2 can.
of 3 THE COURT: I think you can call your man to say
the 4 his opinion that there was nothing that they did out
5 the ordinary and that the statement was freely and
6 voluntarily made.
7 MR. STIDHAM: That's the correct statement of
8 law, your Honor.
9 THE COURT: Well, we might as well get on with
10 I'm going to let him testify but I'm not about to
11 testify that in his opinion Misskelley is innocent--
12 MR. CROW: No, your Honor.

13 THE COURT: ---that his confession was a lie and
14 false. I'm not going to allow him to do that.

15 MR. STIDHAM: He has an opinion as to what---

16 THE COURT: Don't even try to ask him whether or
not
o
0
0
17 he has an opinion whether the confession was true or
18 false, because I'm ruling that he cannot do that.

19 MR. DAVIS: I want him cautioned before we
proceed
0
20 any further so that he doesn't blurt that out.

21 MR. CROW: Your Honor, can you give us two
minutes?

22 THE COURT: Okay.

23 Well, do you understand what I'm saying? I'm
saying
24 that there are areas where he has expertise that
might be
25 of some benefit and that is in the areas of group

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-- or
1 dynamics, in the area of -- of possible coercive or
testify
2 techniques that can be employed to make someone
that
-- or -- or give a statement. Now, whether or not
statement is true or false is another matter.

about,
MR. CROW: That's not what he's testifying
6 your Honor.

THE COURT: And I'm not going to allow him to
8 testify that, In my opinion these officers illegally
exacted or coerced a confession from his either.
I'm not
10 going to allow him to testify to that.
Honor.
11 MR. STIDHAM: That's the Court's job, your
That's the jury job.
12
13 THE COURT: Well, that's exactly right. So
what is
14 he going to testify to?
15 MR. STIDHAM: He's going to testify as to --
he has
16 an opinion that this -- the statements made by the
17 defendant were involuntary and a result of
psychological
a
18 coercive tactics employed by the West Memphis Police
19 Department.
20 THE COURT: Were involuntary in what sense?
0
21 MR. STIDHAM: That's what he'll testify to.
22 THE COURT: Well, I want to know. That -- in
what
23 sense?
24 MR. DAVIS: Could we move in chambers?
25 (RECESS.

,T,r

r

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(RETURN TO OPEN COURT.)

can

2 THE COURT: Airight, ladies and gentlemen, you

3 have about a fifteen minute recess with the usual

4 admonition not to discuss the case.

5 (RECESS.)

6 THE COURT: Mright, court will be in session.

and

7 Airight, ladies and gentlemen, you have heard a

8 number of persons testify that have been presented

hear

9 characterized as expert witnesses and perhaps will

an

10 some more, and in that regard I'm going to give you

will

11 instruction of law that you should consider and it

instructions

12 again be read to you at the time all of the

13 are given.

on

14 An expert witness is a person who has special

15 knowledge, skill, experience, training, or education

g
expert

16 the subject to which his testimony relates. An

17 witness may give his oDinion on questions and

0-

light

18 controversies. You may consider his opinion in the

given

19 of his qualifi:ations and credibility, the reasons

upon

20 for his opinion, and the facts and other matters

accept

21 which his opinion is based. You are not bound to

it

22 an expert opinion as conclusive, but you should give

0

23 whatever weight you think it should have. You may

24 disregard any opinion testimony if you find it to be

25 unreasonable.

□

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1 Alright, gentlemen, let's Proceed.

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

3 THE COURT: Sure.

4 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH
OUT
5 OF THE HEARING OF TILE JURY.)

6 MR. STIDHAM: I assume that the witness has now
been
qualified and I can go on with my questioning?

8 TUE COURT: Again, I never ~'ake that
statement.
just tell you to proceed.

10 MR. STIDHAM: Thank you.

11 (RETURN TO OPEN COURT.)

12 THE COURT: Do you have any additional voir
dire?

13 MR. DAVIS: No, sir, your Honor, not at this
time.
14 we'll reserve it for cross examination.

15 TH~ COURT: Alright. Airight, you may proceed.

16 MR. STIDHAJI: Thank you, your Honor.
17 CONTINUED DIRECT EXAMINATION

18 BY MR. STIDHAM:

19 ~ How many confessions has you analyzed, Doct~r?

20 A. I've been requested to analyze a total of forty-
eight
0

21 separate interrogations leading to confessions.

o
0

22 ~* Okay. Have you ever taken a coerced confession or a
23 false confession from someone?

24 A. Yes, I have.

25 Q* Can you give us an example of that?

-.....T

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546

prosecution

A. In one particular case I was called in by the

case. In

2 with the Duttin together the investigation of what was
~ believed to be a multio~e murder and sex abuse crime

request of

~ the course of '~~y work on that case - again at the

~ the prosecution -- I had access to an individual who was
6 confessing to all manner of heinous crimes.

become

7 In the course of my interviewing of him I began to

had

8 suspicious as to the validity of the confessions that he

At

~ been giving now for five months on a series of subjects.

the

10 that point after nearing from him what happened during

reactions to

11 interrogation and certain other things about his

possibility

12 the interrogation, I determined that there was a

run an

13 that he had been falsely confessing and I determined to

14 experiment.

15 I then invented a cr:me on the spot and told him

that one

16 of his sons and one of his daughters had said that he had
done

o 17 something in parti'cular to them, and asked him if he
could
C

0

18 remember it. Initially he said, "No." lie then started
using

19 the techniques that he had been using to try to remember
these

20 events and I simply allowed him to do that -- in fact,
sent

21 him away and asked him to continue doing this alone and
within

22 twenty-four hours using the techniques that he had
learned in

23 the course of his five month long interrogations, he
produced

24 for me the next day a three page written detailed
confession

25 including dialogue that supposedly happened during the
crime

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1547

1 -- to a crime that never happened that I invented and
that the

2 daughter who was supposedly involved in it confirmed
never

3 happened.

4 I then concluded that this was a highly
suggestible

5 individual because I had flow succeeded with very
minimal

6 effort in eliciting a false confession from him.

7 Q. Have you been ever -- excuse me -- have you been
able to

8 break down your work into percentages with regards to

9 analyzing these r~fess{on~ and the work you've done
with

10 confessions?

11 ~. Yes, I have. Of the forty-eight separate
interrogations

12 I have been iskcd to analvze~ fift"-five percent of the
time

13 my conclusion has been that the :statet~ent that was
made was

14/ voluntary or it was impossible for me to make a
determination

15 and forty-five ~c~c~t of the time that the particular

16 statement that was elicited was either what's called a
coerced

17 comDliarit confession or what's called a coerced
internalized

U

C,

18 confess Lon these are two different types of
confessions

19 generally two different types of false confess.ions.

20 Q. Could you tell the jury the difference between
these
0

21 types of confessions?

22 A. In the literature on interrogation and confession
it was
0

23 recognized that there are two kinds of involuntary and
false

24 confessions. One kind is called coerced compliant.
This is a

25 -- an inaccurate -- that is to say false statement --
that

<<< Page 27 >>>

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1343

1 comes about because an individual can no longer stand the
2 strain of the interrogation and knowingly gives a
statement
3 that they know to be untrue.

4 The other kind is much more complicated. It's
called a
5 coerced internalized confession and this kind of
statement
6 arises when an individual actually becomes convinced that
he
7 or she has committed a crime that they had nothing to do
with.

8 The second kind of confession comes about out of the
use
~ of very special or very extraordinary influence
techniques
10 that operate in a particular way. It can occur by
accident in
~ the course of an ordinary police interrogation, but if it
12 occurs certain conditions have to be present in the
interrogation

13 and they have to happen in a certain sequence in order to
14 persuade someone that they've committed a crime of which
they
15 are innocent.

16 The far more common kind of coerced statement is
the
o
gives
0
17 coerced compliant statement when the individual simply

C,

18 up and agrees to say whatever they need to say because
they

19 can no longer stand the strain of what's going on.
20 ~* Doctor, is it possible for police interrogation
tactics
0
21 to produce a false confession?
0
22 A. Yes. I don't know of any -- any researcher, any
scholar
23 in this area -- who works in this area who does not
24 acknowledge that false confessions come about in the
course of
25 police interrogation, and in fact, a few years ago there
was a

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13

1 landmark study of miscarriages of justice in capital
cases in
2 American history. A study done by Professors Bideau
3 (phonetic) of the University of Michigan and Ratalid
4 (Dhonic) of the University of Florida published in the
5 Stanford Law Review.
6 In This study they identified three hundred and fifty
7 examples of miscarriages -- false convictions in capital
cases
8 in American history. And using the standards that they
9 developed to judge whether or not a particular conviction
was
10 a miscarriage of justice -- in other words an improper
11 conviction -- they identified three hundred and fifty
examples

12 in which by Their criteria, which often had to do with
the
13 real killer beirij found, the person ultimately being
pardoned
14 -- standards of that sort -- they identified three
hundred and
15 fifty examples where the jury had found someone guilty
who was
16 in fact innocent.

17 In that study nineteen percent of The miscarriages
o
were
0
0

18 caused by false confessions :JVCfl by---

19 MR. DAVIS: Your honor---

20 BY THE COURT: ITN:SS:

0

21 ~ -the suspects.

22 MR. DAVIS: - I have an objection to make and I

0

23 think it would be more appropriate if I made it at

the

24 bench rather than---

25 THE COURT: Alright.

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<<< Page 29 >>>

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)~5 50

BENCH OUT

1 (THE FOLLOWING DISCUSSION WAS HELD AT THE

2 OF THE HEARING OF THE JURY.)

ground rules

3 MR. DAVIS: The Court laid down certain

4 and now we're talking about recitations in terms

□

1'~51

1 the shoe i~ on the other ~.no..

2 TI-IE CO[JR[~: Well, no, in that particular

case I

3 think you of 5?red it or it c.~me up through your

all's

4 teSt~rn~nV a~A. he "rni;ht it out---

5 MR. P~OW: No.

6 T~fl ~Ol~JRT- ---is the way I recall it.

7 MR. ~RrM~: I don't think thats correct,

your Honor.

8 ri~ ~flr1~ 'Jell, *t may be wrong on

that. This is

9 tot&ity different. ¶hi~ h~s L~one iugt

e~cactlv what I

10 ~ncficate'i ~ wasn't goin~ to all ow.

11 MR. ')~VT3: Tudgo. snd that's what's

going to happen

12 because o~ this i-ness a~ you sur~ise4i.

Re's very

13 astute. ~4e's very smart, ani he's ~ci.,g --

he's going to

14 SIIP around I~he around ru~e~ and we're sittina

here

15 talk~"g t~ a jury in ~ms -- percent ages of --ases

in

16 -qhich there's been a false confes~t~-n.

17 T9~? C~YJPT: T'~ goin~ to sustain the

3 objection.

C,

18 (RETURN TO ~)PE~ COURT.)

19 THE C~Y1TRT: ~--ctio". sustained.

Cl)

-'

jury to
0
disregard---
to an
merely
with

20 MR. 'ATtS: V~r Honorf couli we ask the
21 lisregard this Thst -- to be admonished to
22 ~1R. 3TTD9~M~ Your Honor, -t would object
23 instrut!.on of that nature. The witness is
24 relatin~ scientific studies an~ empirical studies
25 regar~ to that issue.

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ask.
the
and
susceptible to
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at
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U.
S

1 112. DAVIS: In an area---
2 FR. flIDEAt4: I would be happy to move on and
3 him about liow he analyzes the---
4 1W. DAViS: The concern we have, Judge, is we
a understood he was relating things that are outside
6 area of his expertise.
7 MR. STIDflM: That's not at all the case, your
8 ?onor.
9 TSE COtIRT: Cc ahead. Move on to sometttng else
10 1,11 see.
11 ST MR. 5T19W4:
12 Q. Doctor Ofahe, arc certaIn individuals more
13 coercive pol5.cc ta'tics than others?
14 A. Generally, it 'a been found that IndIv±duals who are
15 lacking in self-confidence, low golf-estee are more
16 persuadable and also ioro likely to respond to coercive
17 tactics. IndLvidual3 who are mentally handIcapped are also

tactics. 18 risk to responding to coercive and overly persuasive
a 19 Q. Can you tell the jury what it is that you do when you
20 analyse a confession?
U
S
* 21 A. All right, that starts with determining whether or
not
U
U
a
1 22 whether an interrogation has been tape recorded. If the
S
U
U. 23 interrogation has been tape recorded in its entirety, then
the 24 analysis of the influence process during the interrogation
is S time consuming and -- is time consuming, but is fairly

- -. - -. r - --

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1553

1 straightforward. Then police agencies have not tape
recorded 2 the interrogation, the problem becomes much more
complicated 3 because it becomes necessary to try to reconstruct the
events 4 of the interrogation from the available information. So
that 5 in a case such as this case in which part of the
interrogation 6 was recorded and most of it was not, it becomes necessary
to 7 first try to identify what actually happened in the
8 interrogation and the order in which things happened to
then 9 relate that to the statements that are undisputed. That
is to 10 that

that say parts of the interrogation which are recorded so
the one can hook up the analysis or hook up the history of
as 12 interrogation as it occurred in the unrecorded part but
the 13 reported on by the police officers involved as well as
how 14 suspect, in order to try to rebuild and get a picture of
by- ~ the interrogation progressed from start to step-by-steo-
the 16 step, and the changes that occurred over the course of
C, 17 interrogation.

two 18 Now, in this particular case this culminates in the

information 19 recorded statements which give us a great deal o~
C

illustrate 20 about what happened during the interrogation and
0

C 21 certain things about the tactics that were used and the
o 22 suggestibility of the susoect in terms of how he
responded to C
0
in the 23 particular tactics that are -- that are simply captured
24 recorded part of the interrogation.

25 Then because it is -- has been reported on in the

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area
explain.
Court
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1 literature as to the kinds of ideas that develop in
2 minds in response to extremely pressured interrogations,
3 usually---

4 MR. DAVIS: Your Honor, at this time, if I may
5 first enter an objection. He keeps referring to "as
6 reported in the literature". Can he be more
7 about what he's referring to? I don't know if these
8 books he's written or if it's something from other
9 sources.

10 MR. STIDHAM: Judge, that's exactly what I was
11 trying to elicit from the witness before when he
12 objected.

13 MR. DAVIS: Your Honor---

14 MR. STIDHAM: The scientific studies in this
15 that's what he was trying to testify about when the
16 prosecutor objected.

17 MR. DAVIS: Your Honor, the if I may
18 The reason I objected was because he was going into
19 scientific literature which as I understood it the
20 has ruled was beyond his area of expertise and
21 exactly why I wanted him to -- to be more specific
22 because he keeps referring to the literature and if
23 don't know what it is, I don't know whether that
24 literature is valid literature. I don't know if
25 something he has expertise in, or I don't know if

it's a

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1 comic book.

2 THE COURT: Okay, I think my ruling was that it
3 invaded the province of the jury and that it was an

4 ultimate question for the jury that exceeded the
scope of

his capabilities. That was my ruling. But that was

to a

6 narrow portion of it.

7 I think what you're raising now -- if you're
asking

8 about the underlying data or information or

scientific

9 research that he -- he's utilizing, I think you're

10 entitled to know that.

11 MR. STIDHAM: I'd be happy to---

12 THE COURT: However, I think you're entitled to

let

13 bring that out on cross examination. So I'm going to

14 you develop it on cross examination.

15 You might have him refer to any treatise or any

when

16 scientific journal or -- that he's referring to and

17 he says "literature", and then you can develop it

C,

18 further.

19 MR. DAVIS: Judge, one other thing. He -- he

0

20 indicated -- as I understood it -- that his analysis

prior to

21 would be based on a reconstruction of the period

that

22 the taped confession, and it's my understanding that

Co

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23 reconstruction would require him to presume facts

not in

24 evidence and to base that upon speculation and UDOf1
25 statements -- out of court statements made by other

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1556

being 1 individuals and we would strenuously object to him
something 2 able to give an opinion or to "reconstruct"
3 based on such speculative premises.

4 ~4R. STIDHAM: Your Honor, there's nothing
clear 5 speculative about it. In fact the rule is very
6 that he can base his opinion on such things. We
7 discussed that earlier.

8 THE COURT: I'm not sure I'm going to allow
him to 9 reconstruct, if that's what you're referring to.
I'm 10 going to allow him to testify based upon his
learning, 11 education, publications, and so forth in the field
of 12 social -- what was the field, Doctor?

13 THE WITNESS: Social psychology.

14 THE COURT: Social psychology. Okay, and I'm
not 15 real sure what that is, but I am real sure about
0) what I 16 told you I wasn't going to let in because that's
for the 17 jury to decide, and I'm not going to substitute
o
this

U
a
18 witness's opinion for theirs.
19 Alright, so let's proceed. You all know where
we
20 stand.
0
0.
(0
21 BY MR. STIDHAM:
22 Q~ Let's back up to the scientific studies in this
area,
(0
0
23 Doctor Of she, that you're familiar with with regard to
24 influence in police interrogation tactics.
25 You mentioned the Stanford Law Review article. ~re
there

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1 any other treatises or studies you can refer to?
2 A. Yes. The book you held u~ before is perhaps the
3 authoritative work in the area at this point by Professor
4 Gudjonsson and he cites numerous studies by himself by
analysis
5 hundreds of other people that all contributes to the
6 of notice interrogation.
7 Q. Are these theories and empirical studies commonly
8 accepted by professionals in your field?
9 A. Yes.
10 THE COURT: Are they in universal acceptance?
11 THE WITNESS: The empirical studies are

research
of
data is
esoteric, so
do
which
o
C-)
certain
conditions
0
and
C
0
0
object to
is

12 based studies that people don't dispute the honesty
13 the researchers. They provide data. I think the
14 accepted. The theories are not particularly
15 that these are very data based studies. They have to
16 with studying the conditions, for example, under
17 individuals make the decision to confess when in fact
18 they committed a crime. In other words, when
19 interrogation is effective and when it elicits
20 sorts of decisions, and they have to do with
21 that lead to statements that are coerced statements
22 in particularly---
23 MR. FOGLEMAN: Your Honor, I would like to
24 this speech that he's making. It's not responsive to
25 what the Court's question was which is whether this

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1558

he
1 universally accepted and he never said yes or no,
2 just---

he's 3 THE COURT: Well, I think I understand what
4 saying, but I guess you're right. He didn't---
5 MR. FOGLEMAN: I didn't -- I didn't get -- I
6 catch him saying that, yes, it was universally
7 1 think he's being evasive.
8 THE COURT: Well, that might have been a real
9 general question, too.
10 Can you answer yes or no and then continue
11 explanation?
12 THE WITNESS: Yes, your Honor, they're
13 accented in the sense that they are data based and
14 disputes the honesty of the researchers who report
15 data. The data is accepted. I then tried to go on
16 explain that the theories are not particularly
17 arise from the data. So this is a very empirically
18 grounded line of work.
19 THE COURT: Is there contrary work?
20 THE WITNESS: Pardon?
21 THE COURT: Are there contrary theories and
22 empirical data?
23 THE WITNESS: The -- the disputes would be
24 explaining why something happens rather than
25 not it happens. So that there might be different

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1559

1 theories about the impact. For example, how much
is
2 attributable to personality or how much is
attributable
3 to something else. ~3ut there are hair-splitting
disputes
4 if everyone agrees to the basic -- that the basic
5 phenomena exists.

6 THE COURT: Airlight. Go ahead.

7 BY MR. STIDHAM:

8 Q. Doctor, I believe you stated earlier what you had to
look
9 at in this case with regard to Jessie Misskelley?

10 A. Yes, I did.

11 Q. You read the transcripts of his statement to the
police
12 -- both statements?

13 A. Yes, I did.

14 Q. You've listened to the t2pes?

15 A. Yes.

16 Q. You've also heard the officers testify at a previous
to
17 hearing?

a

18 ~. Yes, I did.

19 Q. Have you formed an opinion with regard to tke
specific
to

20 issue of the voluntary nature of the defendant's
statements to

0

to 21 the police?

0 22 A. Yes, I have.

to
0 23 Q. And what is that opinion?

24 THE COURT: Wait just a minute. Approach the
bench.

25 (TUE FOLLOWING DISCUSSION WAS HELD AT THE
BENCH OUT

iT --

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1560

1 OF 'rHE HEARIUC OF THE JURY.)

2 THE COURT: I'm not sure that's an appropriate

3 question.

4 MR. CROW: I thought that's---

5 MR. STIDHAM: I thought that's what we---

6 THE COURT: Mo. I mean, are we going to start

7 calling sociologists and psychologists to second
guess a

8 court?

9 MR. CROW: How about, your Honor---

10 THE COURT: Are we going -- are we going -- I
mean,

11 that -- I've already ruled it was voluntary. Now, am
I

12 going to let a witness get up here and contradict my

13 ruling?

14 ~1R. STIDHAM: KaQebuin versus State, your
Honor.

15 THE COURT: That's not what Kagebein holds---

16 MR. STIDIAM: Your Honor---

17 THE COURT: And that is a jury issue granted.

0

18 MR. STIDHAM: Yes, sir.

19 MR. DAVIS: And the question is, obviously the

20 court's given an expert opinion regarding that and

we

21 can't bring that out to the jury.

22 THE COURT: No.

23 MR. DAVIS: And it's based on the same thing.

It's

24 based on your review of those facts and evidence and

we

25 can't bring that out.

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1561

1 MR. CROW: Your Honor, if I -- would the

question be

2 allowed, have you reached an opinion as to whether

the

3 statement was coerced.

4 MR. DAVIS: That's the same---

5 MR. CROW: That's one of the two things we were

6 talking about awhile ago. I'm just trying to figure

out

7 what's going to work here, your Honor.

8 THE COURT: Well, my notion of his testimony is

that

--

9 he can -- he can testify as to recognizable areas of

of -- of influence, of suggestion, but to give an

opinion

10 that would to~aily supplant the jury's function in

11

making

12 that decision, I'm not going to allow it.

issue

13 MR. STIDHAiM: Judge, didn't we talk about this

testify

14 a minute ago when you said you would allow him to

as to whether or not the statements were voluntary?

it

16 THE COURT: No. If I said that I didn't mean

o
U

17 becausc -- I don't think I did.

C,

18 MR. CROW: Your Honor, it would appear to tue --

I
'0

0.

19 just want to make sure I understand what th~ Court

he

20 appears to be saying -- is that he can lay out what

N

21 bases his opinion on, but not give his opinion. I
p

'0
0

22 mean---

23 MR. DAVIS: Your Honor, we were clear on this.

do.

24 THE COURT: sell, I think that's what he can

are

25 think he can talk about the general principles that

.T.r

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in

1 apolied, the general notion or conceots in that area

2 that field, but I -- I to allow him to testify

that,
two
jury
ruling
medical
there was
at
abuse
this
o
abuse
C)
0
the
testify
0
opinion or
coerced.

in my opinion the confession was involuntary does
4 things.
5 It-- one, it -- it goes to the issue that the
6 will have to decide. Two, it directly refutes the
the Court's already made.
8 MR. STIDHAM: Your Honor, an expert in a
9 malpractice case testifies as to whether or not
10 negligence on the part of the treating physician.
11 THE COURT: That's a little bit different.
12 MR. STIDHAM: Well, I don't see any difference
13 all, your Honor.
14 MR. DAVIS: It is very analogous to a child
15 situation where a doctor can testify, I found these
16 factors and these factors, they sometimes exist when
17 happens, but they can't say, in my opinion sexual
18 occurred.
19 THE COURT: It's just like the Johnson case on
20 rape of that child. I'm going to allow him to
21 right up to the point of where he's giving an
22 inference that it was involuntary--that it was
23 MR. STIDHAM: Can he use the word coercive?
24 THE COURT: It's the same thing.

decide

25

~4R. STIDHAM: Your Honor, the jury is here to

TT

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1563

1 the voluntariness---

and

2 THE COURT: That's exactly right and he's not,

3 that's my ruling.

the

4 ~R. STIDHAM: This expert is here to offer an

5 opinion with regard to that issue. It will assist

the

6 trier of fact in determining that issue. It's for

7 jury.

testify on

8 THE COURT: I'm not going to allow him to

9 that opinion. You can make an offer of proof if you
want.

tell me

11 MR. STIDHAM: Your Honor, please -- please

that I

12 what it was that I could ask him a few minutes ago

13 don't understand I can ask him now.

14 THE COURT: I just told you..

15 MR. STIDHAM: I can ask him what?

facts

16 THE COURT: You can ask him to talk about the

and

17 and circumstances, the conditions that he observed

that

18 that he saw these factors for what the police did,

are
testify to.
0

19 they -- that they're suggestive techniques. Those
20 the kinds of things I'm going to allow him to

21 But I'm not going to allow him to give that ultimate
22 oDinion, and I know what the rules say, and I'm

saying
a

a.
23 that our Court will adopt the modification that the
24 federal court made, and that you're trying to get

this

25 witness to supplant the jury and to become the jury

on

~rr

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1364

1 that issue. I'm not going to allow it.

2 MR. DAVIS: Judge, another thing for the
record, his 3 opinion on that is based in I~rge part on what the
4 defendant told him.

5 THE ZOtJRT: I understand that. That's another
basis 6 for it.

7 MR. STIDHAM: Your Honor, will you note our
8 objection and allow us to---

9 THE COURT: Sure.

10 !IR. STIDHAM: ---make an offer of proof?

11 TILE COURT: Yes. You're ~nakin- a record now.

12 MR. CRO!q: Tn that case ~f this is our offer,
it

13 needs to be shown on the record that his opinion
would be

14 that it wa~ -- however the cuestion was worded either
15 involuntary confession or coerced confession -- that
is
16 how he would testify.

17 MR. STIDHAM: I want to make sure I'm crystal
clear.
C,

18 I want to follow the Court's order to a tee. Can I
ask
Cr

19 this witness whether or not ~ny of the tactics
employed
Cr

20 by the police in this interrogation were coercive or
a
a.
21 psychologically overbearing?

22 MR. DAVIS: Based on what he heard in their
23 testimcny.

24 THE COURT: -Yes, I'll let you ask those
questions.

25 But the differencc is you're asking hi~n whether or
not

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1565

1 this was involuntary and allow him to say, In my
opinion
2 it was involuntary -- well, what does involuntary
mean?
3 Does that mean the State -- or the officers did
something
4 impermissible, illegal -- there are a number of
things in
5 the psychological area and the sociological area that
the

6 police could do that are perfectly permissible.
7 Psychological techniques are not necessarily improper
or
8 wrong. From a psychologist's standpoint, he might
say,
9 Well, by using these subtle techniques they caused
him to
10 -- to confess. That doesn't mean that they're
11 involuntary. It means that they're good techniques.
So
12 it means a lot of different things, and I'm not---
13 MR. STIDHAM: Am I allowed to ask the
question---
14 MR. FOLMANN: Your Honor, for the record,
what this
15 person is saying from a standpoint of a
psychologist it
16 might be involuntary in the sense that the person
didn't
17 want to say it, but it doesn't mean in a legal sense
o
that
U
0
18 it's involuntary, and for that reason we would also--
-
19
20 THE COURT: Well, that's what I was trying to
enunciate just a minute ago.
0
21 MR. STIDHAM: Your Honor, after I ask that
question
22 we would like to make an offer of proof.
23 THE COURT: I told you I would let you ask that
last
24 question.
25 MR. DAVIS: Judge, that is premised on what
he's

□

1566

1 read in their transcript of that -- read or heard
him
2 testify to.

3 THE COURT: Yes, that's correct.

4 MR. STIDHAM: That's what I just asked him,
Judge.

5 THE COURT: Allright. I'll allow that.

6 (RETURN JUDGE OPEN COURT.)

7 BY MR. STIDHAM:

8 Q. Doctor Of she, ~ need to rephrase the question for
you.

9 Do you have an opinion as to whether or not some of
the
10 interrogation tactics employed by the police against Mr.
11 Misskelley were coercive in nature or overborne his will?

12 A. Yes, do.

13 Q. Could you tell the jury what that opinion is?

14 MR. DAVIS: Your honor, I -- wait -- wait --
wait.

15 We -- I hate to object and I apologize for this,
but the

16 Court just told Mr. Stidham---

17 MR. STIDHAM: That I would ask that
question.
C,

18 THE COURT: Well---

'0

19 MR. DAVIS: To know----

COURT - ~4~I~ the question grew,

0

would 21 MR. DAVIS: It sure did. Your Honor, we
0 22 object to that question and we would object to that
went 23 response. He knew what the question was and he
has 24 ahead and extended it further beyond what the Court
25 instructed.

-rr

<<< Page 46 >>>

□

1567

could ask 1 MR. SIDUAM: -- I asked your Honor if I
2 that question and I understood that your Honor said I
3 could ask that question.

extent, 4 THE COURT: Well, you lengthened it to some
I 5 but I'm not going to comment any further on that.
6 don't need to.

be 7 All right, ladies and gentlemen, you're going to
last 8 instructed to disregard the last question and the
answ~

witness 10 And, gentlemen, the ruling is that this
jury 11 will not be allowed to testify as to the ultimate
jury. 12 issue. That is solely and only the province of the
notions 13 He may testify as to scientific tools, methods,
14 that he may possess and it will be limited to that.

I

15 think weve outlined that enough up here that I don't
16 need to go on any Lirther.

question

17 M~. S~ID~iAM: Your Honor, can I write the

it?

18 down and ask your Honor to approve it before I ask

agree to

19 T::~12 COURT: Write it down and see if t~ey

0

20 it and then give it to me, then well get on with it.

Honor?

21 f4R. STIDUAM: May I have a moment, your

22 THE COURT: Yes.

down.

23 MR. STIDIiA~'i: I can write better sitting

24 Your Honor, may I approach the bench?

25 THE COURT: Sure.

<<< Page 47 >>>

□

1568

OUT

1 (THE FOLLOWING DISCUSSION WAS HELD AT TEE 3flCE

2 01 THE UEARING OF THE JURY.)

3 KR. STIDHAI: I hope you can read my writing.

4 (HANDING TO THE COURT.)

5 tHE COURT: (EXAMINING.) I'll straggle through.

8 think Cu go along vith that.

7 KR. STIDEAX: Thank you.

8 flU COURT: Have you got any objection to that?

you

9 KR * FOOLDIAN: Your Honor, that' a exactly what

10 told him not to.

11 THE COURT: Well, notreally. Let in -- just a
12 minute. Let n~ see what I can come up with.

13 Let' a take a ten minute recess, ladies and
14 gentlemen, with the admonition not to discuss the

case.

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 proof.
 K
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 U
 U
 yes
 that.

15 (RECESS.)
 16 (THE ?O.LOU LUG HEARING NM HELD OUT or tn
 17 01 THE JURY.)
 18 -. THU COURT: Let ite record reflect this is out
 19 the hearing of the jury and i;'a for a proZ~er of
 MR. DAVIS: While we're here, can we see that
 21 seventy-eight page confess - or statement that he has
 that' a never been provided to us through discovery?
 THE COURT: Well, I think you're entitled to it,
 24 -- if it's going to be used.
 25 MR. STIDHAMA Sour Honor, we would object to

-.....*11*.....-

<<< Page 48 >>>

□

569

1

I It's not goLng to be used. The Court ruled that it
 2 wouldn't be used.
 3 TUE COURT: It will be used if he's going to
 use it.
 4 If he's going to refer to it and relate to it.
 5 142. mAVIS: Well -- ¶Vell---
 6 KR. 5T105A14: It won't be for the jury to see
 and
 7 have reference to.
 8 TEE COURT: Well, I do~a't i!now.

9 SR. FOGLEMAN: it's part of the basis of the
10 defense.
11 MR. STIFLER.!: This Lu a proffer, ycur Sonar, an
12 offer of proof.
13 ?42. CROW: The Court--
14 MR. STIDRIM: But the ~ury's not going to see
IS.

15 KR. CROW: I believe the Court ruled that he
would

16 -- basIcally his opinion Is based on the undisputed
17 things these off Icers said. So it anything--

j
6
C
d
U.

16 ~, ~OLrfl. Well, if that's the case, if it's
U
U
a.
C
a.

19 only on the undisputed things, he's not going to have
anything coercive there to do. Isn't that right,
*
Mr.
U

21 Ofshe?
22 TEE WITNESS: No, I think you ruled -- as I
o
remember
U
U
a.

24 -- you ruled that this is part of the basis for my
opinion - the interview I did with Jossie.
a TUE COURT: Yes, that's what I--

"VT.....-.....-.....-...

□

1570

1 ffl~. \$&GL~MA>i: ~ir - O~shc, could ask a
question?

2 1~sntt h true tha: if you exclude what the
defendant

3 told you that y~u don't find anything coercive, do
you?

4 ZHE ~iTW~SS:)ot true.
5 T!E 2C~JRT~ Okay. L~t~s -- lot's do this in
some
6 order.
7 Co ahead if you want to make a proffer of proof
and
8 let's ~e ~ :ha~ snow dhat I'm excluding and
what --
9 that I know what y~u~e attempting to out in and then
10 maybe I;' II zha~ge my opinion. I don't know.
11 PRC ~FEF. 0Y ?ROOB~
12 BY MR. ~D~IA~
13 Q~ Doctor, hac~z you fo:raed any opinions with regard
to this
14 case?
15 ~ Yes, ~ ha~ju.
16 Q~ Could jo~i tell the 2Qurt youz opinion?
17 ~* That ~he ~tateiuent made by Jessie Misskeltey was a
U
18 product of ~hc inilunce tactics brought to bear on him,
and
19 that it over~cre his initial ~tatzd intention to maintain
that
20 he had nothing to do with this crime and was not there,
and
0
21 that it was a process of influence brought to bear
represented
22 by the interrogation tactics that progressively changed
his
23 statements about that subject.
24 ~* Okay. Were there any other tactics in particular
that --
25 that you though: were im~crtant?

1371

1 A. The process is a process in which one
stop
2 builds on the previous step. And so, for example, the
3 interrogation is dramatically prior to and then
after the
4 polygraph. I assume it's all right at this point
for me to
5 discuss the polygraph.

6 Yes, since we're outside the
presence of
7 the jury.

8 BY THE WITNESS:

9 A. The polygraph is used in this

11 Q* First, Doctor, are you familiar with Mr.
~ioirnes'
12 report on the polygraph?

13 A. Yes,
i. e.

F

14 Q* Okay.

15 A. The polygraph as used in this interrogation has
two
16 effects. One is the opinion formed by the
polygrapher
17 -- which is, I'm aware Mr. ~ioirnes says was an
inappropriate

18 opinion -- that is, "AisskeLley was 'tying his ass off."
That

19 that creates the impression which the
interrogators

20 could shift to an accusatory interrogation, one in
which
C

21 maximum pressure is brought to bear on the suspect and
they

0 22 then did precisely than.
Misskelley 23 The st~cond c~cct of :he polygraph is that Mr.
machine 24 was told that there existed this macnine -- scientific
knew he 25 that was rueorcling that he had dene something that ne

T

<<< Page 51 >>>

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he did 1 had not dooe. ~9hile Mr M~_~kelley reported to me that
he 2 not believe the Dolvara~h the fact that -- the fact that
that he 3 was told that cov~trihute~i to his sense of helplessness
interrogation. 4 ~ fl&d which ~eve oied over the course of the

5 Tn c~v'unct ~n with the other tactics and the other
6 ocedures of the interrogation the oolyqra~h played an
7 important ~ 4n sway i.n~ the influence process that was
the 8 entire interro t~cn and culmi~.ate'i with the two
recorded 9 state¶CntS.

10 Q. Tq~t ~ lid the diagram -- ~he circle diagram, the
11 photograpW~ of the body an~ the ~laying o~ the tapes have
in 12 your anal~'c~?

13 A. Those o~~.rt~c'~lar techni~ues as testified to by
the police 14 officers and a~ Ti ~outi unier and them to fit in police

15 interprop~.t:on~ ~o ~a' ~s T -- T un' rs~-.-irA oclice
16 interr at~ors an~ ha're 3tul{ei ther~i -- the technique
of using
17 the circle is ~n Do~t~nt chni~pie bec~u~e in this
a
18 particular terr',it~.on ~nd consa.stent with what the
officers
19 say, that ~he chnic~u~ ~i~t he~~ used to try to
suggest
20 that *Tcss~e M _s~kdllley 4-."at he wa~ a s'ispect who was
believed
21 to be culpable hut rather t:han he possessed information
that
22 was vital 1:0 the case and that the offer that was
cor~unicated
23 through that was a~- "~fer to join the police.
24 Mr. M²3kellov in ~v jntor~v~ew with him when I asked
him
25 about the i-np~ct of the circle technicjue, did not fully

TT

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<<< Page 52 >>>

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1573

1 comprehend what would follow if you could not get out of
the
2 circle. He simply dii not understand what the
consequences
3 would be. The extent to which he could undersEand that
was
4 characterized by him in the interview I did. He knew
that it
5 was bad. He knew that it was a place where he did not
want to
6 be. And he knew that if he simply conformed -- and that
is to
7 say to agree with the police -- that they would take him

out

8 from the center of the circle and they could join him.

9
interrogation

Over the course of the interrogation as the

10 became accusatory and the offer for safe harbor was made
using

11 the circle technique as what then happened after the
circle

12 technique was used and based on my analysis of the
sequence of

13 the interrogation, based on the notes -- the
conremooraneous

14 notes of the interrogation by Detective Ridge together
with

15 the testimony of the police officers -- it's my opinion
that

16 that circle technique probably occurred early in the
17 interrogation. It was then followed by an hour and a
half of

18 intense pressure brought to bear on Mr. Misskelley in
which he

19 was told repeatedly when he said first he would often
say

20 that he wanted to go home and he was told he could not go
0

0
o
there
0
21 home, that's what Mr. Misskelley reports, which for my
22 purposes contributed to the sense of helplessness that

23 was no way to escape these pressures.

24 Over the course of this hour and a half we have
Detective

25 Ridge's notes which indicate that Mr. Misskelley was now

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was
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use
successively
and
crime
an
the
his head
Misskelley
the
o
U
0
mistakes
they
he was
0
about

1 beginning to talk about the existence of a satanic cult,
2 giving the detective the kinds of statements that would
3 implicate Damion and Jason which it is my opinion that
4 purpose of the entire interrogation and particularly the
5 of the circle technique. The contemporaneously notes
6 illustrate the statement that Mr. Misskelley was
7 giving that were statements that were damning to Damien
8 Jason. This according to Mr. Misskelley was coupled with
~ repeatedly being asked questions about the facts of the
10 and every time he would guess something and. it would be
11 incorrect guess even what was known about the facts of
12 crime, Detective Ridge would be sitting there shaking
13 no indicating that this was the wrong answer.
14 This was repeated on several subjects and Mr.
was continually pressured in this way. Mr. Misskelley
16 describes that what he learned to do was to feed back to
17 interrogators what they were telling him happened and he
18 sought to avoid making mistakes because when he made
19 they would make him go back through the entire story and
20 would not believe him when he repeatedly told them that
21 working with Rickey Deese that day and he knew nothing
22 the crime.

0
about 23 Those repeated refusals to believe his statements
helplessness. 24 where he was contributed again to his sense of
was 25 Then the picture technique and the tape recording

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<<< Page 54 >>>

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575

1

and used. According to the testimony of Detective Gitchell
Detective 2 Detective Ridge the purpose of using -- at least
picture was ~ Gitchell on this point -- the purpose of using the
~ to get a response from Mr. Misskelley. The object in the
~ course of an interrogation would have been -- and this is
interest to 6 still at this point -- for someone whose principal
the -- ~ the interrogators to obtain statements against another,
murdered 8 the technique is showing *a group of ohotographs of a
Misskelley 9 boy was designed to put additional pressure on Mr.
testimony 10 and it succeeded and there arc descriptions in the
description ii of Detective Gitchell and Detective Ridge and the
to the 12 that I obtained from Mr. Misskelley about his reactions
13 use of the picture. All of those descriptions include Mr.
14 Misskelley's becoming transfixed, terribly upset by the

15 picture, staring at it, not responding to other questions, Mr.

16 Misskelley adds that it was a horrible picture and he began to

o 17 cry. He became increasingly upset in immediate response
to
0

0
18 the use of the picture. That was followed by the audio tape

19 of a little boy's voice saying the words that the little boy

20 said.
0

21 Subsequent to that, Mr. Niisskelley stated that -- in

22 effect he stated -- and the very words are quoted by

Detective 0 23 Gitchell and similar words are used by Detective Ridge --
"1

24 want out 2 I have the exact quote and what I just quoted is

25 not exact either, but the statement that was made, was the

Tr

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1376

1 statement "I want out." A reference to the offer contained in

2 the circle that, I'll do what you want in order to escape this

3 continuing relentless pressure of the interrogation.

4 Subsequent to that and immediately following that

5 according to Detective Gitchell he got the tape recorder and

6 would get the first recorded statement. The person --
it's
7 possible now to analyze the influence process contained
in the
8 first recorded statement. We now have the first
undisputed
9 record in the case and in that part of the interrogation
it's
10 possible to demonstrate how relentless, the leading,
11 suggestions, and an unwillingness to accept anything
other
12 than what the police knew the facts of the crime to be.
This
13 was continually suggested to Mr. Misskelley and we can
chart
14 his moving step-by-step-by-step from an inaccurate
statement
15 to a statement that was put in his mouth by the police
and the
16 tape recorded Dart of it illustrates that. And I'm
prepared
o
0
0
17 to go through that step-by-step to illustrate how that
18 happened.
19 Even then there were still gross inaccuracies in the
20 statement. The next thing that happened is that Mr.
0
21 Misskelley is left alone and Detective Gitchell meets
with
o
0
22 Prosecutor Fogleman and some of the specific gross
23 inaccuracies in the -- the recorded statement are now
24 discussed and according to Detective Gitchell's
statement,
25 Prosecutor Fogleman sends him back in to work on these

□

1577

1 particular statements.

2 And then we can look at the second statement and
show how

3 precisely that happened and how again Jessie M~sskelley
is

4 conforming to the demand placed on him and is changing
his

5 statement from direct response to suggestions and direct

6 instructions by Detective Gitchell. There are
illustrations

7 of interrogation tactics in the second part of the
statement

8 that illustrate what I'm talking about and also
illustrates

9 Mr. Misskelley's strategies of simply parroting back to
the

10 police what they told him in order not to displease them
and

11 not to be subject to additional questions.

12 That's the outline of my testimony and analysis of
the

13 process of influence in this interrogation.

14 Q. And you are prepared to go through step-by-step and
cite

15 page numbers of the statement to demonstrate this?

16 A. Page numbers of every statement, on every point,
17 statements made by the police officers, statements made
by Mr.

18 MisSkelley. These are the facts that I deal with.
a

19 Q. Have you also formed an opinion as to the
classification

20 of his confession?

a
0

a
compliant

21 A. I would classify this confession as a coerced

do with

22 confession and for a number of other reasons having to

0

23 other specific statements in the confession statement and

24 gross inaccuracies in the scenario that Mr. Misskelley

interrogation
25 produces, I would reach the opinion that this

Tr - - - 1'~ -

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1

578

be the
was far more -- these statements are far more likely to

that
2 product of influence than they are based on any memory

3 Mr. Misskelley has of the crime.

4 THE COURT: You want to ask him more?

5 MR. STIDHAM: Yes, your Honor, I---

6 THE COURT: Go ahead.

7 BY MR. STIDHAM:

8 Q. Are there any other opinions you have, Doctor, with
9 regard to the interrogation itself?

10 A. I don't believe so. I have a lot of specific
11 illustrations that I've been talking about.

12 Q. I understand that you also have some experience and
13 training with regard to cult---

14 A. Yes, I do.

working in
15 Q. ---and you won a Pulitzer Prize with regard to

16 cults?

cJ

17 A. Yes, I did. I shared one, yes.

with

18 Q. And is it true that you have worked internationally

rephrase

19 regards to satanic cult homicides or -- or let me

a

20 that -- to allegations of satanic ritualistic abuse or

21 homicides?

ah,

22 A. I've consulted internationally, if Canada counts,

real

23 specifically on an occult inspired murder which was a

24 occult inspired murder.

been

25 I've consulted on other cases in which there had

<<< Page 58 >>>

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1579

cult

1 allegations of the existence of a baby murdering satanic

based

2 of the sort that is based on all the available evidence,

three

3 on the studies done by the F. B. I., appear to be totally

4 without foundation insofar as there have now been over

None

5 hundred separate investigations of allegations of child

6 murdering, child sexual abusing, secret satanic cults.

by

7 of these allegations have resulted in any evidence that

8 suggests that these groups exist. This is a conclusion

9 Kenneth Lanning of the F. B. I.

10 On the other hand, there are in my experience what I

the 11 would call youth culture groups that get interested in
12 occult and. these are the groups that are responsible for
mutilations 13 graffiti, responsible for the undisputed anL~al
14 that sometimes occur.

15 The dividing line is between the murderous baby
killing 16 satanic cults and the youth culture groups and the
occasional 17 occult inspired criminal groups that in fact do exist. So
o 0

18 there's both a reality to it and then there's a mythical
level 19 to it.

20 Q Have you--do you have an opinion of whether or not
the

21 homicides in question Mr. Misskelley is charged with or
have 22 anything to do with satanic rituals or anything of the
occult? 0

23 A. As far as I am able to tell, from what I know of the
24 evidence, there is no evidence that suggests that there
is an 25 occult element to this and ~s far as the satanic panic
tips

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1580

none of that are given to the police, my understanding is that

2 them have oanned out. None of them has oroduced
corroboratation

3 and that they have been investigated and this is what one
~ would expect if this is an exampe of a satanic hysteria
that
~ it's picked up by the police. This sort of thing happens,
crime
6 when it happens, when there is a particularly heinous
these
7 for which there is no obvious exolanation. This is when
8 sorts of allegations are likely to surface.
9 Q. What are you basing your opinion on in this case --
that
io opinion with rcgards to thi.s not being a cult killing?
11 ~. Tqhat I know about the follow-up, the leads that
suggested
12 that there existed so~ne cult, that Jessie Misskelley or
anyone
13 else was a member of. ~'or example, during his
interrogation,
14 Mr. Misskclley provided a list of people who were
supposedly
15 members of the cult, and according to the testimony of
16 Detective Ridge who followed that up was knowledgeable at
the
17 time of the deaths, none of those people confirmed the
18 existence of a cult.
19 Apparently there is one individual who claims to
have
20 attended a cult meeting. Apparently her testimony also --
or
0
21 her report is equally unconfirmed. As far as I can tell
there
22 is an absence of hard information suggesting that such a
23 satanic cult exists in this area and in addition, I know
of
24 nothing about the crime scene that suggests that this is
an
25 occult ritual killing.

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1581

1 Q. Thank you, Doctor.

2 THE COURT: Do you want to add anything?

3 MR. DAVIS: Judge, my concern at this point
and I
4 got lost in that monologue there---

5 THE COURT: Don't feel too bad.

6 MR. DAVIS: ---okay. I got lost back there
about
7 the time he got to the first taped confession, but
at
8 least prior to that time what I heard was Mr. Of
she
9 talking about what Jessie told him in a statement.
And,
10 Judge, there are two things about that.

11 Number one, what he has done is taken these --
a
12 statement that we've never seen, we weren't privy
to, and
13 that's now going to paraphrase that statement -- or
so-
14 called statement -- to the jury coming from a so-
called
15 expert in some official capacity to be the basis
for why
16 he finds police coercion.

17 Now, number one we -- we objected to him
o
coming in
0

0

an 18 as an expert in the first place, but assuming he is
what he 19 expert, if he can limit his -- his testimony to
he 20 heard the officers say in their testimony, of what
C
but 21 read in a transcript about what the officers said,
point the 22 when he starts saying, "Jessie told me at this
0
C
0
another 23 officer really bore down on him and they spent
his 24 hour .and a half with him. This made him increase
25 feelings of helplessness."

<<< Page 61 >>>

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1582

if 1 Now, your Honor, we can't cross examine Jessie
she, and 2 his voice is coming through the body of Doctor Of
that's 3 that's what they're basioally trying to do and
way 4 clearly inappropriate. THe -- there is no possible
statement he 5 that a person in his position can rely on a
translate 6 took from a person and then paraphrase it and
whether 7 it to a jury. That's hearsay. it doesn't matter
else. 8 it comes from him or whether it comes from someone

9 That's hearsay testimony.

10 He can say what he observed. He can testify
how
11 that affects his opinion. He can list the facts
that
12 indicate coercion. If he goes beyond that, your
Honor,
13 the State feels that he's clearly gotten into a
province
14 that's -- that's the sole province of the jury --
in the
15 area that's the sole province of the jury.

16 THE COURTS Alright, I've heard the proffer of
proof
o
17 and it can be submitted as a proffer of proof, and
it
o
18 would be my finding that the information elicited
C,
and the
19 testimony proffered not only embraces the ultimate
issue
20 or facts for the jury to consider, that it in
effect
21 tells the jury what their finding should be.

22 And I'm -- I'm going to apply the rule in
o
Gramling
o
23 versus Jennings, 274 Ark. 346. I'm going to apply
the
24 additional phrasing adopted by Congress in nineteen
25 eighty-four to Rule Eight Oh Four that says
explicitly,

T

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mental
case may
defendant
defense
term
trier of
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of
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what's
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as
0
to.
testify

1 "No expert witness testifying with respect to the
2 state or condition of a defendant in a criminal
3 state an opinion or inference as to whether the
4 did or did not have the mental state or condition
5 constituting an element of the crime charged or a
6 thereof 21
7 and I think that applies here and I think the
8 -- just reading Rule Seven Oh Four alone, it says,
9 "Testimony in the form of an opinion or inference
10 otherwise admissible is not objectionable because it
11 embraces an ultimate issue to be decided by the
12 the fact 2?
13 The question is: That does embrace mean and our
14 court tried to define it in two or three cases. One
15 them was that framing case. Another one is Aetna
16 Casualty -- that was a civil case.
17 I just think under the facts and circumstance
18 this case, to allow him to testify in the fashion
19 tendered would be eliminating the jury and accepting
20 expert's opinion. So the opinion of the jury is
21 significant to me.
22 There are some things that he testified to such
23 the occult activity that he might properly testify
24 There are other things that I would allow him to

<<< Page 63 >>>

□

1594

opinion
 2 knowledge, but to give that final and conclusive
 3 in -- in the fashion that it's elicited -- says, Jury,
 it. 4 you must find this way - and I 'a not going to allow
 Court's 5 MR. STIDHAW: Your Honor, I understand the
 6 ruling.
 7 THE COURT: I -- I -- everything -- everything
 a 8 you've just said, however, I submit would be an
 the 9 appropriate argument that you may make to the jury at
 normally 10 proper time, and that an expert in his capacity
 strategies 11 is employed to consult with and discuss trial
 12 and techniques with counsel. And if I allowed him to
 13 testify based upon a -- you say a seventy-five page
 14 statement taken from the defendant would be doing just
 a exactly what the prosecutor says -- allowing him to
 * 15 testify as a surrogate.
 16 MR. STIDHAM: That's why we did it as a proffer,
 17 your Honor.
 0*
 d
 N.
 that. 18 THE COURT: Yes. Well, I'm not going to allow
 19 MR. STIDHAM: Your Honor, I understand your
 ruling
 C
 N.
 a
 U
 a
 K
 £
 21 pursuant to Rule Seven Oh Four with regard to our
 a
 S 22 interpretation as we discuss4 earlier with regard to
 U

U
0 23 Rule Seven Oh Four.
ma.

24 THE COURT: We just made a record.
25 MR. STIDHAM: Thank you, your Honor.

-.....-----
r.....

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1585

1 MR. CROW: Thank you, your Honor.
2 ~4R. ~'ODLEYAN; Your Honor, we would like to
make as
3 a part of the record Statc versus Luff, E21, N.E.2d
493,
4 whic~' ~ ar~ Ohio case ~i ;qhich the ae~endarit
(sic) was
5 found not qualified to testify and also United
States
6 versus ~ishman it' s---
7 TUE REPORTER: Yzu said, 'defendant.'" Did you
mean
8 witness?
9 MR. FOCLZMA»=34 ~e ~as found not ;ualifiea to
testify
10 as a witness, zigic. And also State versus
Fishman,
11 which is in the ~Tcrtherz District of California 743
12 ~ 7:3.
13 r~IE ~RT. Okay.
14 ~4R. STD~iAM: Your Honor, like~tse, we would
like to
15 offer two er~l~ c~ when ~octzr Ofshe was allowed to
16 testify as a~ expert in this exact area and we would

like

17 to submit those exhibits.

a

18

THE COURT: Alrighr, they may ~e received.
(DEFENDANT' S EXKI2 ITS ~U~!BER EIC~{T AND

NUMBER NINE

20

ARE RECEIVED AS A PROFFER.)

0

21

(S''~'~'S EXHIBITS NUMBER ONE HUNDRED SIX AND

NUMBER

22

oi~ ~ SEVEN ARE RECEIVED AS A Pt~CFFER.)

23

MR. STIDHA4: I'm ;oing to make some copies

and

24

have---

25

THE COURT: Sure, you can do that later if you

want

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1

to.

2

Mfl. ST~D~M: Tha'~nk you, your Honor,

3

T~F CCURT~ There do we stand now?

4

Your ~--ror, T think ti~at

we're at the

5

~o~rit where T c~n -- we can. ask the jury to

come sack in

6

and I can read the question that -- that the

Court

7

perm4~t& At least that's my understanding of

where

8

we're at.

9

MR. C~M~ Thur Honor7 my only concern

]5

10

~'he~her or not this geitlenan ~ gotng to base

his

11 oo~n.ton- on -- on ~ fendant told him because

12 Er~m ~v2t he testified to in the proffer he
alooted the

13 defen~.ant ' ~ vc~s~ on versus the officers'
version -

14 TI~ CTiRT~ I think that's what he said.

15 r'~t. ~u~x~: .~j.rvtr~t, ~'~e~l T i~h~k
*-hal- th~tys an C'. *

16 ~mnroncr basis of his opinion and if he's going

17 ~ur~crt to testif'~ n~w about coercive tactics
to
o
and
o
adopt
0

18 what this defendant's told him and say things
that aren't

19 in accordance w~ ~h the e~a.dence, I think the
jury is

20 going to be----
0

21 THE COURT: T d~n't think that's the way I
worded

22 tt. I -- I allowed him to ask a m2estton using

23 statements~ rhe files and test~monv that he
the two
reviewed and

24 whether or nct he had an opinion as to whether or
not the

25 tactics employed were su~estive or that would
lead

IT

□

1 ?4isskelley to utica a statement.
2 ME. STIDEAW: And the basis of hIs opinIon is the
3 Statements and tapes that he ' s hoafI of the
defoadant' a
4 statements to zhe polIce.
5 TIE COURT: I'm going to allow him to do that.

And,

e of course, everything he just said you may use in an
7 argant to your jury if you want to.

B !m. TfldHAN: Thank you.

s 'S. CROW: Thank you. your Honor.

10 MR. 3NV11: 3ut the question would be restricted
and

11 would not &ncThde whatever ~taternents -- his opinIon
12 vau"4 have to be based on everything except those
13 statements he recnived from the defendant.

14 TES ZOURT: I think he said he could do that.

2 MR. nArq, ' want to be sure of that because then
U
*0

a
*

16 In cross anmination. when I ask what specific polioe

I
6

17 mIsconduct or police coercive tactics are you talking

0*
6

U.
*

18 about, I don': want him to go back and say, 'lell,

Jessie
a

f
U

19 told me - or -- or even through the back door because,

a.
C

20 your Honor, at least the last few hours I * vs come to

f
a

U.
U

21 respect the witness * I know he can certainly catch

*
you

a
a

22 when you make~ questions that give--

U
S

U
U

23 TIE ZOfIlt: Tricky, isn't he.

2

24 MR. DAVIS: ---gin him an opportunity to answer,
a and---

□

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588

1 TUE COURT: i-ic s an expert, you know.

clearly

2 MR. DAVS: If he aoesn't understand very

basis of

that he is not to r~.Eer to that statement as a

getting

his opinion, then I think w&re going to end up

it in one form or another.

that

6 ~4R. STIDHAM: Do you understand, Doctor Of she,

you're not to refer to the defenaant s statement.

8 rUE WITNESS: I unoerstand.

(RETURN 73 QP~& ZOURT.

10 MR. ~TIDHAM: May I proceed, your Honor?

11 TUE COUR~2: ~.

12 BY MR. ~TI~HAM:

the

13 ~ Doctor ~fsh~, c~o ~ot~ have an opinion based on the
14 transcription of the statements made by this defendant to

those tapes of

West ~'iernphis Police De~arxia~nc arid iistenin9 to

g
by

16 the statements made to the West Memphis Police Department

you've
C,

17 the defendant or t~e testimony of the officers that

by

18 heard as to whether any of the ~nterrogatiou tactics used

Were

19 the police again~t the defendant, JeSSie ~iss:~eliey,

20 suggestive or led. Misskelley to make that statement?

0

the 21 A. Yes. I would add to that that I would also rely on
certain 22 notes that were produced by the officers and also
23 other facts I've been informed have been testified to by
24 various witnesses in this courtroom.

that 25 ~* So if I understand your testimony it is your opinion

'Tr

-

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1

1 those tactics did---

2 MR. FOGLEMAN: Your Honor---

that's 3 THE COURT: If he's talking about testimony,
4 fine.

testimony in 5 MR. FOGLEMAN: Was he here to lie in this
6 the courtroom?

he 7 THE COURT: Well, if it was made known to him,
8 doesn't have to be here.

known 9 MR. FOGLEMAN: But how do we know it was made
10 to him accurately, your Honor? If somebody told him
that 11 50 and so testified---

to 12 MR. STIDHAM: Judge, I asked the Court to
13 give me a transcript and that's what he looked at.

14 THE COURT: All right.

15 MR. FOGLEMAN: Well, if that's the case, that's
16 alright.
5 17 THE COURT: Alright. Is that the case?
18 MR. FOGLEMAN: Is that the case?
THE WITNESS: I have not seen a transcript of
this
20 hearing. I've seen a transcript of a prior hearing
and
0
21 was informed as to certain specific testimony given
and
22 presented by the medical examiner and I'll identify
the
0
23 particular facts that I'm using if that would be
helpful.
24 BY MR. STIDHAM:
25 ~* Well, if I understand your testimony, it is that the

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1 tactics used by the police were suggestive and led the
2 defendant to make a statement?
3 A. Yes, and that the statement -- the contents of the
4 statement was shaped by these techniques.
5 CROSS EXAMINATION
6 BY MR. DAVIS:
7 Q. Now, Mr. Of she, earlier in your testimony you
referred
8 about -- you were telling us about this scenario where
you
9 have claimed to have maintain a false confession in a case
you
10 worked on?

11 A. That's correct.

12 Q. Is that the case out in Washington State?

13 A. That's right.

14 Q. Okay, and in that case the scenario you presented
to the

- he
15 defendant in that case that you said you created and he -

in
16 agreed with, that scenario was similar to the allegations

o
0
17 the actual case, correct?

0

18 A. No. The scenario was specifically designed to be

invented
19 different from any of the allegations in the case. I

20 it to make it in the same area, otherwise it would be

any
21 meaningless, but I made it specifically different from

the
C
22 allegations in the case and then I verified with one of

a
never
23 people who was supposedly involved in it that in fact it

24 happened just to double check that in fact it did not
happen.

25 Q. Well, isn't it true that in both instances the

Tr

<<< Page 70 >>>

□

1591

1 allegations involved child sexual abuse?

told
2 A. This was a case about child sexual abuse and when I

-
2 him the ~eifi~ a~ t~ a particular event which I made up -

then
event
victims
that
sexually
believe
their
allegations
which
bodies.
0
he
0
Co
0
he
answer

4 I made up peculiar circumstances for that event and he
5 produced a very detailed confession specific to that
6 including dialogue and then I verified from one of the
7 that no such event had ever occurred.
8 Q. And isn't it true that in that particular scenario
9 both daughters of that defendant had testified he had
10 abused them?
11 ~. I don't believe they ever testified to that. I
12 they made allegations as to that effect. I don't think
13 formal testimony was ever taken. They also made
14 to the fact that their bodies were covered with scars
15 were then subject to examination and -- a court ordered
16 medical examination and there were no scars on their
17 So they made a lot of allegations, none of which proved
18 empirically correct.
19 Q~ Those were two adult daughters, correct?
20 A. That's correct.
21 Q~ Okay, and also the wife also made allegations that
22 sexually abused the daughters, correct?
23 ~ The wife was being threatened with having her---
24 MR. DAVIS: Your Honor, could you ask him -- if
25 has an explanation we can hear that, but would he

□

1592

the 1 the question on the front end before we go through
2 five minute---

-- 3 THE COURT: --Try to answer yes or no and then
4 then if you need to explain, I'm going to let you.

5 THE WITNESS: Thank you, your Honor.
6 BY THE WITNESS:

7 A. Yes. The wife during the period when she was being
8 pressured by the police and threatened with having her
one

9 remaining child taken away from her if she did not come
10 with accusations against her husband, proceeded to come
up

11 with such accusations and some of those accusations
12 being present at a satanic cult ceremony where blood
13 out of a book and flowed uphill over her arms -- over her
14 body.

15 I was asked to evaluate her by the prosecution to
16 help
her

17 them make a determination as to whether or not to charge
18 or whether or -- or -- whether or not to charge her and
it was
U

a
19 my recommendation not to charge her.
It

19 Q* And in fact her husband had pled guilty to these

sexual

9

a.

It

It

20 abuse charges, correct?

of

21 A. No. In fact her husband pled guilty to six counts

degree

22 third degree -- entered pleas to six counts of third

--

23 rape when he was told that if he did not enter that plea-

to

24 MR. DAVIS: Your Honor, would he be responsive

25 the question?

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□

1

593

1 BY MR. DAVIS:

2 Q. Did he enter a plea of guilty to charges of rape or
3 sexual abuse?

of

4 ~. He entered -- yes -- he entered a plea to six counts

5 third degree rape.

months

6 Q. Did he maintain his guilt for a period of five

7 prior to entering that plea of guilty?

8 A. Oh, yes.

decide

9 Q. Okay, and isn't it true, Doctor, that he did not

10 that he was not guilty until he talked with you?

11 A. After he talked---

respond

12 MR. DAVIS: Your Honor, could he be asked to

13 yes or no?

14 THE COURT: Yes or no and then---

15 BY THE WITNESS:

16 A. Yes, that's technically correct. However, the
discussion
17 that I had with him which was tape recorded was not a
C
18 discussion that precipitated his changing his mind. He
19 changed his mind subsequent to that after he
independently
20 began to look at the things that he had confabulated and
after
21 the pressures that he had been under during this five
month
(0
0
22 period were withdrawn, after which he had been gotten to
enter
23 a guilty plea. So his decision -- his realization that he
in
24 fact committed none of these things -- was done
independent of
25 any conversation I had with him.

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15

1 Q. And despite your opinion that his confession was
coerced
2 or involuntary in that case, the jury and the court found
3 otherwise, correct -- or the court did?
4 A. The court found based on statements made prior to
the
5 statements that I analyzed -- found that it was
sufficient to
6 accept -- or not to accept his request to withdraw his
guilty
7 plea and go to trial.
8 Q. So in that scenario with the husband saying for five

9 months he's guilty, with the wife saying that he's
guilty, and
10 the two daughters giving statements as to his guilt, you
met
11 with him and convinced him that he was not guilty,
correct?

12 A. Incorrect.

13 Q* Well, after you met with him is when he decided that
he
14 was not guilty, correct?

15 A. A month after he met with me after going through his
own
16 analysis of what happened -- after he was no longer being
o
17 constantly coached by the interrogators, by the
psychologists,
C
C
18 and by his minister, he realized that the beliefs that he
had
19 formed made no sense whatsoever and he realized that he -
- he
20 had come to believe something that was not true.
0

21 What he came to believe was that he was the leader
of a
0
22 satanic cult that had been in operation for seventeen
years,
23 that had killed hundreds of children for which there was
no
24 evidence. That's what he came to realize made no sense.
25 ~ And you testified in his behalf in a hearing
designed to

~*1~

1 get that guilty plea set aside, correct?

2 P~. I test -- that's correct, and the result of that
was that

~ the judge chose to maintain the guilty plea based on

4 statements that he had made prior to the matter that I

5 testified about, and that was the justification for not

6 allowing him a trial.

7 Q. What exactly -- based on the testimony that you
heard

8 from the officers at the prior hearings and based upon

your

9 examination of those taped statements -- what coercive

tactics

10 do you allege that the police made in this case -- or

did?

ii A. In order to answer your question, first I need to

break

12 the interrogation down into its component part so that I

can

13 cut out oarts of it and focus on a particular part.

14 Q. Well, one thing I want you to assure me, Doctor, is

that

15 you're referring to either testimony you've heard, or to

the

16 taoed statements of the---

0

17 A. That's correct, and the notes.

0

18 First---

19 Q. When you say "the notes", what notes are you

talking

20 about?

21 A. The detectives' handwritten notes and typed notes

and

22 also I may refer to a fact I've been informed that was

23 testified in this courtroom and I'll specify exactly what

that

24 was when I do.

find any 25 Q. Let me -- let me back up just a minute. Did you

<<< Page 75 >>>

□

596

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physical 1 evidence in any of those things you referred to as to

2 coercion?

A. No, I did not.

indicate ~ 0. Did you find anything in any of that evidence to

were ~ that any of the officers yelled or used a loud voice or

testimony 6 degrading to the defendant in those tapes or in that

~ that you reviewed?

8 A. NOr the officers testified they did not do that.

didn't 9 Q. Okay, and in those tapes that you observed, you

10 hear anything of that nature, did you?

ii A. No, I did not.

would 12 Q. Okay, and there is nothing in the notes prior that

13 indicate there was any undue influence, ptessure, or loud

14 voices and demands rn~de on the defendant, was there?

me to 15 A. Not in the limited set of materials you're allowing

16 testify on.

o to U 17 0. So as far as those tyoe of tactics you would have

0

18 aaree that what you reviewed is devoid of any evidence of

19 that, correct?

materials
0 20 A. I would have to agree that based on the set of

21 on which I am now testifying, I can find no example of
that.

22 Q. ~nd those things that you refer to that you're
testifying

23 to are based on your review of testimony and your
observance

24 of that confession? You've read it and listened to it,
25 correct?

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597

1

1 A. That's correct.

2 Q. And is what you term or what you find in there
coercive

3 that the officers asked at times leading questions -- is
that

4 one of the things?

5 A. The questions were more than leading. The questions
were

6 very directly specifying what the answers should be.

7 Q. Did you find anything in your review of the officers'
8 testimony, in your review of the statement of the
defendant or

9 either of the statements of the defendant to indicate
that the

10 officers gave him the information about which boy was
11 castrated?

12 A. In their statements? ~o.

13 Q. And in their notes?

14 A. In their notes? No.

15 Q. In the taDed confession?

16 A. Other than .1 seem to recall that he was being shown
a

2 17 picture of one of the boys and that happened to be the
boy

18 that was castrated and I believe that, if memory serves,
that
Co

19 he then identified that boy as the one that was
castrated, but

20 ~
he believe -- and perhaps I'm wrong -- but I believe that
0

21 was being shown a picture of that boy at the time.

22 Q* Do you know where that is in the transcript?
0

23 A. No, that's not something I'm sure of at this point.

24 Q* And if that turns out to be inconsistent with what
the

25 testimony at trial has been, then you certainly wouldn't

<<< Page 77 >>>

□

159

8

1 disagree with that?

2 A. My memory may be defecttvo on that.

3 0. And those facts that -- in fact -- let -- let me ask
you

4 this: In fact af to: this defendand makes the statement
and

5 identifies the one that's castrated, the next question is,

6 "Are you absolutely certain that's the one?" Isn't that
the

7 next question in the interview?

8 A. Can you direct me to that?

9 Q. Yes, sir. St's in the first statement. It's on page

10 seven. Let mc soc which statement you have. (flAHINING.)

11 Okay, it's that transcript on page stren.

12 ~. (EX.annaHa.)

13 Q. Down at the bottot of the page. Where the officer
asked,

a 14 "Whicih boy was that?"

* 15 And to defendant caid, "That one right therc ."
I 16 And Offtfoer Ottohelli said, "You're talking about the
6 17 Dyers toy again?"
0*
6
a
U.
C 18 And the defendazt said, "Yes."

19 A. Then what was the next question that Off icc~ Ridge
asked?
U
U
U
I-
U
was
U
a 21 cut?'
U
U
£
a
a ~ 0. Okay. Mow, Mr. Ofahe, if the police arc coercing him
a
a ~ when he has just given them the acuratc information and has
24 just told them the Dyers boy is the one who was castrated,
are
25 you saying that it's :ooro+ve for Officer Ridge to their
ask,

<<< Page 78 >>>

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1399

1 "Are you sure he was the one that got cut?"
2 A. Well, judy ~'q from this ~t~ter'~ent ap~J~rently
therc: was a
3 photogr~.ph o the ~ers ~ov beza:asc: he w:ts able to
s~.y1 "That
4 one right there.
5 Q. Sc yOu're ~r ur~in~ those ~acts?
6 A. I think -- i~ says, "Thi ch boy was that?" An~

then Mr.

7 Misskitley res?onzts, 'rhat one right there." T read
that as

8 indicatin; he is identifyin; some representation of that
boy

9 right there.

10 Q. Okay, anci c~s yc~ ~ow how :aany ~hoto~3ra9hs were
thcre?

11 A. Uc, I i~cn't * ~nd .:on' c knew how ~:cse
photographs were

12 being m.~ni~ula:ed at *:hc ~:i~ne.

13 Q. E.ut---

14 A. l 'm j~st ~uinting out that th~.t's a ~ossibility.

~ '2. You Th~' ~ ~o f~r fr~z~ the
tcstimony or

16 from ::ie taped nssio:~ and anyth.in~j zo indicate

17 ~hoto3 were ~ p~la~zct, ~c you?
a

18 ~ i.~c, don~-

19 Q* Ohay, :o you would have to sresu~e That :~ct if you
were

20 not to :a~e some ~~ p!acc some si~n~nce on that
particular
a

21 statement, correct?

22 A. It's Qs~sibility. ~f the reccr~ not olear
o
as to one

23 way or the 'thor as ~o whethe~ o~ ~'ot this is being

24 suggestive. This is an area that in my mind is
unclear.

25 Q* Well, explain to :~e how it's suggestive or i~ --
if the

<<< Page 79 >>>

□

1 police ~re ~rv~n~ to coerce ~o~neone into giving them an

2 incorrect or a ~a~io ~~hV w~uk! they go

haok and

~ ask the "rc vo" s'-c that lv~ w~s the one thlt was
c~it?"

4 Why wo'~ir~ ' t ~he~x lcv-e it alone when the~T had the
~ln9wer they

~ wanted2

6 A. Bcc.2use ~'zhe-i ~hc" jot the answer that they
wanted, then

7 they cmh~is~c tt v~ o~'ier to 3t il~e that so that
when you

8 get soi~cb\$~v ;'jhe~e yc'i want ~he~t, von emphasize
that's what

9 you're tryfii7 to do.

10 Nowl c~r~ ~he'i ~ ot~mr ~ lc'~ o~ ve'v d~root
leading

11 SQa~~eS~1.~YI3 ~h~: sh~q3 t>w '~ t~v~ c~~rse o~ this

12 intcrrc~. :'ic;e ogCioe~rs were canable o~ clot:2g
that and I

13 know t'~.cre ~X3 ~ :tu~c there ~il xt ~av have
haooened that

14 they i~d *a~-e~ which ~icture 3h~Ul~ be sc~ctel.

15 Q. W2iit, c~ec, ~''1~-''- tc -- -tv' h.a~>=
ha~enel vo'a would
Co

CO 16 have tc ass'ice ani ~rrire zer~a in ~ ~n:ot~riate
~,olice
0

17 conduct, we:iXh'~ TY1?

18 A. I ~iouPi have t~ 3'fllk'. th~r~' ~re Thner
tnapptopriate

19 police cond'.~ct which T cac efY ¶j.~ht al~ have
ev~ressed

20 itself her'~ ~od I m4Tht t~oint ont that you broiaght u~
this
0

21 point, I iidn't.. Th~ is not ccc o~ '~y exawp2.es.
This is

22 sornethir~g that 7 w.~ui.'1! j'PI'je tO >~

23 Q. An~ that's why the acsw~r to that is that
not clear to

24 you that whcn the ficers h~irc the answer thats
consistent

25 with the evidence arA they kee'~ on going and they say,
"Are

<<< Page 80 >>>

□

1601

1 you certain that's the one?" Doesn't that indicate to
you

2 that those officers are trying to get an accurate
statement

3 rather than coerce him into saying something?

4 A. Well, if we -- we're looking at an interrogation
that was

5 free of the kind of gross leading and suggestion that

6 characterizes this interrogation---

7 Q. Is -- wait, let me -- let me stop you. The
question,

8 "Are you certain that is the one?" -- are you
characterizing

9 that as a gross leading statement?

10 A. I'm suggesting that if---

11 Q. Could you answer that question for me, please?

12 MR. STIDHAM: Your Honor, he's trying to answer
the

13 question and the Drosecutor won't let him.

14 THE COURT: Answer the question.

15 BY THE WITNESS:

16 A. Under some circumstances that could be and that
would be

17 under ~~me circumstances a gross leading suggestion if it
were

(J

18 done in a particular way.

19 Q. Do you have any actual facts or knowledge from that

20 transcript and those tapes and you're hearing the officer

0

21 testify that there was anything that would contribute

with

22 that statement to make it a gross leading statement?

23 A. As I said, this is your example I think it's

unclear

24 because I don't -- I don't believe the record is clear in

my

25 mind as to the circumstances under which this occurred

and I'm

<<< Page 81 >>>

□

1602

1 simply pointing out that there are other examples of

gross

2 leading, highly suggestive, if not demanding statements

on

3 other points that illustrate that as an operating

procedure

4 this is present in this interrogation and, therefore,

there is

5 a possibility -- and I don't know the particular

circumstances

6 of this particular presentation of the photograph. You

7 brought it up, I didn't.

8 Q. Okay. When you say, "It's my example", it's his

voice,

9 isn't it true, Doctor? I mean, you heard the tape.

10 A. It's also -- yes, it is his voice. It is also his

voice

in the
about
analyze
is not
about
o
that
0-
0
the
those
pressure
0
Lu
Lu
0
0
Lu
finish

11 that says that he arrives at the scene at nine o'clock
12 morning, which is the very first statement that he makes
13 the time that this all began, and that statement is a
14 statement that because it is not the statement as I
15 the influence process of this interrogation, because it
16 the statement that fits with the facts. The statement
17 the time at which this crime occurred is a statement
18 comes up and is manipulated eight different times over
19 course of this interrogation and over the course of
20 eight manipulations one sees a pattern of unrelenting
21 on Mr. Misskelley.
22 ~ When you talk in terms of general valid---
23 A. May -- may I finish?
24 ~* Mr. Ofshe, when you talk in terms of generality---
25 MR. STIDHAM: Your Honor, may the witness

<<< Page 82 >>>

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1

1 answering the question?
2 MR. DAVIS: Your Honor, he hasn't answered my
3 question yet.
4 MR. STIDHAM: He hasn't answered the question
the

5 way he wants him to.

6 MR. DAVIS: Well, your Honor, I asked him the
7 question about part of the statement and he starts
off
8 talking about something that's on page twenty-four.

9 THE COURT: Airight, answer yes or no and then
if
10 you need to explain I'm going to permit it.

11 THE WITNESS: May I have the question again,
please?

12 BY MR. DAVIS:

13 Q. I don't know what the terminology is in Berkeley,
14 California, but is it different when somebody says, "Are
you
15 sure that he was the one that was cut?" Is that a
leading
16 statement in California?

17 A. No, it's not a leading statement in California and
o
may I
C
18 explain?
a

19 Q. Is it a leading statement in Arkansas?

20 A. If it is a state -- I never said it was a leading
C
21 statement. I think what I tried to explain and what I
would
22 like to explain is---

23 Q. Well, are you -- are you going to confine your
a
remark to
24 that statement, Doctor, or are we going to roam around
the
25 entire tape recording?

1 MR. STIDHAM: Your Honor---

2 THE COURT: Yes.

3 didn't

MR. STIDHAM: He's asking questions and he

4 ~et the right answer he wanted---

5 THE COURT: You're making a statement. Make an
6 objection if you've got one.

7 the

MR. STIDHAM: Your Honor, my objection is that

8 witness should be allowed to answer the question and
9 explain his answer.

10 THE COURT: Airight, I'm going to allow him to
11 answer the question yes or no and then give your
12 explanation. Were you through?

13 BY THE WITNESS:

14 I

A. No, that is not a leading statement in California and

15 I
16 interrogator

think the point I was trying to make was if following

manipulating a suspect to a statement that the

17 CD

likes, the interrogator is likely at that point to try to

18 C

reinforce that particular statement and will, therefore,

19 immediately

because it's very likely that if the person has

20 0

said, "That's the one," however, that was accomplished.

21 it's
22 0

To stabilize that, one would then reinforce it by

22 allowing the person to restate it, yes, I'm sure, because

23 a very very low likelihood that the person is not going

to
24 immediately continue. That's a good tactic for
stabilizing an
25 answer that you like.

<<< Page 84 >>>

□

605

1

1 THE COURT: Doctor, excuse me, are you assuming
that
2 a single photograph of one individual was exhibited?

3 THE WITNESS: No. I am -- I am assuming that I
4 don't know how the photographs were placed, that I
5 know what prominence it might have been given, and I
6 don't know what indication might or might not have
been
7 given, and therefore, I don't know what surrounds
that is
8 not included in this record in this particular
choice---

9 THE COURT: --Have you read the officer's
10 description of the showing or viewing of the
photographs
11 or photograph?

12 THE WITNESS: Yes, I have.

13 THE COURT: Have you seen the photographs or
14 photograph?

15 THE WITNESS: No, I have not.

16 THE COURT: Show them to him.

17 ~4R. DAVIS: Your Honor, for the record I
believe
0

18 it's marked as State's Exhibit Number One Oh Five.

19 (HANDING TO WITNESS.)

20 THE WITNESS: (EXAMINING.)

0
a-

21 BY MR. DAVIS:

o
photographs
0

22 ~* Doctor, if that -- if that -- if those three

23 are laid out on the table and he makes the statement that
one

24 of them was cut on his bottom and is pointing to his
private

25 parts at the time he does that and the officer says,
"Which

<<< Page 85 >>>

□

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606

"That boy was that?", and he points to the picture and says,

2 boy right there," are you saying that that's unduly
3 suggestive?

4 A. Or if he responds to an officer whose finger is on
the

5 picture and says, "That one there." If that happened,
that

6 would be a way of accomplishing that identification.

7 Q. But we're in a court of law and we deal with evidence
and

8 if there's no testimony or evidence in the record or in

9 anything you've looked at to indicate that that happened,
then

10 there's nothing suggestive about that question or there's

11 nothing that indicates that that response was coerced, is
12 there?

13 A. And all I said was, "That's a possibility. I don't
know

14 all the facts."

things in 15 Q. Okay. But you have to presume facts or assume
16 order for you to reach the conclusion that that indicates

a
0 17 coercion, isn't that correct, Doctor?

a
particular 18 A. If I were to reach that conclusion about that
CC- 19 statement, I would agree with you. If I say, "I don't
know"

don't 20 on that particular statement, then I'm trying to say I
0

21 know.

that 22 Q* And, also, on that same page the defendant indicates
0

23 one of the boys was being cut in the face. Isn't that
24 correct? Page seven.

25 A. Yes.

<<< Page 86 >>>

□

607

1

him 1 Q. And the question before that was, "Where did he cut

the 2 at?" And Jessie's response was, "He was cutting him in

the 3 face." Is there anything coercive or suggestive about

4 question, "Where did he cut him at?"

know the 5 A. No, my judgment is indeterminate because I don't

6 facts surrounding it.

7 Q. So when the defendant identified who it was who was

8 castrated and he indicated that one of the boys was cut

in the

any of 9 face, you don't know and you can't give an opinion that

10 those questions were coercive in nature, can you?

that we 11 A. And the record -- no, I can't because the record

the 12 are dealing with is very incomplete because this part of

of 13 record is preceded and everyone agrees by over two hours

in 14 interrogation in which many subjects were discussed and

because we 15 which we do not know what was said on the subjects

have no 16 have two hours of interaction about this for which we

17 record.

during 18 Q* And your speculation on what might have happened

CD 19 that time and your guess as to what occurred and what

testimony, you 20 transpired and what happened after reading this
C

can 21 can't speculate any better than any of these people can,

22 you?

CD
C

points 23 A. Not on this particular point, no. There are other

happy 24 about which the record is quite clear, about which I'm

25 to be helpful.

<<< Page 87 >>>

□

1608

1 Q. How many cases in the past twelve months have you
2 provided expert testimony on?

3 A. Perhaps five or six.

4 Q. What percentage of your income last year was
derived from
5 the providing of expert testimony?

6 A. I don't know what the percentage was. I can tell
you the
7 number if you'd like.

8 Q* What's that number?

9 A. In my -- I -- I earned Forty Thousand Dollars last
year
10 out of this part of my professional life for which I
take half
~ time leave from the university every year to free up my
time
12 to do it.

13 Q. And is your going rate---

14 A. Half time unpaid leave from the university.

15 ~ Is your going rate approximately Three Hundred
Dollars an
16 hour?

17 A. No, it is not.
C,

18 ~ What is it?

19 A. My rate is a hundred and fifty dollars an hour for
20 consultation and Three Hundred Dollars an hour for time
spent
0

21 in court or in depositions.

22 Q~ Okay. So---
0

23 A. Because time sent in court or depositions is very,
very
24 hard work.

25 ~* Okay. I will agree with that, Doctor.

□

609

1

when
1 So it's Three Hundred Dollars per hour in court and
2 you're asked -- when you're initially asked to evaluate a
3 case, you don't get the Three Hundred Dollars an hour
unless
4 you give an opinion that's consistent with what the
person
5 asking you wants to hear. If they don't call you as a
6 witness, you don't get your Three Hundred Dollars an
hour,
7 correct?

8 MR. STIDHAM: Judge, that's a ridiculous
question.

9 It has an inference that---

10 THE COURT: --Are you -- again, you're making a
11 statement. How many times have I got to tell you,
Dan.

12 Stand up first of all and say, "I object", okay?

13 MR. STEDHAM: I object, your Honor.

14 THE COURT: ~lright. What is your objection?

15 MR. STIDHAM: My objection is it's not a proper
way
16 to impeach the witness. It's very -- it's -- it's
17 speculation and it's -- the witness has testified,

your
C,

18 Honor, that he is a consultant--

19 THE COURT: Well---

20 MR. STIDHAM: ---to the prosecuting attorneys s

0

21 office in several areas throughout the United States.

U
0

22 MR. DAVIS: Your Honor---

statement.

23 THE COURT: Okay. Again, that gets into

conuton

24 My -- my ruling on your objection is is it's

25 and customary practice to ask an expert what their

<<< Page 89 >>>

□

1

~lo

to compensation for their testimony is, and I'm going

2 allow it to that extent.

what

3 MR. STIDHAM: To ask him -- if he doesn't say

That's

4 he's supposed to say he's not going to get paid?

5 what the prosecutor asked him.

6 THE COURT: Well, I'll let you rehabilitate him

7 then, although I think he don't needs much help.

8 MR. STIDHAM: Thank you, your Honor.

9 BY MR. DAVIS:

10 Q. Isn't it true, Mr. Ofshe, that you actually
formulated an

11 opinion before you ever heard or examined any testimony
from

12 the ~OilCC officers?

13 A. No. I -- I had an idea about what might have
happened,

14 but I needed to hear the testLl'onv from the officers to
find

15 out much more information about what did happen. In fact
in

16 order to try to get that information I tra -- I tried to
17 travel to Memphis to meet with the officers to interview
them
0
18 about what happened so that I could have a fuller basis
for
It
19 it, but that meeting wa~ in part unscheduled because of
the
It
20 airplane problems and in part aDparently because they
were
0
21 going to refuse to talk to me in any case.
22 And so at the hearing that I attended, I observed
the
It
23 officers and listened to their testimony and in fact my
24 oDinions changed very substantially because of the
testimony
25 that I heard.

<<< Page 90 >>>

□

1611

1 Q. Isn't it true that you had advised Mr. Stidham
that you
2 had an opinion as zo the coercion that was used in this
case
3 orior to the time you ever heard the DoliCe officers
testify?
4 A. Uh -- the opinion that I had at that point was
based on
5 the materials available to me which included my having
6 interviewed Jessie Y.isskelley.
7 O. Well, my question I have for you is: Didn't you

8 formulate an opinion before you ever heard the officers?
And

9 you just indicated, "My opinion was ~, so you had
formulated an

10 opinion, ~orr~cr~

11 A. *rhad ~ormulated a tentative opinion and I was
aware that

12 there was much that I wanted to know about the
interrogations

13 that I could not know from just the records, and so the

14 hearing that I attended was an opportunity to hear
answers to

0, 15 :specif Ic questions that I wanted to know from the
officers

16 which allowed me to refine my opinion about what
happened.

o 17 Q* Was your opinion before that that the officers had
not
0

0

18 coerced anyone?

19 ~* Well, the op~n~on that Mr. Misskelley's statement
was a

20 coerced statement can be supported from the records that
were
C

21 available---

22 MR. DAVIS: --Doctor -- your Honor, would he -
-

23 would you ask him to answer the question?

24 THE COURT: Answer yes or no and then if you
need to

25 explain you're going to be permitted to.

Tv-

□

1 BY THE WITNESS:

2 A. Could you repeat the question, please?

3 Q. Prior to hearing the police officers testify or
either
was
police
4 reviewing their testimony in the form of a transcript,
5 your opinion at that point that the police -- that the
6 officers didn't coerce anybody?

7 A. No, that was not my opinion.

8 Q. Okay, so your opinion prior to that -- granted
tentative
about
9 but before you even heard or sat -- saw or read anything
10 what the police officers did -- you already formulated an
11 opinion that this was -- this confession was coercive in
12 nature, ~

13 A. That is correct because there is adequate evidence
as to
I
14 the coercive nature of it contained in the materials that
15 already saw, but there were many questions that I had
about
16 the specifics of it that were very unclear until I heard
the
o
substantially
0
17 officers and what they said caused me to modify

S
18 my analysis of what led to the materials that I already
had
19 seen.

20 Q* How many cases in the last twelve months have you
0

part 21 testified to and indicated that there was coercion on the

0 22 of police in obtaining a confession?

my work 23 A. I can recall one that I testified to that most of
24 consists of evaluating the interrogation and feeding back
25 opinions to attorneys and, more than half the time those

<<< Page 92 >>>

□

13

1~

tell 1 opinions do not Thad me back into the courtroom because I

because 2 the attorneys there is nothing for me to testify about

3 I don't find in materials that have been provided to me
4 suggesting that there is coercion.

Three 5 Q. How many times have you testified at the rate of

6 Hundred Dollars an hour that a confession was coerced?

7 A. To the best of my knowledge, never.

testified 8 Q. How many times have you testified for hire and

9 that a confession was coerced or as a result of police
10 coercion?

this 11 A. I think that number is -- over the years I've done

testifying 12 -- I've testified -- I've testified to coercion thirteen
13 times. Of those thirteen times at least once I was

Dollars 14 without fees and in no case was I paid Three Hundred

best 15 an hour because -- while that's my standard fee, to the

16 of my recollection all of the other cases involved

indigent

17 defendants and the State rarely pays very much money for
one's
a 18 time to do this work.

19 So in no case has anyone ever paid me my customary
rate

20 and I do it for whatever rate is appropriate once I reach
the
C
0

21 conclusion that this is what the facts tell me and I have
done

22 it for nothing and would do it for nothing again.

23 Q. But the truth of the matter is that the more you do
it

24 and the more high profile cases you do it in, the more
25 attention you get, correct?

<<< Page 93 >>>

□

I-1 4

1 A. The more wh~

2 Q. Attention.

3 A. I suppose.

4 Q. That's my understanding; Doctor, you didn't find
5 anything coercive about the statement that Jessie
Misskelley

6 made about the injuries of Stevie -- or of Christopher
Byers.

7 Is that correct?

8 A. No, that is not correct. I didn't reach any
conclusion

9 about those statements because I don't believe that the
record

10 is sufficient for me to reach a conclusion one way or the

11 other.

found 12 Q. And the remainder of it is basically because you

13 some question that you determined to be leading?

14 A. Oh, no, not at all.

- Tc. ~

15 c not what testimony was earlier?

16 A. I don't believe I said that the remainder of it was

d 17 because I merely found the question to be leading. My

than 18 recollection of your testimony was that it was much more

19 than which I would be having to explain to you.

Your 20 MR. DAVIS: Your honor, wait just a second.

0

21 honor, we'll pass the witness.

22 REDIRECT EXAMINATION

23 BY MR. STIDMAN:

will 24 Q* Doctor, when you mentioned that sometimes you

25 testify for indigent defendants. Is that correct?

<<< Page 94 >>>

□

1615

case 1 A. I believe every time I've testified in a confession

2 it has been for an indigent defendant.

3 Q. Were you told that this particular defendant over at

4 counsel table was indigent?

5 A. I believe so.

6 Q. Have you received any money in this case so far?

trips 7 A. I haven't even received my expenses for the three

ptoney. 8 I've made to Arkansas. Now, I haven't received any

tape 9 Q. Do police officers usually yell at suspects when the

10 recorder is on?

11 MR DAVIS: Your Sonar, I would object to that
12 question because this individual doesn't have any
13 expertise in the field of police interrogation, as far
as
14 his personal experience of being there to make that
15 determinat Lou.

Y
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U
j

16 S. STIDHAM: Vs not sure I understand his
17 objection.

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to
C
£
Ma
U.

18 fl CO'JRT: Well, I'm not sure it takes an expert

19 answer that question, so I'm going to allow him to
answer
*
£
ma
U-

1 20 it.*

22 ~
1 21 ;STIDHAX: Thank you, your Honor.
No, when the tape recorder is on, one gets behavioral
24 statements that are tailored to the fact that the tape
25 recorder is there and so one would not expect the yelling
to

.....- --.....- *.....a

<<< Page 95 >>>

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616

1

1 happen.

2 In ~ experience the yelling and the other improper
3 activities happen when the tape recorder is off.

4 Q. Is there any difference between cops yelling at
people in

is on 5 Los Angeles or Corning, Arkansas, when the tape recorder

6 or off?

7 A. I don't see why.

or a Q. The Prosecutor kept wanting you to ask question --

9 asked you questions about the coercive nature of the
10 statements on -- the questions and answers on page seven
that

11 he pointed out to you on the transcript, and I kind of
got the

12 impression when I was sitting over there in that chair
that

13 you wanted to talk about other examples of leading and
14 suggestion that was employed by the police. Would you
like to

15 talk about those?

16 A. Yes, I would.

0 17 THE COURT: How long are we going to be talking

18 about them?

you're 19 MR. STIDHAM: We're all tired and we know

0 20 tired and the jury looks tired---

0 21 MR. FOGLEMAN: Your Honor---

0 22 MR. STIDHAM: ---so we won't be long.

asking 23 MR. FOGLEMAN: ---we don't mind Mr. Stidham

don't 24 questions but to try to elicit some narrative, we

25 think that's proper.

your

1 THE COURT: I'll object -- I mean I'll sustain
2 objection to the invitation for a narrative. This
3 witness is capable of answering questions in question
4 form and answer rather than a narrative and that

not

objection will be sustained. The Court Reporter is
6 going to be able to go much longer.

minutes,

MR. STIDHAM: May I have just a few more
8 Judge?

THE COURT: Sure.

10 BY MR. STIDHAM:

11 ~* Doctor Ofshe, could you point to a few areas of the
12 interrogation which you feel are leading and suggestive?

13 MR. STIDHAM: Your Honor, may I use the word
14 coercive like the prosecutor used?

gander
0

15 THE COURT: I guess that's the goose and the
16 thing, isn't it? Go ahead.

o
0

17 BY MR. STIDHAM:

0

coercive
(0
0

18 ~* Could you give some examples of the police being

0

19 and leading or suggestive during the course of the

C

20 interrogation?

0

21 A. Yes, I can. Perhaps the most powerful example in my
22 opinion is the example of the eight revisittings of the
23 question of the time at which the crimes occurred.

24 The first example occurs on page -- in my numbering -

-

25 eleven -- which I believe is page three -- and this is
the

<<< Page 97 >>>

□

618

1

you point at which Detective Ridges says, "Airright, when did

2 go with them?"

3 Mr. Misskelley says, "That morning."

4 Detective Ridge says, "Nine o'clock in the morning?"

5 Jessie says, "Yes, I did. I went with them and then

6 Then they talk about walking. At that point Jessie
is

7 now saying he went there at nine o'clock in the morning.

8 believe that there is a mistyping here. I believe it's
Jessie

9 said, "Nine o'clock in the morning." But this transcript
does

10 not say that and I'll point that out. That's my
recollection.

11 In any case he agrees or says that it was nine
o'clock in

12 the morning. There is no follow-up at that point. The
tape

13 recorder is on. Nine o'clock in the morning is grossly
14 inaccurate as everyone knows.

15 Detective Ridge has testified in hearings that that
was

16 the first time that any time for this occurring happened
and

17 in his hearing testimony at page ninety-nine of the
o
C)

N

which 18 transcript. The next time the subject of the time at
(0 19 the events occurred comes up is on page nine of the first
C
reading 20 transcribed interrogation and, at this point without
C
Mr. 21 ~ I'll just point out that Detective Ridge asked Mr.
C 22 Misskelley -- he's now revisiting the subject. He asks
0
saying 23 Misskelley, "I'm not saying when they called you. I'm
24 what time was it that you were actually there in the ~
25 Mr. Misskelley says, "About noon."

Tr

<<< Page 98 >>>

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1619

mark. 1 Ridge says, "About noon?" -- and it has a question
2 Jessie says, "Yes."
3 Ridge now says something that in my opinion was an
4 attempt to manipulate Mr. Misskelley's statement about
the
5 time because Detective Ridge now says, "Okay, was it
after 6 school had let out?" This is immediately after Jessie
saying,
7 ~ "It's at noon." He's now suggesting it must be later by
8 saying, "Is it after school let out?"
9
10 Jessie says, "I didn't go to school."
Ridge now has to clarify and say, "These little
boys."
11 Jessie says, "They skipped school."

question 12 Ridge says, "They skipped school?" -- with a
13 mark.
and so 14 Then there was more discussion about their bikes
15 on. Again, there is an error. We know it's impossible
for 16 these boys to have been there at noon.
Now, 17 Going on to the third example on page nineteen.
18 it's Detective Gitchell who revisits the question of time
19 still because the time is inaccurate and he raia,~es --
"Now,
20 did you say the boys skipped school that day? These
little
0
21 boys did?" Said in that way, it's a suggestion that you
0
This 22 change your answer indicating, I'm displeased with this.
0 23
24 isn't the right answer. Did you really say would be the
emphasis on that.
"What 25 Jessie then answers. He asks -- Gitchell now asks,

<<< Page 99 >>>

□

1620

1 time did you get there?"
2 Jessie again repeats, "I got there about nine."
3 Gitchell says, "In the morning?"
4 Jessie says, "Yes." So Jessie now attempts again to
say
5 he got there at nine in the morning.
6 Now, I am of the belief that there has been
testimony
7 that Jessie was roofing that morning. I believe that

that was

8 testified to. So that would be an example if I'm correct
in

9 that belief that Jessie was somewhere -- says he was
somewhere

10 else and someone confirms that and he is now saying he
got

11 there at nine o'clock in the morning. Clearly a
12 contradiction.

13 Q. Doctor Ofshe, is there another example in the
second

14 recorded statement?

15 A. Yes. This goes on and is repeated several times.

If I
(0
statement.
16 can just illustrate one other point in the first

o
(C
17 Q. Certainly.

C,

(0
which the
18 A. There is a very important example of the way in

19 detectives refuse to allow Jessie's inaccurate statement
to

20 stand and directly manipulated Jessie's statement

through
0

21 skillful interrogation tactics.

22 So for example, on page eighteen of the transcript
at the

23 conclusion of a discussion about the supposed cult,

Detective

24 Ridge now changes the subject. There is nothing that
precedes

25 this about the timing, but now for the fourth time
revisits

<<< Page 100 >>>

□

1 the timing and this time Detective Ridge says and I
quote,
2 "Okay. The night you were in the woods, had you all been
in
3 the water?"
4 Jessie replies, "Yeah, we'd been in the water. We
were
5 in it that night playing around in it."
6 This is the first time in the record according to my
7 analysis of it and according to Detective Ridge's
testimony
8 that it is directly suggested to Jessie that the correct
9 answer is, "This happened at night."
10 Immediately upon that being suggested Jessie is --
11 responds by accepting and now he starts to use the word
"at
12 night", where he had never used it before, where he had
13 consistently said it was during the day. It is in direct
14 response to Detective Ridge's substitution and
introduction
15 into the interrogation the correct fact that this
happened at
16 night so Jessie now adopts that. That is an influence
tactic.
17 It is a way of getting someone to accept something out
of
C'
18 pressure and out of suggestion.
19 Detective Ridge follows up with his victory ~on page
20 thirty -- page twenty-four of the transcript at the
bottom
0
21 where Detective Ridge now capitalizing in my opinion on
his
22 victory at getting night into the story now seeks to do
what I

C
0

23 was describing before -- stabilize that -- by saying the
24 following -- and again, this is introduced by Ridge and
there
25 is nothing preceding it from which this follows. Re is

<<< Page 101 >>>

□

1622

1 choosing to return to this subject and he says, "Okay,
they
2 killed the boys. You decided to go. You went home. How
long
3 after you got home bef~re you received the phone call -
-
4 thirty m~nuzes or an hour?"

5 Now there has been previous testimony about a phone
call
6 to Jessie at home at nine P. M. That's what Detective
Ridge
7 is referring to. But Detective Ridge now links this up
with
8 Jessie going home and gives Jessie the choice of having
~ arrived home either thiri-y minutes or an hour before
the phone
10 call occurred, which would mean he's now suggesting to
Jessie
11 and elaborating on the story and getting Jessie to -- as
he
12 next does -- Jessie says, "Uh~ -- there's a silence and
then
13 he says, "An hour."

14 So Ridge had given Jessie a choice. You can either
say
15 you got home a half hour before the phone call or you
can say

the 16 you got home an hour before the phone call. Those are
17 only choices he's got. Jessie now chooses an hour.
the 18 Again, that's a tactic of influence. That is posing
'0
19 question in such a way that you only have two choices.
Either
(0
20 one of those choices, I win. Detective Ridge is using
that
0
21 technique.
22 Then we get to the second interrogation. That's the
last
a
U- 23 time that the time subject comes up in the first
24 interrogation. As we know at two forty-four in the
afternoon
25 -- at three-eighteen in the afternoon the first tape was

<<< Page 102 >>>

□

623

1

with 1 finished. According to Detective Gitchell no one spoke
-- 2 Jessie between then and the time that Detective Gitchell
in to 3 after meeting with the Prosecutor Fogleman -- went back
4 get the statement that is labeled "Interview of Jessie
5 Misskelley, Junior, Second Interview Conducted to Clarify
6 Previous Statement2'
that 7 The last two times you will recall that Jessie said
8 anything was brought up about time, Jessie had been

the ~ successfully moved to talk about the events happening in

10 evening instead of in the morning which is where he
started.

the ~ So now Gi~hel I comes in and on page one of the second
12 transcript begins with, "Jessie, ub -- when you got with

woods 13 boys and with Jason Baldwin when you three were in the

the 14 and them little boys come up, about what time was it when

15 boys come up to the woods?"

so -- 16 Jessie replied, '~I would say it was about five or

o * ft

0 17 five or six.

but 18 So Jessie is now moving in the direction of later

about 19 it's as if there is the original statement that ~ie made
a-

evening 20 the morning and he's being slowly moved towards the
C

a- 21 but clearly in this statement he has not gone far enough
C

22 because five or six I gather from what I've been informed

shown up 23 about the testimony is too early for the boys to have

24 at the woods.

25 Now, we have---

<<< Page 103 >>>

□

624

1

1 MR. FOGLEMAN: Your Honor, I'm going to have to

2 object to that statement ~y this witness. There is

no

early

the

minutes.

don't

that

record and

all of

heard,

notes

C

a

the

about

a-

0

C

C

o

C

0

interrogation

basis for him concluding that five or six is too

for this defendant and the defendants to show up in

woods. There is no basis for that.

6 THE COURT: Well, he's been talking for ten

I guess that's been in response to a question. I

S know. What is your objection?

MR. FOGLEMAN: Your Honor, my objection is is

he is testifying on things that are not in the

have not been testified to.

11 12 THE COURT: Doctor, I'm -- I'm assuming that

13 your testimony is based upon the testimony you've

14 the statements you've read and listened to, and the

15 given by the officers.

16

-
THE WITNESS:

17 Absolutely, your Honor, and specifically on this point the transcript says when

18

little boys come up. It is a specific statement

19

when the children arrived.

20

THE COURT: All right. Mr. Stidham.

21 BY MR. STIDHAM:

22 ~ Your last example, Doctor?

23 A. The next after failing to get the time moved to the

24

proper time, Detective Gitchell uses another

25 tactic. He now says -- and I quote from page one of the

□

1625

1 second transcript -- "Alright, you told me earlier around
2 seven or eight. Which time is it?"

3 And there are two important things about this. The
first
4 one is it's obvious that Detective Gitchell is doing the
same
5 thing that Detective Ridge has done earlier -- giving
Jessie a
6 choice. Pick one and I win or pick two and I win --
either
7 seven or eight.

8 Gitchell can live with either answer and he's giving
9 Jessie only those two choices. But what's even more
important
10 about this is that nowhere in the record, including the
record
11 of what the detectives say, the notes, the specific
statements
12 by Detective Ridge, the transcript of the first
interrogation,

13 is there any indication that Jessie ever said -- as
Detective
14 Gitchell says, "You told me earlier around seven or
eight."
N

15 There is an absolute absence of anything indicating that.
16 That's extremely important to me because what this
17 illustrates is the legitimate interrogation tactic of
making
18 up evidence, or overstating, inaccurately stating the
19 evidence. This is something that happens in police
20 interrogations all the time. It is not something that it

is
0

It is 21 my understanding is improper in police interrogations.
22 something I see all the time and it is a tactic for
review 23 manipulating the suspect and, in this case, based on my
Ridge 24 of the evidence there is no place at which Jessie told
25 -- told Gitchell that they had arrived there at seven or

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I

1 eiTht. And in fact Detective Ridge in his testimony in
the 2 hearing takes very clear that the very first time any
time 3 came up was when ~es:ic said, "~inc o'clock in the
morning."
4 And we have ~ C Dlotc record of every utterance from that
5 point forward. So Detective Ridge who was present with
tape no 6 Detective Gitchell. says prior to the beginning of the
prior to 7 time was mentioned and we note every mention of time
8 that.
9 So it's my opinion :hat this is a tactic and it's a
very
10 effective tactic 5ecau~e Jessie now simply repeats back
to
11 Detective Gich~ll what Gitchell told him. ~-Ie says,
"It was
12 seven or ci~ht." Tessie doesn't even make a choice. ~e
just
13 tells Gitchell everything that Gitchell told him. That's
an

not 14 indication of someone who is willing to comply and does
therefore want to take any chances of making a mistake and
16 being punished for it through pressure.
o 17 Then there's some more discussion of that and -- and
it
0
0
18 changes again. But that's one example. There are many
other
a:
19 examples of -- of illustrations of manipulation on
important
20 points throughout this record.
0

21 ~ Thank you, Doctor.
a:
o 22 MR. STIDEAM: Pass the witness.
a:
23 RECROSS~ EXAMINATION
24 BY MR. DAVIS:
25 ~ Doctor, just one question. It's certainly an option
for

<<< Page 106 >>>

□
there. I 1 Jessie Misskell.ey to make the statement, I wasn't
don't 2 didn't kill anybody. I didn't see anybody killed. I
that he 3 know anything about that. That is certainly an option
not? 4 could have used ½ talking to t~e police off i~ ~s, is it
5 A. Yes1 it is ~nd may I explain?
further 6 MR. DAVIS: Your qonor, I -- I have no
7 TIestions.

8 MR. STtDH~M: Your Uonor, I would like to
give the
9 witness the opportunity to explain that since the
10 prosecutor brought it u~.
11 MR. '!~VTS: Your !~onor, I don't think that
question
12 calls for ~ response.
13 MR. STTDTIAM: Well, then it wasn't a
question.
14 '1?. DWIS: Other than -- other than a yes or
no
15 response.
16 MR. STT!)~AM: Your ~onor, may the witness
please
17 explain his answer?
o
a
C
18 TqE COURT: What -- what is the -- what
ex~ianation
19 is necessary to that -- your answer?
N
20 T~IE NITNESS: The presumption that that's an
option
0
21 presumes that the person does not feel pressure and
in
22 fact the scientific literature -on the subject of
when one
23 gets a coerced compliant confession is when the
24 individual feels that they have no choice, cannot
escape
25 the situation---

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and

1 MR. DAVIS: Your honor---
2 THE COURT: And can no longer resist

3 therefore simply give up resisting and comply.

4 MR. STIDHAM: Nothin; further, your honor.

5 RE-CROSS EXAMINATION

6 BY MR. DAVIS:

being

7 Q. Doctor, just one more time. When the person is

and

8 asked questions and they don't know anything about it,

say, I

9 they don't know any of the details, they can always

know the

10 don't know. They don't know anything about it. They don't

that,

11 details you're asking me about. They can always say

12 can't they?

which

13 A. They can and sometimes they get to the point at

14 they can no longer do that and so they simply give up.

15 THE COURT: Alright, anything else?

16 THE STIDHAM: No your Honor.

17 (WITNESS EXCUSED.)

a

18 THE COURT: Do you have any other witnesses?

c

19 MR. STIDHAM: Your Honor---

mean
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20 THE COURT: I'm not asking for it right now. I

21 we've---

22 MR. CROTHER: Your Honor, we -- we are debating

1 *'

we'll---

23 recalling one witness for the one question and

few

24 MR. STIDHAM: Your Honor, if I could have a

25 mLnutes with Mr. Crow, I think we can make a
decision

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

STATE OF ARKANSAS

PLAINTIFF

VS.

NO. CR-93-47

JESSIE LLOYD MISSKELLEY, JR.

DEFENDANT

PRETRIAL AND TRIAL PROCEEDINGS

CORNING, ARKANSAS

VOLUME 9

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BEFORE THE HONORABLE:

DAVID BURNETT, CIRCUIT JUDGE

BARBARA J. FISHER
OFFICIAL COURT REPORTER
P. O. BOX 521
PARAGOULD, AR 72451-0521
(501)236-8034

1 Q. But you're telling this jury that you know positively
2 where you were on May the fifth?

3 A. May the fifth.

4 Q. And you didn't talk to anybody about it until this past
5 Sunday?

6 A. Right.

7 REDIRECT EXAMINATION

8 BY MR. STIDHAM:

9 Q. Was Jessie Misskelley with you on May the fifth in Dyess,
10 Arkansas?

11 A. He sure was.

12 Q. Between the hours of seven-thirty and eleven-thirty P.
13 M.?

14 A. He was.

15 (WITNESS EXCUSED.)

16 DOCTOR RICHARD OFSHE

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

19 DIRECT EXAMINATION

20 BY MR. STIDHAM:

21 Q. Please state your name for the Court.

22 A. Richard Ofshe.

23 Q. And what do you do for a living, Mr. Ofshe?

24 A. I'm a professor of sociology at the University of
25 California at Berkeley.

1 Q. Okay. Can you tell the Court and the jury a little bit
2 about your education and background?

3 A. I received a Bachelor's Degree in psychology from Queens
4 College of the City University of New York, and then a
5 Master's Degree in sociology from the same institution, and
6 then a Ph.D. in the sociology department of Stanford
7 University with a speciality in a sub-field called social
8 psychology.

9 Q. Would you explain to the Court and the jury what social
10 psychology is?

11 A. Social psychology is a speciality area that is found both
12 within psychology and within sociology. It has to do
13 principally and particularly the part that I specialize in --
14 it has to do with influence, decision making, belief, and
15 attitude change, techniques of pressure and coercion and I
16 specialize particularly in extraordinary techniques control
17 and influences.

18 Q. Do you have any experience or training in the area of
19 influence and more specifically in the area of influence with
20 regard to police interrogation?

21 A. All my work for the last thirty years or more has been on
22 the subject of influence starting out doing work in
23 traditional problems -- excuse me -- traditional problems in
24 social psychology having to do with decision making, group
25 influence, interpersonal influence.

1 Then starting about the early part of the nineteen
2 seventies I became interested in complex real world systems of
3 influence. That is to say not laboratory research, but rather
4 studying on-going very complicated influence environments and
5 particularly those kinds of environments that have massive
6 effects on individuals.

7 So initially I did a lot of work for about ten or twelve
8 years studying what are called cult groups. That is to say
9 groups that are very strongly organized, that exert enormous
10 pressure on individuals and that can lead individuals to
11 change the way in which they see the world and be willing to
12 take part in activities that they otherwise would ordinarily
13 not take part in.

14 During -- and I specialized in studying cult groups that
15 generate violence. During that period of time I did a great
16 deal of work often involving the analysis of groups that led
17 their followers to commit murders. I did a lot of work for
18 prosecutorial agencies, analyzing and prosecuting such crimes.

19 Then my interest in influence continued and I began to
20 become interested in the study of police interrogation. Ah,
21 police interrogation is the root of -- out of which various
22 studied round the world procedures of influence groups --
23 particularly techniques that have to do with coercing
24 confessions from individuals and generally manipulating them
25 in extraordinary ways.

1 And that work began in the late nineteen eighties and
2 since then I've done a great deal of work and written about
3 police interrogation tactics, in particular police
4 interrogations that can and does lead to coerced and/or false
5 confessions.

6 Q. Has any of your work been published, Doctor Ofshe?

7 A. Yes. I've published four or five books, and thirty or
8 more articles in scientific journals, and presented papers at
9 dozens of conferences over the years. The work on all of
10 these subjects have been published.

11 Q. Are you familiar with a Doctor Gudjonsson?

12 A. Yes, I am.

13 Q. And how are you familiar with his work?

14 A. He's one of the other people who is a specialist in
15 techniques of interrogation and influencing police
16 interrogations.

17 MR. DAVIS: Your Honor, at this time if I may
18 interrupt, as I understood it he is qualifying him as --
19 or in the process of qualifying him as an expert.
20 They're moving on to another area and I'd ask that I'd
21 have an opportunity to voir dire the witness regarding
22 his special qualifications.

23 THE COURT: Well---

24 MR. STIDHAM: Your Honor, I asked him about what has
25 been published.

1 THE COURT: You're asking about somebody else's
2 work.

3 MR. STIDHAM: Your Honor, I was---

4 THE COURT: Right now if you're qualifying him, then
5 -- then go through his qualification, his vitae, and then
6 pass him, and then if they've got any questions, then I'm
7 going to allow them to voir dire.

8 MR. STIDHAM: I think my next question will clear
9 this up, your Honor.

10 THE COURT: Alright.

11 BY MR. STIDHAM:

12 Q. Are you mentioned in Doctor Gudjonsson's book, "The
13 Psychology of Interrogations, Confessions, and Testimony"?

14 A. My work is discussed in that book, yes.

15 Q. Did you contribute to the book in any form or fashion?

16 A. Well, he asked me to review certain chapters of the book
17 and I reviewed them, and made comments, and then he thanked me
18 in the introduction for doing that, and then he also discusses
19 my work in the substance of the book.

20 Q. I also understand, Doctor Ofshe, that you've won a
21 Pulitzer Prize?

22 A. I shared in the nineteen seventy-nine Pulitzer Prize for
23 public service, yes.

24 Q. And what was that for -- I mean, what was the subject of
25 your---

1 A. That was for work I did with the publisher of a small
2 weekly newspaper in West Marin County, California. We did an
3 expose of a group called Synanon which started out as a drug
4 rehabilitation organization and turned into a violent cult
5 group that was assaulting and attempting to murder people in
6 the immediate area. It became quite a major subject and that
7 year we were lucky enough to be awarded a Pulitzer Prize.

8 Q. Are you a member of any professional associations?

9 A. Yes. I'm a member of the American Psychological
10 Association, the American Sociological Association, the
11 American Psychological Society, the Sociologic Practice
12 Association, and the Pacific Sociologic Association.

13 Q. Have you ever served as a consultant to any law
14 enforcement agencies?

15 A. Oh, yes, I have. Starting in nineteen seventy-nine I
16 served as consultant to Marin County Sheriff's Department and
17 then subsequent to that the office of the Attorney General of
18 the State of California, the office of the Attorney General of
19 the State of Arizona, the United States Department of Justice
20 -- both the tax division and the criminal division -- the
21 Prosecuting Attorney of Jefferson County, West Virginia, the
22 Los Angeles District Attorney's office, the Internal -- that's
23 not a law enforcement agency, I guess. The United States
24 Attorney's office in West Virginia, the Thurston County,
25 Washington, prosecutor's office, currently the State's

1 Attorney's office in Fort Lauderdale, Florida, and again for
2 the United States Attorney's office in West Virginia.

3 Q. Have you ever testified on behalf of the prosecution in a
4 criminal case?

5 A. I don't believe -- I'll have to look at the list of cases
6 in which I've testified.

7 Q. Well, I'll go on to the next question.

8 Do you lecture to groups regarding the influence of
9 police tactics in false confessions?

10 A. Yes, I do. I'm -- in fact I've been asked to -- in May
11 of this year to -- at the request of the Supreme Court of the
12 State of Florida -- been asked to address for a half day a
13 judicial conference in Florida on the subject of false
14 confessions.

15 Q. Have you been involved in both civil and criminal cases
16 dealing with false confessions and confessions in general?

17 A. Yes, I have.

18 Q. How many -- excuse me -- how many cases dealing with
19 confessions have you been involved in?

20 A. Confessions specifically thirteen -- I've testified
21 thirteen separate times. I've been involved in many more
22 cases. Much of the work that I do is consulting work that
23 doesn't necessarily culminate in testimony. That's why I
24 wasn't certain whether I had actually testified in this
25 criminal matter. I'm scheduled to the week after next, but I

1 can't at this moment think of another example where I already
2 have.

3 Q. Okay. Have you testified in court with regard to any
4 confessions taken on the defense side?

5 A. Yes. Most -- most of the confession cases in which I've
6 testified have been cases involving coerced or coerced false
7 confessions and, therefore, my testimony has been principally
8 for the defense in those cases.

9 Q. How many times have you been qualified as an expert in
10 the area of influence and police interrogation?

11 A. Twenty-five times.

12 Q. Twenty-five times? In both state and federal courts?

13 A. Yes, sir.

14 MR. DAVIS: Your Honor, if I might -- the question
15 was: Qualified as an expert in the area of influence and
16 police interrogations -- can we break that down? I
17 didn't hear anything in the background as far as police
18 interrogation.

19 THE COURT: Can you break it down?

20 BY MR. STIDHAM:

21 Q. Have you been qualified as a expert by any court in the
22 area of police interrogation tactics and influence on
23 individuals during police interrogations tactics?

24 A. Yes. On influence in police interrogation in particular
25 I've qualified and testified thirteen times. On influence in

1 general I've been qualified and testified an additional twelve
2 times making a total of twenty-five.

3 Q. Okay. Have these been in both state and federal courts?

4 A. Yes, they have.

5 Q. Have you ever testified in the State of Arkansas?

6 A. Yes, I have.

7 Q. And where was that at?

8 A. In Fort Smith in federal court in a case brought by a
9 young man and his family against a person named Tony Alamo who
10 ran a cult group located in Fort Smith, and the case had to do
11 with the beating of this child.

12 MR. STIDHAM: Your Honor, at this time we would ask
13 that the witness be qualified as an expert in the area of
14 police interrogation tactics and influence of people
15 involved in police interrogations.

16 MR. DAVIS: Whether or not he's qualified as a
17 expert is what we would like to address in voir dire.

18 THE COURT: Alright.

19 VOIR DIRE

20 BY MR. DAVIS:

21 Q. Doctor Ofshe, you are a social science professor at the
22 University of California at Berkeley. Is that correct?

23 A. I'm a professor in the sociology department.

24 Q. Okay. And what -- so you teach sociology. Is that
25 right?

1 A. I teach specifically courses in social psychology and
2 courses on extreme techniques of influence including police
3 interrogation.

4 Q. You are not a licensed psychologist, correct?

5 A. Ah, that's correct.

6 Q. Okay. You can't practice psychology in California or any
7 other state, can you?

8 A. Ah -- no, I don't practice clinical psychology which is
9 -- what is generally licensed.

10 Q. Okay. And would it be a fair statement to say that
11 psychology is different from social -- sociology in that
12 sociology deals with group activities?

13 A. No, that's a very general and unhelpful definition.
14 Social psychology which is an area that I work in is an area
15 that's represented in both disciplines and I'm a member of the
16 professional association of both disciplines. Both
17 disciplines maintain sub-sections called social psychology and
18 social psychology deals with a very special set of topics that
19 has to do with influence on individuals, decision making,
20 attitude change, interpersonal and group pressure.

21 Q. Are you a licensed social psychologist?

22 A. It's not necessary to be licensed to be a social
23 psychologist because I don't treat anyone.

24 Q. Is there such a thing as a licensed social psychologist?

25 A. No.

1 Q. Okay. In other words---

2 A. Because it does not engage in the treatment of people
3 it's generally not licensed.

4 Q. Okay. So there are sociologists and there are people
5 that hold themselves out to be social psychologists, correct?

6 A. People who are members of the requisite professional
7 associations and members of the sub-sections that are
8 specialities in social psychology and I'm a member of both and
9 in each case as a social psychologist.

10 Q. How many states and how many courts have refused to
11 accept you as an expert in this work?

12 A. No state has ever refused to accept me as an expert.

13 Q. How many courts?

14 A. There's one case in which a line of testimony to which my
15 testimony would have been foundational was rejected. It has
16 to do with whether or not a certain theory---

17 Q. Where was that?

18 A. That was in California.

19 Q. Okay.

20 A. That had to do with whether or not a certain line of
21 testimony was appropriate for the insanity defense and in that
22 case the judge barred that line of testimony.

23 Q. As far as -- what is it that you studied in relationship
24 to this case?

25 A. In this case in particular I have studied the following

1 materials: The police reports and notes of Detectives
2 Gitchell, Ridge, and Durham, the transcript of the first tape
3 recorded interrogation of Jessie Misskelley, the transcript of
4 the second tape recorded interrogation of Jessie Misskelley.
5 I've listened to the tape recordings of both interrogations.
6 I studied the transcript and the video recording of an
7 interview of Buddy Lucas. I've studied the treatment records
8 of Jessie Misskelley at East Arkansas Mental Health Center.
9 The transcript of a hearing in which Detective Ridge sought
10 his search warrants from Judge Rainey. I attended a hearing
11 in this case on January the thirteenth, nineteen ninety-four
12 at which I heard and saw the testimony of Detectives Allen,
13 Durham Ridge, and Gitchell with respect to what occurred
14 during the interrogation. And I subsequently reviewed the
15 transcripts of that hearing and then I interviewed Jessie
16 Misskelley on December the fifteenth, nineteen ninety-three,
17 and have subsequently carefully reviewed, and studied, and
18 analyzed the transcript of that interview.

19 Q. How long was that interview?

20 A. Three hours, more or less. It may have a bit more. It
21 may have been a bit less. I don't have the -- I don't have
22 that -- it might be helpful. It worked out to an eighty-seven
23 page transcript.

24 Q. You talked with Jessie Misskelley for three hours. Is
25 that right?

1 A. No. I talked with Jessie Misskelley for the length of
2 time it took to produce this transcript here.

3 Q. And you reviewed testimony of the police officers?

4 A. I reviewed their reports. I reviewed the actual
5 transcript of the one part of the interrogation that -- or the
6 two parts of the interrogation that were tape recorded. I
7 studied and analyzed their notes, studied and analyzed their
8 testimony.

9 Q. And what scientific basis is it that you intend to give
10 an opinion on?

11 A. Well, the first thing that's necessary is to try to get a
12 clear picture of the history of the interrogation of exactly
13 what happened step-by-step. Subsequently, that---

14 Q. --If you could---

15 A. Yes.

16 Q. What scientific basis and what scientific tests are you
17 basing your opinion on that you -- that the defense is
18 proposing that you testify to?

19 A. It is based on the literature on the subject of
20 influence, and particularly what is known about techniques of
21 influence, the conditions that lead up to coerced confessions.
22 The analysis that I will do on this involves specifying the
23 pattern, what happened during the interrogation---

24 Q. --What scientific basis is it based on? Not what your
25 procedure is, but what scientific basis is your opinion

1 grounded in?

2 A. The opinion is grounded in the research on what is known
3 about the conditions that lead up to coerced confessions.
4 There are patterns of conduct that are known to lead to
5 coerced confessions. There are consequences that follow from
6 those patterns that are generally used to identify a coerced
7 confession. There are criteria that are used to judge whether
8 or not a confession is coerced or is not coerced, and whether
9 it is a confession that appears to be the product of influence
10 or appears to be the product of memory.

11 Q. Again -- is that -- is that based on empirical studies?

12 A. Oh, yes.

13 Q. And those empirical studies would have to determine which
14 confessions were coerced and which were not coerced in order
15 for those studies to have any validity, correct?

16 A. Well, there are studies of confessions---

17 Q. Would you answer my question, please, sir? You would --
18 you would have to determine -- someone would have to determine
19 was a confession coerced or was it voluntary before those
20 studies would have any validity?

21 A. The studies of confessions are often broken down into---

22 MR. DAVIS: Your Honor, could you ask him---

23 THE COURT: Answer yes or no and then -- then I'm
24 going to allow you to explain your answer.

25 THE WITNESS: Okay.

1 THE COURT: If you can, answer yes or no. If you
2 can't, just say, "It's not capable of being answered yes
3 or no."

4 THE WITNESS: It's not capable of being answered yes
5 or no. I could probably answer your question if you'll
6 allow me to explain why it's not capable.

7 THE COURT: Well, I don't want to allow a long
8 narrative discourse. If you can answer the question
9 concisely then proceed.

10 BY THE WITNESS:

11 A. The validity -- the truth or falsity of a confession is
12 certainly important and sometimes it's possible to know
13 whether a confession was in fact true or false. There have
14 been studies -- a lot of studies are done on what are called
15 disputed confessions as opposed to undisputed confessions, and
16 the undisputed confessions are more important because it is
17 known whether or not the confession was true or false.

18 Q. Well, if your studies are based -- is there empirical
19 data that you're basing your opinion on?

20 A. Yes.

21 Q. Okay. Those studies would have to say -- you would have
22 to presume that a confession was coerced for those studies to
23 have any validity, correct?

24 A. No. Sometimes one knows that a confession is false and
25 therefore coerced because of -- of independent factors, such

1 as knowing -- eventually identifying who the real killer might
2 be.

3 Q. But in those studies for those to have any value at all
4 scientifically, somebody has to make a determination that the
5 confessions were coerced or not, correct?

6 A. Not necessarily because we know the conditions that lead
7 up to confessions that are undisputed where individuals give
8 true confessions and do not recant them, and we know under
9 other circumstances when people give false confessions which
10 are subsequently proven to be false because the perpetrator is
11 in fact caught.

12 Q. Well, let me ask you this: How would you characterize
13 the situation where you said it was a false confession and a
14 court determined that it was not a false confession, where
15 would you categorize that?

16 A. I don't know that I've ever said that something was a
17 false confession. I know I've testified as to whether
18 something was coerced or not.

19 Q. So you -- as far as this talk previously about false
20 confessions you don't deal in that area?

21 A. No. I -- the question suggested to me, you're asking me
22 about a time when I testified in a court that a confession was
23 false, and it was judged the other way and I don't believe
24 that that's ever occurred.

25 Q. Have you not testified as to inaccurate contents of

1 confessions in a court and the jury disregarded that and ruled
2 another way?

3 A. I testified I believe in one case in which I testified
4 that in my opinion a particular confession was coerced and the
5 confession was not suppressed and I've testified in other
6 cases where it is my opinion that a confession was in fact
7 coerced and the court found that way.

8 Q. Okay. Well---

9 MR. CROW: May we approach the bench, please?

10 THE COURT: Alright.

11 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT
12 OF THE HEARING OF THE JURY.)

13 MR. CROW: Your Honor, is he qualifying this witness
14 or is he cross examining him?

15 MR. DAVIS: Your Honor---

16 THE COURT: Well, I'm going to be honest, gentlemen,
17 I'm real interested in knowing what a sociologist is
18 going to testify to that would aid and benefit the jury
19 and what is the scientific basis of that testimony. It
20 seems to me that you've called this witness to give an
21 opinion that the confession was coerced---

22 MR. STIDHAM: That is---

23 THE COURT: ---and that it was involuntary.

24 MR. STIDHAM: That's exactly right, your Honor.

25 THE COURT: And I think that -- that's a question

1 for the jury to decide and I'm not sure I'm going to
2 allow him to testify in that narrow framework. I can see
3 him having value testifying that these are common
4 techniques employed by the police overrides one's free
5 will. I found such and such of these conditions
6 prevailing here and things of that nature, or maybe group
7 dynamics of a cult.

8 MR. CROW: Your Honor---

9 THE COURT: But I'm not sure I'm prepared to allow
10 him to testify that in his opinion it's coerced and
11 therefore invalid.

12 MR. CROW: Your Honor---

13 THE COURT: I mean, what the hell do we need a jury
14 for?

15 MR. STIDHAM: He's not going to testify whether or
16 not the confession is false or true or whether the
17 defendant is guilty or innocent. He's going to testify
18 to the voluntary nature of the confession -- statement to
19 the police -- whether or not it was coerced. That's an
20 issue that the jury has to decide and that's what an
21 expert witness is for, to help the jury decide these
22 issues.

23 MR. DAVIS: No. No, Judge, that's where -- that's
24 the real crux of the matter -- whether the confession was
25 coerced or not, doesn't make -- whether it was the truth.

1 It's whether it was the truth and they're trying to get
2 through the back door what they can't get through the
3 front door.

4 MR. CROW: Disagree, your Honor. I---

5 MR. STIDHAM: Your Honor, that's not the correct
6 statement of the law.

7 MR. CROW: The law recognizes---

8 THE COURT: No. The -- the -- the -- I mean, of
9 course, I've ruled that it was voluntary. The jury, I
10 guess, could go back and decide that it wasn't. If
11 that's the issue you're talking about---

12 MR. CROW: That is what Arkansas law---

13 THE COURT: ---but the question of whether or not
14 psychological ploys or tools were used to get a guilty
15 person to give a true statement, now that's another
16 issue.

17 MR. STIDHAM: Your Honor, that's not what he's going
18 to testify to.

19 THE COURT: I don't know what you've got him here
20 for. What is he going to testify to? I want to know.

21 MR. STIDHAM: Your Honor, he has an opinion as to
22 whether or not the statements made by Mr. Misskelley to
23 the West Memphis Police Department were voluntary.

24 THE COURT: Is that the way you're going to couch
25 the question to him and is that the way he's going to

1 give his opinion. In my opinion they were involuntary.

2 MR. STIDHAM: Yes, your Honor.

3 THE COURT: That the police used subtle techniques
4 to cause an innocent man to confess -- to confess.

5 MR. CROW: He's not going to say whether he's
6 innocent or not, your Honor.

7 MR. STIDHAM: Your Honor, that's for the jury to
8 decide.

9 MR. DAVIS: Judge, what we've got -- they're trying
10 to get through the back door what they can't get through
11 the front. It's the same way.

12 MR. STIDHAM: Your Honor---

13 THE COURT: Well, unfortunately they might be able
14 to do that under the status of our law.

15 MR. DAVIS: Your Honor, the concern that I have here
16 is that for there to be any empirical data and for him to
17 actually claim to have any scientific basis, somebody
18 somewhere has to categorize these cases as false
19 confession cases or coercion cases. And what I'm saying
20 is that this man along with his cohorts in the field have
21 -- they label things to -- to back up or substantiate
22 their particular theories, and -- and---

23 THE COURT: Well, I think all of those go to the
24 weight of his -- weight of his testimony.

25 MR. STIDHAM: That's what -- that's what experts do.

1 If they want to bring an expert to counter them, they
2 can.

3 THE COURT: I think you can call your man to say in
4 his opinion that there was nothing that they did out of
5 the ordinary and that the statement was freely and
6 voluntarily made.

7 MR. STIDHAM: That's the correct statement of the
8 law, your Honor.

9 THE COURT: Well, we might as well get on with it.
10 I'm going to let him testify but I'm not about to let him
11 testify that in his opinion Misskelley is innocent---

12 MR. CROW: No, your Honor.

13 THE COURT: ---that his confession was a lie and
14 false. I'm not going to allow him to do that.

15 MR. STIDHAM: He has an opinion as to what---

16 THE COURT: Don't even try to ask him whether or not
17 he has an opinion whether the confession was true or
18 false, because I'm ruling that he cannot do that.

19 MR. DAVIS: I want him cautioned before we proceed
20 any further so that he doesn't blurt that out.

21 MR. CROW: Your Honor, can you give us two minutes?

22 THE COURT: Okay.

23 Well, do you understand what I'm saying? I'm saying
24 that there are areas where he has expertise that might be
25 of some benefit and that is in the areas of group

1 dynamics, in the area of -- of possible coercive or -- or
2 techniques that can be employed to make someone testify
3 -- or -- or give a statement. Now, whether or not that
4 statement is true or false is another matter.

5 MR. CROW: That's not what he's testifying about,
6 your Honor.

7 THE COURT: And I'm not going to allow him to
8 testify that, In my opinion these officers illegally
9 exacted or coerced a confession from his either. I'm not
10 going to allow him to testify to that.

11 MR. STIDHAM: That's the Court's job, your Honor.
12 That's the jury job.

13 THE COURT: Well, that's exactly right. So what is
14 he going to testify to?

15 MR. STIDHAM: He's going to testify as to -- he has
16 an opinion that this -- the statements made by the
17 defendant were involuntary and a result of psychological
18 coercive tactics employed by the West Memphis Police
19 Department.

20 THE COURT: Were involuntary in what sense?

21 MR. STIDHAM: That's what he'll testify to.

22 THE COURT: Well, I want to know. What -- in what
23 sense?

24 MR. DAVIS: Could we move in chambers?
25

(RECESS.)

1 (RETURN TO OPEN COURT.)

2 THE COURT: Alright, ladies and gentlemen, you can
3 have about a fifteen minute recess with the usual
4 admonition not to discuss the case.

5 (RECESS.)

6 THE COURT: Alright, court will be in session.

7 Alright, ladies and gentlemen, you have heard a
8 number of persons testify that have been presented and
9 characterized as expert witnesses and perhaps will hear
10 some more, and in that regard I'm going to give you an
11 instruction of law that you should consider and it will
12 again be read to you at the time all of the instructions
13 are given.

14 An expert witness is a person who has special
15 knowledge, skill, experience, training, or education on
16 the subject to which his testimony relates. An expert
17 witness may give his opinion on questions and
18 controversies. You may consider his opinion in the light
19 of his qualifications and credibility, the reasons given
20 for his opinion, and the facts and other matters upon
21 which his opinion is based. You are not bound to accept
22 an expert opinion as conclusive, but you should give it
23 whatever weight you think it should have. You may
24 disregard any opinion testimony if you find it to be
25 unreasonable.

1 Alright, gentlemen, let's proceed.

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

3 THE COURT: Sure.

4 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT
5 OF THE HEARING OF THE JURY.)

6 MR. STIDHAM: I assume that the witness has now been
7 qualified and I can go on with my questioning?

8 THE COURT: Again, I never make that statement. I
9 just tell you to proceed.

10 MR. STIDHAM: Thank you.

11 (RETURN TO OPEN COURT.)

12 THE COURT: Do you have any additional voir dire?

13 MR. DAVIS: No, sir, your Honor, not at this time.
14 We'll reserve it for cross examination.

15 THE COURT: Alright. Alright, you may proceed.

16 MR. STIDHAM: Thank you, your Honor.

17 CONTINUED DIRECT EXAMINATION

18 BY MR. STIDHAM:

19 Q. How many confessions has you analyzed, Doctor?

20 A. I've been requested to analyze a total of forty-eight
21 separate interrogations leading to confessions.

22 Q. Okay. Have you ever taken a coerced confession or a
23 false confession from someone?

24 A. Yes, I have.

25 Q. Can you give us an example of that?

1 A. In one particular case I was called in by the prosecution
2 with the putting together the investigation of what was
3 believed to be a multiple murder and sex abuse crime case. In
4 the course of my work on that case -- again at the request of
5 the prosecution -- I had access to an individual who was
6 confessing to all manner of heinous crimes.

7 In the course of my interviewing of him I began to become
8 suspicious as to the validity of the confessions that he had
9 been giving now for five months on a series of subjects. At
10 that point after hearing from him what happened during the
11 interrogation and certain other things about his reactions to
12 the interrogation, I determined that there was a possibility
13 that he had been falsely confessing and I determined to run an
14 experiment.

15 I then invented a crime on the spot and told him that one
16 of his sons and one of his daughters had said that he had done
17 something in particular to them, and asked him if he could
18 remember it. Initially he said, "No." He then started using
19 the techniques that he had been using to try to remember these
20 events and I simply allowed him to do that -- in fact, sent
21 him away and asked him to continue doing this alone and within
22 twenty-four hours using the techniques that he had learned in
23 the course of his five month long interrogations, he produced
24 for me the next day a three page written detailed confession
25 including dialogue that supposedly happened during the crime

1 -- to a crime that never happened that I invented and that the
2 daughter who was supposedly involved in it confirmed never
3 happened.

4 I then concluded that this was a highly suggestible
5 individual because I had now succeeded with very minimal
6 effort in eliciting a false confession from him.

7 Q. Have you been ever -- excuse me -- have you been able to
8 break down your work into percentages with regards to
9 analyzing these confessions and the work you've done with
10 confessions?

11 A. Yes, I have. Of the forty-eight separate interrogations
12 I have been asked to analyze, fifty-five percent of the time
13 my conclusion has been that the statement that was made was
14 voluntary or it was impossible for me to make a determination
15 and forty-five percent of the time that the particular
16 statement that was elicited was either what's called a coerced
17 compliant confession or what's called a coerced internalized
18 confession -- these are two different types of confessions
19 generally two different types of false confessions.

20 Q. Could you tell the jury the difference between these
21 types of confessions?

22 A. In the literature on interrogation and confession it was
23 recognized that there are two kinds of involuntary and false
24 confessions. One kind is called coerced compliant. This is a
25 -- an inaccurate -- that is to say false statement -- that

1 comes about because an individual can no longer stand the
2 strain of the interrogation and knowingly gives a statement
3 that they know to be untrue.

4 The other kind is much more complicated. It's called a
5 coerced internalized confession and this kind of statement
6 arises when an individual actually becomes convinced that he
7 or she has committed a crime that they had nothing to do with.

8 The second kind of confession comes about out of the use
9 of very special or very extraordinary influence techniques
10 that operate in a particular way. It can occur by accident in
11 the course of an ordinary police interrogation, but if it
12 occurs certain things have to be present in the interrogation
13 and they have to happen in a certain sequence in order to
14 persuade someone that they've committed a crime of which they
15 are innocent.

16 The far more common kind of coerced statement is the
17 coerced compliant statement when the individual simply gives
18 up and agrees to say whatever they need to say because they
19 can no longer stand the strain of what's going on.

20 Q. Doctor, is it possible for police interrogation tactics
21 to produce a false confession?

22 A. Yes. I don't know of any -- any researcher, any scholar
23 in this area -- who works in this area who does not
24 acknowledge that false confessions come about in the course of
25 police interrogation, and in fact, a few years ago there was a

1 landmark study of miscarriages of justice in capital cases in
2 American history. A study done by Professors Bideau
3 (phonetic) of the University of Michigan and Ratalid
4 (phonetic) of the University of Florida published in the
5 Stanford Law Review.

6 In this study they identified three hundred and fifty
7 examples of miscarriages -- false convictions in capital cases
8 in American history. And using the standards that they
9 developed to judge whether or not a particular conviction was
10 a miscarriage of justice -- in other words an improper
11 conviction -- they identified three hundred and fifty examples
12 in which by their criteria, which often had to do with the
13 real killer being found, the person ultimately being pardoned
14 -- standards of that sort -- they identified three hundred and
15 fifty examples where the jury had found someone guilty who was
16 in fact innocent.

17 In that study nineteen percent of the miscarriages were
18 caused by false confessions given by---

19 MR. DAVIS: Your Honor---

20 BY THE WITNESS:

21 A. ---the suspects.

22 MR. DAVIS: ---I have an objection to make and I
23 think it would be more appropriate if I made it at the
24 bench rather than---

25 THE COURT: Alright.

1 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT
2 OF THE HEARING OF THE JURY.)

3 MR. DAVIS: The Court laid down certain ground rules
4 and now we're talking about percentages in terms of false
5 -- false confessions. We aren't talking about opinion.

6 THE COURT: I'm interpreting this as an -- as an
7 attempt to -- to use coercive techniques on the jury to
8 suggest to them that this is a false confession and that
9 there is danger on their considering the confession and
10 that it suggests to them that they have to be very
11 careful not to make a three hundred and fifty error --
12 whatever the percentages were.

13 Gentlemen, that's -- that's a -- I'm---

14 MR. FOCLEMAN: I thought this would -- what they did
15 is exactly what the Court had told them not to do.

16 MR. STIDHAM: No, your Honor, I asked the witness if
17 there were empirical scientific studies and he was simply
18 relating those to the jury.

19 THE COURT: Well, I don't care. You're still making
20 inferences that by these statements that this particular
21 statement was false and untrue.

22 MR. CROW: Your Honor, if I can interject.
23 Yesterday I objected to questions that -- where Mr.
24 Holmes stated that ninety-nine percent were real, or
25 something like that. That's empirical data that's -- now

1 the shoe is on the other foot.

2 THE COURT: Well, no, in that particular case I
3 think you offered it or it came up through your all's
4 testimony and he brought it out---

5 MR. CROW: No.

6 THE COURT: ---is the way I recall it.

7 MR. CROW: I don't think that's correct, your Honor.

8 THE COURT: Well, I may be wrong on that. This is
9 totally different. This has done just exactly what I
10 indicated I wasn't going to allow.

11 MR. DAVIS: Judge, and that's what's going to happen
12 because of this witness as you surmised. He's very
13 astute. He's very smart, and he's going -- he's going to
14 slip around the ground rules and we're sitting here
15 talking to a jury in terms of percentages of cases in
16 which there's been a false confession.

17 THE COURT: I'm going to sustain the objection.

18 (RETURN TO OPEN COURT.)

19 THE COURT: Objection sustained.

20 MR. DAVIS: Your Honor, could we ask the jury to
21 disregard this last -- to be admonished to disregard---

22 MR. STIDHAM: Your Honor, I would object to an
23 instruction of that nature. The witness is merely
24 relating scientific studies and empirical studies with
25 regard to that issue.

1 MR. DAVIS: In an area---

2 MR. STIDHAM: I would be happy to move on and ask
3 him about how he analyzes the---

4 MR. DAVIS: The concern we have, Judge, is we
5 understood he was relating things that are outside the
6 area of his expertise.

7 MR. STIDHAM: That's not at all the case, your
8 Honor.

9 THE COURT: Go ahead. Move on to something else and
10 I'll see.

11 BY MR. STIDHAM:

12 Q. Doctor Ofshe, are certain individuals more susceptible to
13 coercive police tactics than others?

14 A. Generally, it's been found that individuals who are
15 lacking in self-confidence, low self-esteem are more
16 persuadable and also more likely to respond to coercive
17 tactics. Individuals who are mentally handicapped are also at
18 risk to responding to coercive and overly persuasive tactics.

19 Q. Can you tell the jury what it is that you do when you
20 analyze a confession?

21 A. Ah, that -- that starts with determining whether or not
22 the interrogation has been tape recorded. If the
23 interrogation has been tape recorded in its entirety, then the
24 analysis of the influence process during the interrogation is
25 time consuming and -- is time consuming, but is fairly

1 straightforward. When police agencies have not tape recorded
2 the interrogation, the problem becomes much more complicated
3 because it becomes necessary to try to reconstruct the events
4 of the interrogation from the available information. So that
5 in a case such as this case in which part of the interrogation
6 was recorded and most of it was not, it becomes necessary to
7 first try to identify what actually happened in the
8 interrogation and the order in which things happened to then
9 relate that to the statements that are undisputed. That is to
10 say that parts of the interrogation which are recorded so that
11 one can hook up the analysis or hook up the history of the
12 interrogation as it occurred in the unrecorded part but as
13 reported on by the police officers involved as well as the
14 suspect, in order to try to rebuild and get a picture of how
15 the interrogation progressed from start to step-by-step-by-
16 step, and the changes that occurred over the course of the
17 interrogation.

18 Now, in this particular case this culminates in the two
19 recorded statements which give us a great deal of information
20 about what happened during the interrogation and illustrate
21 certain things about the tactics that were used and the
22 suggestibility of the suspect in terms of how he responded to
23 particular tactics that are -- that are simply captured in the
24 recorded part of the interrogation.

25 Then because it is -- has been reported on in the

1 literature as to the kinds of ideas that develop in people's
2 minds in response to extremely pressured interrogations, I
3 usually---

4 MR. DAVIS: Your Honor, at this time, if I may --
5 first enter an objection. He keeps referring to "as
6 reported in the literature". Can he be more specific
7 about what he's referring to? I don't know if these are
8 books he's written or if it's something from other
9 sources.

10 MR. STIDHAM: Judge, that's exactly what I was
11 trying to elicit from the witness before when he
12 objected.

13 MR. DAVIS: Your Honor---

14 MR. STIDHAM: The scientific studies in this area
15 that's what he was trying to testify about when the
16 prosecutor objected.

17 MR. DAVIS: Your Honor, the -- if I may explain.
18 The reason I objected was because he was going into
19 scientific literature which as I understood it the Court
20 has ruled was beyond his area of expertise and that's
21 exactly why I wanted him to -- to be more specific
22 because he keeps referring to the literature and if I
23 don't know what it is, I don't know whether that
24 literature is valid literature. I don't know if it's
25 something he has expertise in, or I don't know if it's a

1 comic book.

2 THE COURT: Okay, I think my ruling was that it
3 invaded the province of the jury and that it was an
4 ultimate question for the jury that exceeded the scope of
5 his capabilities. That was my ruling. But that was to a
6 narrow portion of it.

7 I think what you're raising now -- if you're asking
8 about the underlying data or information or scientific
9 research that he -- he's utilizing, I think you're
10 entitled to know that.

11 MR. STIDHAM: I'd be happy to---

12 THE COURT: However, I think you're entitled to
13 bring that out on cross examination. So I'm going to let
14 you develop it on cross examination.

15 You might have him refer to any treatise or any
16 scientific journal or -- that he's referring to and when
17 he says "literature", and then you can develop it
18 further.

19 MR. DAVIS: Judge, one other thing. He -- he
20 indicated -- as I understood it -- that his analysis
21 would be based on a reconstruction of the period prior to
22 the taped confession, and it's my understanding that that
23 reconstruction would require him to presume facts not in
24 evidence and to base that upon speculation and upon
25 statements -- out of court statements made by other

1 individuals and we would strenuously object to him being
2 able to give an opinion or to "reconstruct" something
3 based on such speculative premises.

4 MR. STIDHAM: Your Honor, there's nothing
5 speculative about it. In fact the rule is very clear
6 that he can base his opinion on such things. We
7 discussed that earlier.

8 THE COURT: I'm not sure I'm going to allow him to
9 reconstruct, if that's what you're referring to. I'm
10 going to allow him to testify based upon his learning,
11 education, publications, and so forth in the field of
12 social -- what was the field, Doctor?

13 THE WITNESS: Social psychology.

14 THE COURT: Social psychology. Okay, and I'm not
15 real sure what that is, but I am real sure about what I
16 told you I wasn't going to let in because that's for the
17 jury to decide, and I'm not going to substitute this
18 witness's opinion for theirs.

19 Alright, so let's proceed. You all know where we
20 stand.

21 BY MR. STIDHAM:

22 Q. Let's back up to the scientific studies in this area,
23 Doctor Ofshe, that you're familiar with with regard to
24 influence in police interrogation tactics.

25 You mentioned the Stanford Law Review article. Are there

1 any other treatises or studies you can refer to?

2 A. Yes. The book you held up before is perhaps the
3 authoritative work in the area at this point by Professor
4 Gudjonsson and he cites numerous studies by himself by
5 hundreds of other people that all contributes to the analysis
6 of police interrogation.

7 Q. Are these theories and empirical studies commonly
8 accepted by professionals in your field?

9 A. Yes.

10 THE COURT: Are they in universal acceptance?

11 THE WITNESS: The empirical studies are research
12 based studies that people don't dispute the honesty of
13 the researchers. They provide data. I think the data is
14 accepted. The theories are not particularly esoteric, so
15 that these are very data based studies. They have to do
16 with studying the conditions, for example, under which
17 individuals make the decision to confess when in fact
18 they committed a crime. In other words, when
19 interrogation is effective and when it elicits certain
20 sorts of decisions, and they have to do with conditions
21 that lead to statements that are coerced statements and
22 in particularly---

23 MR. FOGLEMAN: Your Honor, I would like to object to
24 this speech that he's making. It's not responsive to
25 what the Court's question was which is whether this is

1 universally accepted and he never said yes or no, he
2 just---

3 THE COURT: Well, I think I understand what he's
4 saying, but I guess you're right. He didn't---

5 MR. FOGLEMAN: I didn't -- I didn't get -- I didn't
6 catch him saying that, yes, it was universally accepted.
7 I think he's being evasive.

8 THE COURT: Well, that might have been a real
9 general question, too.

10 Can you answer yes or no and then continue with your
11 explanation?

12 THE WITNESS: Yes, your Honor, they're universally
13 accepted in the sense that they are data based and no one
14 disputes the honesty of the researchers who report the
15 data. The data is accepted. I then tried to go on to
16 explain that the theories are not particularly esoteric
17 arise from the data. So this is a very empirically
18 grounded line of work.

19 THE COURT: Is there contrary work?

20 THE WITNESS: Pardon?

21 THE COURT: Are there contrary theories and contrary
22 empirical data?

23 THE WITNESS: The -- the disputes would be about
24 explaining why something happens rather than whether or
25 not it happens. So that there might be different

1 theories about the impact. For example, how much is
2 attributable to personality or how much is attributable
3 to something else. But there are hair-splitting disputes
4 if everyone agrees to the basic -- that the basic
5 phenomena exists.

6 THE COURT: Alright. Go ahead.

7 BY MR. STIDHAM:

8 Q. Doctor, I believe you stated earlier what you had to look
9 at in this case with regard to Jessie Misskelley?

10 A. Yes, I did.

11 Q. You read the transcripts of his statement to the police
12 -- both statements?

13 A. Yes, I did.

14 Q. You've listened to the tapes?

15 A. Yes.

16 Q. You've also heard the officers testify at a previous
17 hearing?

18 A. Yes, I did.

19 Q. Have you formed an opinion with regard to the specific
20 issue of the voluntary nature of the defendant's statements to
21 the police?

22 A. Yes, I have.

23 Q. And what is that opinion?

24 THE COURT: Wait just a minute. Approach the bench.

25 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT

1 OF THE HEARING OF THE JURY.)

2 THE COURT: I'm not sure that's an appropriate
3 question.

4 MR. CROW: I thought that's---

5 MR. STIDHAM: I thought that's what we---

6 THE COURT: No. I mean, are we going to start
7 calling sociologists and psychologists to second guess a
8 court?

9 MR. CROW: How about, your Honor---

10 THE COURT: Are we going -- are we going -- I mean,
11 that -- I've already ruled it was voluntary. Now, am I
12 going to let a witness get up here and contradict my
13 ruling?

14 MR. STIDHAM: Kagebein versus State, your Honor.

15 THE COURT: That's not what Kagebein holds---

16 MR. STIDHAM: Your Honor---

17 THE COURT: And that is a jury issue granted.

18 MR. STIDHAM: Yes, sir.

19 MR. DAVIS: And the question is, obviously the
20 Court's given an expert opinion regarding that and we
21 can't bring that out to the jury.

22 THE COURT: No.

23 MR. DAVIS: And it's based on the same thing. It's
24 based on your review of those facts and evidence and we
25 can't bring that out.

1 MR. CROW: Your Honor, if I -- would the question be
2 allowed, have you reached an opinion as to whether the
3 statement was coerced.

4 MR. DAVIS: That's the same---

5 MR. CROW: That's one of the two things we were
6 talking about awhile ago. I'm just trying to figure out
7 what's going to work here, your Honor.

8 THE COURT: Well, my notion of his testimony is that
9 he can -- he can testify as to recognizable areas of --
10 of -- of influence, of suggestion, but to give an opinion
11 that would totally supplant the jury's function in making
12 that decision, I'm not going to allow it.

13 MR. STIDHAM: Judge, didn't we talk about this issue
14 a minute ago when you said you would allow him to testify
15 as to whether or not the statements were voluntary?

16 THE COURT: No. If I said that I didn't mean it
17 because -- I don't think I did.

18 MR. CROW: Your Honor, it would appear to me -- I
19 just want to make sure I understand what the Court
20 appears to be saying -- is that he can lay out what he
21 bases his opinion on, but not give his opinion. I
22 mean---

23 MR. DAVIS: Your Honor, we were clear on this.

24 THE COURT: Well, I think that's what he can do. I
25 think he can talk about the general principles that are

1 applied, the general notion or concepts in that area in
2 that field, but I -- I -- to allow him to testify that,
3 in my opinion the confession was involuntary does two
4 things.

5 It -- one, it -- it goes to the issue that the jury
6 will have to decide. Two, it directly refutes the ruling
7 the Court's already made.

8 MR. STIDHAM: Your Honor, an expert in a medical
9 malpractice case testifies as to whether or not there was
10 negligence on the part of the treating physician.

11 THE COURT: That's a little bit different.

12 MR. STIDHAM: Well, I don't see any difference at
13 all, your Honor.

14 MR. DAVIS: It is very analogous to a child abuse
15 situation where a doctor can testify, I found these
16 factors and these factors, they sometimes exist when this
17 happens, but they can't say, in my opinion sexual abuse
18 occurred.

19 THE COURT: It's just like the Johnson case on the
20 rape of that child. I'm going to allow him to testify
21 right up to the point of where he's giving an opinion or
22 inference that it was involuntary -- that it was coerced.

23 MR. STIDHAM: Can he use the word coercive?

24 THE COURT: It's the same thing.

25 MR. STIDHAM: Your Honor, the jury is here to decide

1 the voluntariness---

2 THE COURT: That's exactly right and he's not, and
3 that's my ruling.

4 MR. STIDHAM: This expert is here to offer an
5 opinion with regard to that issue. It will assist the
6 trier of fact in determining that issue. It's for the
7 jury.

8 THE COURT: I'm not going to allow him to testify on
9 that opinion. You can make an offer of proof if you
10 want.

11 MR. STIDHAM: Your Honor, please -- please tell me
12 what it was that I could ask him a few minutes ago that I
13 don't understand I can ask him now.

14 THE COURT: I just told you.

15 MR. STIDHAM: I can ask him what?

16 THE COURT: You can ask him to talk about the facts
17 and circumstances, the conditions that he observed and
18 that he saw these factors for what the police did, that
19 they -- that they're suggestive techniques. Those are
20 the kinds of things I'm going to allow him to testify to.
21 But I'm not going to allow him to give that ultimate
22 opinion, and I know what the rules say, and I'm saying
23 that our Court will adopt the modification that the
24 federal court made, and that you're trying to get this
25 witness to supplant the jury and to become the jury on

1 that issue. I'm not going to allow it.

2 MR. DAVIS: Judge, another thing for the record, his
3 opinion on that is based in large part on what the
4 defendant told him.

5 THE COURT: I understand that. That's another basis
6 for it.

7 MR. STIDHAM: Your Honor, will you note our
8 objection and allow us to---

9 THE COURT: Sure.

10 MR. STIDHAM: ---make an offer of proof?

11 THE COURT: Yes. You're making a record now.

12 MR. CROW: In that case if this is our offer, it
13 needs to be shown on the record that his opinion would be
14 that it was -- however the question was worded either
15 involuntary confession or coerced confession -- that is
16 how he would testify.

17 MR. STIDHAM: I want to make sure I'm crystal clear.
18 I want to follow the Court's order to a tee. Can I ask
19 this witness whether or not any of the tactics employed
20 by the police in this interrogation were coercive or
21 psychologically overbearing?

22 MR. DAVIS: Based on what he heard in their
23 testimony.

24 THE COURT: Yes, I'll let you ask those questions.
25 But the difference is you're asking him whether or not

1 this was involuntary and allow him to say, In my opinion
2 it was involuntary -- well, what does involuntary mean?
3 Does that mean the State -- or the officers did something
4 impermissible, illegal -- there are a number of things in
5 the psychological area and the sociological area that the
6 police could do that are perfectly permissible.

7 Psychological techniques are not necessarily improper or
8 wrong. From a psychologist's standpoint, he might say,
9 Well, by using these subtle techniques they caused him to
10 -- to confess. That doesn't mean that they're
11 involuntary. It means that they're good techniques. So
12 it means a lot of different things, and I'm not---

13 MR. STIDHAM: Am I allowed to ask the question---

14 MR. FOGLEMAN: Your Honor, for the record, what this
15 person is saying from a standpoint of a psychologist it
16 might be involuntary in the sense that the person didn't
17 want to say it, but it doesn't mean in a legal sense that
18 it's involuntary, and for that reason we would also---

19 THE COURT: Well, that's what I was trying to
20 enunciate just a minute ago.

21 MR. STIDHAM: Your Honor, after I ask that question
22 we would like to make an offer of proof.

23 THE COURT: I told you I would let you ask that last
24 question.

25 MR. DAVIS: Judge, that is premised on what he's

1 read in their transcript of that -- read or heard him
2 testify to.

3 THE COURT: Yes, that's correct.

4 MR. STIDHAM: That's what I just asked him, Judge.

5 THE COURT: Alright. I'll allow that.

6 (RETURN TO OPEN COURT.)

7 BY MR. STIDHAM:

8 Q. Doctor Ofshe, I need to rephrase the question for you.
9 Do you have an opinion as to whether or not some of the
10 interrogation tactics employed by the police against Mr.
11 Misskelley were coercive in nature or overborne his will?

12 A. Yes, I do.

13 Q. Could you tell the jury what that opinion is?

14 MR. DAVIS: Your Honor, I -- wait -- wait -- wait.
15 We -- I hate to object and I apologize for this, but the
16 Court just told Mr. Stidham---

17 MR. STIDHAM: That I could ask that question.

18 THE COURT: Well---

19 MR. DAVIS: He knows---

20 THE COURT: ---I think the question grew, but---

21 MR. DAVIS: It sure did. Your Honor, we would
22 object to that question and we would object to that
23 response. He knew what the question was and he went
24 ahead and extended it further beyond what the Court has
25 instructed.

1 MR. STIDHAM: I -- I asked your Honor if I could ask
2 that question and I understood that your Honor said I
3 could ask that question.

4 THE COURT: Well, you lengthened it to some extent,
5 but I'm not going to comment any further on that. I
6 don't need to.

7 Alright, ladies and gentlemen, you're going to be
8 instructed to disregard the last question and the last
9 answer.

10 And, gentlemen, my ruling is is that this witness
11 will not be allowed to testify as to the ultimate jury
12 issue. That's solely and only the province of the jury.
13 He may testify as to scientific tools, methods, notions
14 that he may possess and it will be limited to that. I
15 think we've outlined that enough up here that I don't
16 need to go on any further.

17 MR. STIDHAM: Your Honor, can I write the question
18 down and ask your Honor to approve it before I ask it?

19 THE COURT: Write it down and see if they agree to
20 it and then give it to me, then we'll get on with it.

21 MR. STIDHAM: May I have a moment, your Honor?

22 THE COURT: Yes.

23 MR. STIDHAM: I can write better sitting down.
24 Your Honor, may I approach the bench?

25 THE COURT: Sure.

1 (THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT
2 OF THE HEARING OF THE JURY.)

3 MR. STIDHAM: I hope you can read my writing.
4 (HANDING TO THE COURT.)

5 THE COURT: (EXAMINING.) I'll struggle through. I
6 think I'll go along with that.

7 MR. STIDHAM: Thank you.

8 THE COURT: Have you got any objection to that?

9 MR. FOGLEMAN: Your Honor, that's exactly what you
10 told him not to.

11 THE COURT: Well, not really. Let me -- just a
12 minute. Let me see what I can come up with.

13 Let's take a ten minute recess, ladies and
14 gentlemen, with the admonition not to discuss the case.

15 (RECESS.)

16 (THE FOLLOWING HEARING WAS HELD OUT OF THE PRESENCE
17 OF THE JURY.)

18 THE COURT: Let the record reflect this is out of
19 the hearing of the jury and it's for a proffer of proof.

20 MR. DAVIS: While we're here, can we see that
21 seventy-eight page confess -- or statement that he has
22 that's never been provided to us through discovery?

23 THE COURT: Well, I think you're entitled to it, yes
24 -- if it's going to be used.

25 MR. STIDHAM: Your Honor, we would object to that.

1 It's not going to be used. The Court ruled that it
2 wouldn't be used.

3 THE COURT: It will be used if he's going to use it.
4 If he's going to refer to it and relate to it.

5 MR. DAVIS: Well -- well---

6 MR. STIDHAM: It won't be for the jury to see and
7 have reference to.

8 THE COURT: Well, I don't know.

9 MR. FOGLEMAN: It's part of the basis of the
10 defense.

11 MR. STIDHAM: This is a proffer, your Honor, an
12 offer of proof.

13 MR. CROW: The Court---

14 MR. STIDHAM: But the jury's not going to see it.

15 MR. CROW: I believe the Court ruled that he would
16 -- basically his opinion is based on the undisputed
17 things these officers said. So if anything---

18 MR. FOGLEMAN: Well, if that's the case, if it's
19 only on the undisputed things, he's not going to have
20 anything coercive there to do. Isn't that right, Mr.
21 Ofshe?

22 THE WITNESS: No, I think you ruled -- as I remember
23 -- you ruled that this is part of the basis for my
24 opinion -- the interview I did with Jessie.

25 THE COURT: Yes, that's what I---

1 MR. FOGLEMAN: Mr. Ofshe, could I ask a question?
2 Isn't it true that if you exclude what the defendant
3 told you that you don't find anything coercive, do you?

4 THE WITNESS: Not true.

5 THE COURT: Okay. Let's -- let's do this in some
6 order.

7 Go ahead if you want to make a proffer of proof and
8 let's be sure that I know what I'm excluding and what --
9 that I know what you're attempting to put in and then
10 maybe it'll change my opinion. I don't know.

11 PROFFER OF PROOF

12 BY MR. STIDHAM:

13 Q. Doctor, have you formed any opinions with regard to this
14 case?

15 A. Yes, I have.

16 Q. Could you tell the Court your opinion?

17 A. That the statement made by Jessie Misskelley was a
18 product of the influence tactics brought to bear on him, and
19 that it overbore his initial stated intention to maintain that
20 he had nothing to do with this crime and was not there, and
21 that it was a process of influence brought to bear represented
22 by the interrogation tactics that progressively changed his
23 statements about that subject.

24 Q. Okay. Were there any other tactics in particular that --
25 that you thought were important?

1 A. The interrogation forms a process in which one step
2 builds on the preceding step. And so, for example, the
3 interrogation changes dramatically prior to and then after the
4 polygraph -- I assume it's all right at this point for me to
5 discuss the polygraph.

6 THE COURT: Yes, since we're outside the presence of
7 the jury.

8 BY THE WITNESS:

9 A. The poly -- the polygraph as used in this
10 interrogation---

11 Q. First of all, Doctor, are you familiar with Mr. Holmes'
12 report on the polygraph?

13 A. Yes, I am.

14 Q. Okay.

15 A. The polygraph as used in this interrogation has two
16 effects. One based on the opinion formed by the polygrapher
17 -- which as I'm aware Mr. Holmes says was an inappropriate
18 opinion -- that Mr. Misskelley was "lying his ass off." That
19 that created the circumstances under which the interrogators
20 could shift to a -- an accusatory interrogation, one in which
21 maximum pressure is brought to bear on the suspect and they
22 then did precisely that.

23 The second effect of the polygraph is that Mr. Misskelley
24 was told that there existed this machine -- scientific machine
25 that was recording that he had done something that he knew he

1 had not done. While Mr. Misskelley reported to me that he did
2 not believe the polygraph the fact that -- the fact that he
3 was told that contributed to his sense of helplessness that he
4 had which developed over the course of the interrogation.

5 In conjunction with the other tactics and the other
6 procedures of the interrogation the polygraph played an
7 important role in swaying the influence process that was the
8 entire interrogation and culminated with the two recorded
9 statements.

10 Q. What effect did the diagram -- the circle diagram, the
11 photographs of the body and the playing of the tapes have in
12 your analysis?

13 A. Those particular techniques as testified to by the police
14 officers and as I would understand them to fit in police
15 interrogations so far as I -- I understand police
16 interrogations and have studied them -- the technique of using
17 the circle is an important technique because in this
18 particular interrogation and consistent with what the officers
19 say, that the technique was not being used to try to suggest
20 that Jessie Misskelley that he was a suspect who was believed
21 to be culpable but rather than he possessed information that
22 was vital to the case and that the offer that was communicated
23 through that was an offer to join the police.

24 Mr. Misskelley in my interview with him when I asked him
25 about the impact of the circle technique, did not fully

1 comprehend what would follow if you could not get out of the
2 circle. He simply did not understand what the consequences
3 would be. The extent to which he could understand that was
4 characterized by him in the interview I did. He knew that it
5 was bad. He knew that it was a place where he did not want to
6 be. And he knew that if he simply conformed -- and that is to
7 say to agree with the police -- that they would take him out
8 from the center of the circle and they could join him.

9 Over the course of the interrogation as the interrogation
10 became accusatory and the offer for safe harbor was made using
11 the circle technique as what then happened after the circle
12 technique was used and based on my analysis of the sequence of
13 the interrogation, based on the notes -- the contemporaneous
14 notes of the interrogation by Detective Ridge together with
15 the testimony of the police officers -- it's my opinion that
16 that circle technique probably occurred early in the
17 interrogation. It was then followed by an hour and a half of
18 intense pressure brought to bear on Mr. Misskelley in which he
19 was told repeatedly when he said -- first he would often say
20 that he wanted to go home and he was told he could not go
21 home, that's what Mr. Misskelley reports, which for my
22 purposes contributed to the sense of helplessness that there
23 was no way to escape these pressures.

24 Over the course of this hour and a half we have Detective
25 Ridge's notes which indicate that Mr. Misskelley was now

1 beginning to talk about the existence of a satanic cult, was
2 giving the detective the kinds of statements that would
3 implicate Damion and Jason which it is my opinion that the
4 purpose of the entire interrogation and particularly the use
5 of the circle technique. The contemporaneously notes
6 illustrate the statement that Mr. Misskelley was successively
7 giving that were statements that were damning to Damien and
8 Jason. This according to Mr. Misskelley was coupled with
9 repeatedly being asked questions about the facts of the crime
10 and every time he would guess something and it would be an
11 incorrect guess even what was known about the facts of the
12 crime, Detective Ridge would be sitting there shaking his head
13 no indicating that this was the wrong answer.

14 This was repeated on several subjects and Mr. Misskelley
15 was continually pressured in this way. Mr. Misskelley
16 describes that what he learned to do was to feed back to the
17 interrogators what they were telling him happened and he
18 sought to avoid making mistakes because when he made mistakes
19 they would make him go back through the entire story and they
20 would not believe him when he repeatedly told them that he was
21 working with Rickey Deese that day and he knew nothing about
22 the crime.

23 Those repeated refusals to believe his statements about
24 where he was contributed again to his sense of helplessness.

25 Then the picture technique and the tape recording was

1 used. According to the testimony of Detective Gitchell and
2 Detective Ridge the purpose of using -- at least Detective
3 Gitchell on this point -- the purpose of using the picture was
4 to get a response from Mr. Misskelley. The object in the
5 course of an interrogation would have been -- and this is
6 still at this point -- for someone whose principal interest to
7 the interrogators to obtain statements against another, the --
8 the technique is showing a group of photographs of a murdered
9 boy was designed to put additional pressure on Mr. Misskelley
10 and it succeeded and there are descriptions in the testimony
11 of Detective Gitchell and Detective Ridge and the description
12 that I obtained from Mr. Misskelley about his reactions to the
13 use of the picture. All of those descriptions include Mr.
14 Misskelley's becoming transfixed, terribly upset by the
15 picture, staring at it, not responding to other questions, Mr.
16 Misskelley adds that it was a horrible picture and he began to
17 cry. He became increasingly upset in immediate response to
18 the use of the picture. That was followed by the audio tape
19 of a little boy's voice saying the words that the little boy
20 said.

21 Subsequent to that, Mr. Misskelley stated that -- in
22 effect he stated -- and the very words are quoted by Detective
23 Gitchell and similar words are used by Detective Ridge -- "I
24 want out." I have the exact quote and what I just quoted is
25 not exact either, but the statement that was made, was the

1 statement "I want out." A reference to the offer contained in
2 the circle that, I'll do what you want in order to escape this
3 continuing relentless pressure of the interrogation.

4 Subsequent to that and immediately following that
5 according to Detective Gitchell he got the tape recorder and
6 would get the first recorded statement. The person -- it's
7 possible now to analyze the influence process contained in the
8 first recorded statement. We now have the first undisputed
9 record in the case and in that part of the interrogation it's
10 possible to demonstrate how relentless, the leading,
11 suggestions, and an unwillingness to accept anything other
12 than what the police knew the facts of the crime to be. This
13 was continually suggested to Mr. Misskelley and we can chart
14 his moving step-by-step-by-step from an inaccurate statement
15 to a statement that was put in his mouth by the police and the
16 tape recorded part of it illustrates that. And I'm prepared
17 to go through that step-by-step to illustrate how that
18 happened.

19 Even then there were still gross inaccuracies in the
20 statement. The next thing that happened is that Mr.
21 Misskelley is left alone and Detective Gitchell meets with
22 Prosecutor Fogleman and some of the specific gross
23 inaccuracies in the -- the recorded statement are now
24 discussed and according to Detective Gitchell's statement,
25 Prosecutor Fogleman sends him back in to work on these

1 particular statements.

2 And then we can look at the second statement and show how
3 precisely that happened and how again Jessie Misskelley is
4 conforming to the demand placed on him and is changing his
5 statement from direct response to suggestions and direct
6 instructions by Detective Gitchell. There are illustrations
7 of interrogation tactics in the second part of the statement
8 that illustrate what I'm talking about and also illustrates
9 Mr. Misskelley's strategies of simply parroting back to the
10 police what they told him in order not to displease them and
11 not to be subject to additional questions.

12 That's the outline of my testimony and analysis of the
13 process of influence in this interrogation.

14 Q. And you are prepared to go through step-by-step and cite
15 page numbers of the statement to demonstrate this?

16 A. Page numbers of every statement, on every point,
17 statements made by the police officers, statements made by Mr.
18 Misskelley. These are the facts that I deal with.

19 Q. Have you also formed an opinion as to the classification
20 of his confession?

21 A. I would classify this confession as a coerced compliant
22 confession and for a number of other reasons having to do with
23 other specific statements in the confession statement and
24 gross inaccuracies in the scenario that Mr. Misskelley
25 produces, I would reach the opinion that this interrogation

1 was far more -- these statements are far more likely to be the
2 product of influence than they are based on any memory that
3 Mr. Misskelley has of the crime.

4 THE COURT: You want to ask him more?

5 MR. STIDHAM: Yes, your Honor, I---

6 THE COURT: Go ahead.

7 BY MR. STIDHAM:

8 Q. Are there any other opinions you have, Doctor, with
9 regard to the interrogation itself?

10 A. I don't believe so. I have a lot of specific
11 illustrations that I've been talking about.

12 Q. I understand that you also have some experience and
13 training with regard to cult---

14 A. Yes, I do.

15 Q. ---and you won a Pulitzer Prize with regard to working in
16 cults?

17 A. Yes, I did. I shared one, yes.

18 Q. And is it true that you have worked internationally with
19 regards to satanic cult homicides or -- or let me rephrase
20 that -- to allegations of satanic ritualistic abuse or
21 homicides?

22 A. I've consulted internationally, if Canada counts, ah,
23 specifically on an occult inspired murder which was a real
24 occult inspired murder.

25 I've consulted on other cases in which there had been

1 allegations of the existence of a baby murdering satanic cult
2 of the sort that is based on all the available evidence, based
3 on the studies done by the F. B. I., appear to be totally
4 without foundation insofar as there have now been over three
5 hundred separate investigations of allegations of child
6 murdering, child sexual abusing, secret satanic cults. None
7 of these allegations have resulted in any evidence that
8 suggests that these groups exist. This is a conclusion by
9 Kenneth Lanning of the F. B. I.

10 On the other hand, there are in my experience what I
11 would call youth culture groups that get interested in the
12 occult and these are the groups that are responsible for
13 graffiti, responsible for the undisputed animal mutilations
14 that sometimes occur.

15 The dividing line is between the murderous baby killing
16 satanic cults and the youth culture groups and the occasional
17 occult inspired criminal groups that in fact do exist. So
18 there's both a reality to it and then there's a mythical level
19 to it.

20 Q. Have you -- do you have an opinion of whether or not the
21 homicides in question Mr. Misskelley is charged with or have
22 anything to do with satanic rituals or anything of the occult?

23 A. As far as I am able to tell from what I know of the
24 evidence, there is no evidence that suggests that there is an
25 occult element to this and as far as the satanic panic tips

1 that are given to the police, my understanding is that none of
2 them have panned out. None of them has produced corroboration
3 and that they have been investigated and this is what one
4 would expect if this is an example of a satanic hysteria that
5 it's picked up by the police. This sort of thing happens,
6 when it happens, when there is a particularly heinous crime
7 for which there is no obvious explanation. This is when these
8 sorts of allegations are likely to surface.

9 Q. What are you basing your opinion on in this case -- that
10 opinion with regards to this not being a cult killing?

11 A. What I know about the follow-up, the leads that suggested
12 that there existed some cult, that Jessie Misskelley or anyone
13 else was a member of. For example, during his interrogation,
14 Mr. Misskelley provided a list of people who were supposedly
15 members of the cult, and according to the testimony of
16 Detective Ridge who followed that up was knowledgeable at the
17 time of the deaths, none of those people confirmed the
18 existence of a cult.

19 Apparently there is one individual who claims to have
20 attended a cult meeting. Apparently her testimony also -- or
21 her report is equally unconfirmed. As far as I can tell there
22 is an absence of hard information suggesting that such a
23 satanic cult exists in this area and in addition, I know of
24 nothing about the crime scene that suggests that this is an
25 occult ritual killing.

1 Q. Thank you, Doctor.

2 THE COURT: Do you want to add anything?

3 MR. DAVIS: Judge, my concern at this point and I
4 got lost in that monologue there---

5 THE COURT: Don't feel too bad.

6 MR. DAVIS: ---okay. I got lost back there about
7 the time he got to the first taped confession, but at
8 least prior to that time what I heard was Mr. Ofshe
9 talking about what Jessie told him in a statement. And,
10 Judge, there are two things about that.

11 Number one, what he has done is taken these -- a
12 statement that we've never seen, we weren't privy to, and
13 he is now going to paraphrase that statement -- or so-
14 called statement -- to the jury coming from a so-called
15 expert in some official capacity to be the basis for why
16 he finds police coercion.

17 Now, number one, we -- we objected to him coming in
18 as an expert in the first place, but assuming he is an
19 expert, if he can limit his -- his testimony to what he
20 heard the officers say in their testimony, of what he
21 read in a transcript about what the officers said, but
22 when he starts saying, "Jessie told me at this point the
23 officer really bore down on him and they spent another
24 hour and a half with him. This made him increase his
25 feelings of helplessness."

1 Now, your Honor, we can't cross examine Jessie if
2 his voice is coming through the body of Doctor Ofshe, and
3 that's what they're basically trying to do and that's
4 clearly inappropriate. He -- there is no possible way
5 that a person in his position can rely on a statement he
6 took from a person and then paraphrase it and translate
7 it to a jury. That's hearsay. It doesn't matter whether
8 it comes from him or whether it comes from someone else.
9 That's hearsay testimony.

10 He can say what he observed. He can testify how
11 that affects his opinion. He can list the facts that
12 indicate coercion. If he goes beyond that, your Honor,
13 the State feels that he's clearly gotten into a province
14 that's -- that's the sole province of the jury -- in the
15 area that's the sole province of the jury.

16 THE COURT: Alright, I've heard the proffer of proof
17 and it can be submitted as a proffer of proof, and it
18 would be my finding that the information elicited and the
19 testimony proffered not only embraces the ultimate issue
20 or facts for the jury to consider, that it in effect
21 tells the jury what their finding should be.

22 And I'm -- I'm going to apply the rule in Gramling
23 versus Jennings, 274 Ark. 346. I'm going to apply the
24 additional phrasing adopted by Congress in nineteen
25 eighty-four to Rule Eight Oh Four that says explicitly,

1 "No expert witness testifying with respect to the mental
2 state or condition of a defendant in a criminal case may
3 state an opinion or inference as to whether the defendant
4 did or did not have the mental state or condition
5 constituting an element of the crime charged or a defense
6 thereof."

7 And I think that applies here and I think the term
8 -- just reading Rule Seven Oh Four alone, it says,
9 "Testimony in the form of an opinion or inference
10 otherwise admissible is not objectionable because it
11 embraces an ultimate issue to be decided by the trier of
12 the fact."

13 The question is: What does embrace mean and our
14 court tried to define it in two or three cases. One of
15 them was that Gramling case. Another one is Aetna
16 Casualty -- that was a civil case.

17 I just think under the facts and circumstance of
18 this case, to allow him to testify in the fashion
19 tendered would be eliminating the jury and accepting an
20 expert's opinion. So the opinion of the jury is what's
21 significant to me.

22 There are some things that he testified to such as
23 the occult activity that he might properly testify to.
24 There are other things that I would allow him to testify
25 to that would be in the general nature of his expert

1 knowledge, but to give that final and conclusive opinion
2 in -- in the fashion that it's elicited -- says, Jury,
3 you must find this way - and I'm not going to allow it.

4 MR. STIDHAM: Your Honor, I understand the Court's
5 ruling.

6 THE COURT: I -- I -- everything -- everything
7 you've just said, however, I submit would be an
8 appropriate argument that you may make to the jury at the
9 proper time, and that an expert in his capacity normally
10 is employed to consult with and discuss trial strategies
11 and techniques with counsel. And if I allowed him to
12 testify based upon a -- you say a seventy-five page
13 statement taken from the defendant would be doing just
14 exactly what the prosecutor says -- allowing him to
15 testify as a surrogate.

16 MR. STIDHAM: That's why we did it as a proffer,
17 your Honor.

18 THE COURT: Yes. Well, I'm not going to allow that.

19 MR. STIDHAM: Your Honor, I understand your ruling
20 and we would just ask the Court to note our objections
21 pursuant to Rule Seven Oh Four with regard to our
22 interpretation as we discussed earlier with regard to
23 Rule Seven Oh Four.

24 THE COURT: We just made a record.

25 MR. STIDHAM: Thank you, your Honor.

1 MR. CROW: Thank you, your Honor.

2 MR. FOGLEMAN: Your Honor, we would like to make as
3 a part of the record State versus Luff, 621, N.E.2d 493,
4 which is an Ohio case in which the defendant (sic) was
5 found not qualified to testify and also United States
6 versus Fishman it's---

7 THE REPORTER: You said, "defendant." Did you mean
8 witness?

9 MR. FOGLEMAN: He was found not qualified to testify
10 as a witness, right. And also State versus Fishman,
11 which is in the Northern District of California 743
12 F.Supp. 713.

13 THE COURT: Okay.

14 MR. STIDHAM: Your Honor, likewise, we would like to
15 offer two examples of when Doctor Ofshe was allowed to
16 testify as an expert in this exact area and we would like
17 to submit those exhibits.

18 THE COURT: Alright, they may be received.

19 (DEFENDANT'S EXHIBITS NUMBER EIGHT AND NUMBER NINE
20 ARE RECEIVED AS A PROFFER.)

21 (STATE'S EXHIBITS NUMBER ONE HUNDRED SIX AND NUMBER
22 ONE HUNDRED SEVEN ARE RECEIVED AS A PROFFER.)

23 MR. STIDHAM: I'm going to make some copies and
24 have---

25 THE COURT: Sure, you can do that later if you want

1 to.

2 MR. STIDHAM: Thank you, your Honor.

3 THE COURT: Where do we stand now?

4 MR. STIDHAM: Your Honor, I think that we're at the
5 point where I can -- we can ask the jury to come back in
6 and I can read the question that -- that the Court
7 permitted. At least that's my understanding of where
8 we're at.

9 MR. FOGLEMAN: Your Honor, my only concern is
10 whether or not this gentleman is going to base his
11 opinion on -- on what this defendant told him because
12 from what he testified to in the proffer he adopted the
13 defendant's version versus the officers' version.

14 THE COURT: I think that's what he said.

15 MR. FOGLEMAN: Alright, and I think that that's an
16 improper basis of his opinion and if he's going to
17 purport to testify now about coercive tactics and adopt
18 what this defendant's told him and say things that aren't
19 in accordance with the evidence, I think the jury is
20 going to be---

21 THE COURT: I don't think that's the way I worded
22 it. I -- I allowed him to ask a question using the two
23 statements, the files and testimony that he reviewed and
24 whether or not he had an opinion as to whether or not the
25 tactics employed were suggestive or that would lead

1 Misskelley to make a statement.

2 MR. STIDHAM: And the basis of his opinion is the
3 statements and tapes that he's heard of the defendant's
4 statements to the police.

5 THE COURT: I'm going to allow him to do that. And,
6 of course, everything he just said you may use in an
7 argument to your jury if you want to.

8 MR. STIDHAM: Thank you.

9 MR. CROW: Thank you, your Honor.

10 MR. DAVIS: But the question would be restricted and
11 would not include whatever statements -- his opinion
12 would have to be based on everything except those
13 statements he received from the defendant.

14 THE COURT: I think he said he could do that.

15 MR. DAVIS: I want to be sure of that because then
16 in cross examination when I ask what specific police
17 misconduct or police coercive tactics are you talking
18 about, I don't want him to go back and say, Well, Jessie
19 told me -- or -- or even through the back door because,
20 your Honor, at least the last few hours I've come to
21 respect the witness. I know he can certainly catch you
22 when you make questions that give---

23 THE COURT: Tricky, isn't he.

24 MR. DAVIS: ---give him an opportunity to answer,
25 and---

1 THE COURT: He's an expert, you know.

2 MR. DAVIS: If he doesn't understand very clearly
3 that he is not to refer to that statement as a basis of
4 his opinion, then I think we're going to end up getting
5 it in one form or another.

6 MR. STIDHAM: Do you understand, Doctor Ofshe, that
7 you're not to refer to the defendant's statement.

8 THE WITNESS: I understand.

9 (RETURN TO OPEN COURT.)

10 MR. STIDHAM: May I proceed, your Honor?

11 THE COURT: Yes.

12 BY MR. STIDHAM:

13 Q. Doctor Ofshe, do you have an opinion based on the
14 transcription of the statements made by this defendant to the
15 West Memphis Police Department and listening to those tapes of
16 the statements made to the West Memphis Police Department by
17 the defendant or the testimony of the officers that you've
18 heard as to whether any of the interrogation tactics used by
19 the police against the defendant, Jessie Misskelley, were
20 suggestive or led Misskelley to make that statement?

21 A. Yes. I would add to that that I would also rely on the
22 notes that were produced by the officers and also certain
23 other facts I've been informed have been testified to by
24 various witnesses in this courtroom.

25 Q. So if I understand your testimony it is your opinion that

1 those tactics did---

2 MR. FOGLEMAN: Your Honor---

3 THE COURT: If he's talking about testimony, that's
4 fine.

5 MR. FOGLEMAN: Was he here to hear this testimony in
6 the courtroom?

7 THE COURT: Well, if it was made known to him, he
8 doesn't have to be here.

9 MR. FOGLEMAN: But how do we know it was made known
10 to him accurately, your Honor? If somebody told him that
11 so and so testified---

12 MR. STIDHAM: Judge, I asked the Court Reporter to
13 give me a transcript and that's what he looked at.

14 THE COURT: Alright.

15 MR. FOGLEMAN: Well, if that's the case, that's
16 alright.

17 THE COURT: Alright. Is that the case?

18 MR. FOGLEMAN: Is that the case?

19 THE WITNESS: I have not seen a transcript of this
20 hearing. I've seen a transcript of a prior hearing and
21 was informed as to certain specific testimony given and
22 presented by the medical examiner and I'll identify the
23 particular facts that I'm using if that would be helpful.

24 BY MR. STIDHAM:

25 Q. Well, if I understand your testimony, it is that the

1 tactics used by the police were suggestive and led the
2 defendant to make a statement?

3 A. Yes, and that the statement -- the contents of the
4 statement was shaped by these techniques.

5 CROSS EXAMINATION

6 BY MR. DAVIS:

7 Q. Now, Mr. Ofshe, earlier in your testimony you referred
8 about -- you were telling us about this scenario where you
9 have claimed to have obtain a false confession in a case you
10 worked on?

11 A. That's correct.

12 Q. Is that the case out in Washington State?

13 A. That's right.

14 Q. Okay, and in that case the scenario you presented to the
15 defendant in that case that you said you created and he -- he
16 agreed with, that scenario was similar to the allegations in
17 the actual case, correct?

18 A. No. The scenario was specifically designed to be
19 different from any of the allegations in the case. I invented
20 it to make it in the same area, otherwise it would be
21 meaningless, but I made it specifically different from any
22 allegations in the case and then I verified with one of the
23 people who was supposedly involved in it that in fact it never
24 happened just to double check that in fact it did not happen.

25 Q. Well, isn't it true that in both instances the

1 allegations involved child sexual abuse?

2 A. This was a case about child sexual abuse and when I told
3 him the specifics as to a particular event which I made up --
4 I made up peculiar circumstances for that event and he then
5 produced a very detailed confession specific to that event
6 including dialogue and then I verified from one of the victims
7 that no such event had ever occurred.

8 Q. And isn't it true that in that particular scenario that
9 both daughters of that defendant had testified he had sexually
10 abused them?

11 A. I don't believe they ever testified to that. I believe
12 they made allegations as to that effect. I don't think their
13 formal testimony was ever taken. They also made allegations
14 to the fact that their bodies were covered with scars which
15 were then subject to examination and -- a court ordered
16 medical examination and there were no scars on their bodies.
17 So they made a lot of allegations, none of which proved
18 empirically correct.

19 Q. Those were two adult daughters, correct?

20 A. That's correct.

21 Q. Okay, and also the wife also made allegations that he
22 sexually abused the daughters, correct?

23 A. The wife was being threatened with having her---

24 MR. DAVIS: Your Honor, could you ask him -- if he
25 has an explanation we can hear that, but would he answer

1 the question on the front end before we go through the
2 five minute---

3 THE COURT: --Try to answer yes or no and then --
4 then if you need to explain, I'm going to let you.

5 THE WITNESS: Thank you, your Honor.

6 BY THE WITNESS:

7 A. Yes. The wife during the period when she was being
8 pressured by the police and threatened with having her one
9 remaining child taken away from her if she did not come up
10 with accusations against her husband, proceeded to come up
11 with such accusations and some of those accusations included
12 being present at a satanic cult ceremony where blood flowed
13 out of a book and flowed uphill over her arms -- over her
14 body.

15 I was asked to evaluate her by the prosecution to help
16 them make a determination as to whether or not to charge her
17 or whether or -- or -- whether or not to charge her and it was
18 my recommendation not to charge her.

19 Q. And in fact her husband had pled guilty to these sexual
20 abuse charges, correct?

21 A. No. In fact her husband pled guilty to six counts of
22 third degree -- entered pleas to six counts of third degree
23 rape when he was told that if he did not enter that plea---

24 MR. DAVIS: Your Honor, would he be responsive to
25 the question?

1 BY MR. DAVIS:

2 Q. Did he enter a plea of guilty to charges of rape or
3 sexual abuse?

4 A. He entered -- yes -- he entered a plea to six counts of
5 third degree rape.

6 Q. Did he maintain his guilt for a period of five months
7 prior to entering that plea of guilty?

8 A. Oh, yes.

9 Q. Okay, and isn't it true, Doctor, that he did not decide
10 that he was not guilty until he talked with you?

11 A. After he talked---

12 MR. DAVIS: Your Honor, could he be asked to respond
13 yes or no?

14 THE COURT: Yes or no and then---

15 BY THE WITNESS:

16 A. Yes, that's technically correct. However, the discussion
17 that I had with him which was tape recorded was not a
18 discussion that precipitated his changing his mind. He
19 changed his mind subsequent to that after he independently
20 began to look at the things that he had confabulated and after
21 the pressures that he had been under during this five month
22 period were withdrawn, after which he had been gotten to enter
23 a guilty plea. So his decision -- his realization that he in
24 fact committed none of these things -- was done independent of
25 any conversation I had with him.

1 Q. And despite your opinion that his confession was coerced
2 or involuntary in that case, the jury and the court found
3 otherwise, correct -- or the court did?

4 A. The court found based on statements made prior to the
5 statements that I analyzed -- found that it was sufficient to
6 accept -- or not to accept his request to withdraw his guilty
7 plea and go to trial.

8 Q. So in that scenario with the husband saying for five
9 months he's guilty, with the wife saying that he's guilty, and
10 the two daughters giving statements as to his guilt, you met
11 with him and convinced him that he was not guilty, correct?

12 A. Incorrect.

13 Q. Well, after you met with him is when he decided that he
14 was not guilty, correct?

15 A. A month after he met with me after going through his own
16 analysis of what happened -- after he was no longer being
17 constantly coached by the interrogators, by the psychologists,
18 and by his minister, he realized that the beliefs that he had
19 formed made no sense whatsoever and he realized that he -- he
20 had come to believe something that was not true.

21 What he came to believe was that he was the leader of a
22 satanic cult that had been in operation for seventeen years,
23 that had killed hundreds of children for which there was no
24 evidence. That's what he came to realize made no sense.

25 Q. And you testified in his behalf in a hearing designed to

1 get that guilty plea set aside, correct?

2 A. I test -- that's correct, and the result of that was that
3 the judge chose to maintain the guilty plea based on
4 statements that he had made prior to the matter that I
5 testified about, and that was the justification for not
6 allowing him a trial.

7 Q. What exactly -- based on the testimony that you heard
8 from the officers at the prior hearings and based upon your
9 examination of those taped statements -- what coercive tactics
10 do you allege that the police made in this case -- or did?

11 A. In order to answer your question, first I need to break
12 the interrogation down into its component part so that I can
13 cut out parts of it and focus on a particular part.

14 Q. Well, one thing I want you to assure me, Doctor, is that
15 you're referring to either testimony you've heard, or to the
16 taped statements of the---

17 A. That's correct, and the notes.

18 First---

19 Q. When you say "the notes", what notes are you talking
20 about?

21 A. The detectives' handwritten notes and typed notes and
22 also I may refer to a fact I've been informed that was
23 testified in this courtroom and I'll specify exactly what that
24 was when I do.

25 Q. Let me -- let me back up just a minute. Did you find any

1 evidence in any of those things you referred to as to physical
2 coercion?

3 A. No, I did not.

4 Q. Did you find anything in any of that evidence to indicate
5 that any of the officers yelled or used a loud voice or were
6 degrading to the defendant in those tapes or in that testimony
7 that you reviewed?

8 A. No, the officers testified they did not do that.

9 Q. Okay, and in those tapes that you observed, you didn't
10 hear anything of that nature, did you?

11 A. No, I did not.

12 Q. Okay, and there is nothing in the notes prior that would
13 indicate there was any undue influence, pressure, or loud
14 voices and demands made on the defendant, was there?

15 A. Not in the limited set of materials you're allowing me to
16 testify on.

17 Q. So as far as those type of tactics you would have to
18 agree that what you reviewed is devoid of any evidence of
19 that, correct?

20 A. I would have to agree that based on the set of materials
21 on which I am now testifying, I can find no example of that.

22 Q. And those things that you refer to that you're testifying
23 to are based on your review of testimony and your observance
24 of that confession? You've read it and listened to it,
25 correct?

1 A. That's correct.

2 Q. And is what you term or what you find in there coercive
3 that the officers asked at times leading questions -- is that
4 one of the things?

5 A. The questions were more than leading. The questions were
6 very directly specifying what the answers should be.

7 Q. Did you find anything in your review of the officers'
8 testimony, in your review of the statement of the defendant or
9 either of the statements of the defendant to indicate that the
10 officers gave him the information about which boy was
11 castrated?

12 A. In their statements? No.

13 Q. And in their notes?

14 A. In their notes? No.

15 Q. In the taped confession?

16 A. Other than I seem to recall that he was being shown a
17 picture of one of the boys and that happened to be the boy
18 that was castrated and I believe that, if memory serves, that
19 he then identified that boy as the one that was castrated, but
20 I believe -- and perhaps I'm wrong -- but I believe that he
21 was being shown a picture of that boy at the time.

22 Q. Do you know where that is in the transcript?

23 A. No, that's not something I'm sure of at this point.

24 Q. And if that turns out to be inconsistent with what the
25 testimony at trial has been, then you certainly wouldn't

1 disagree with that?

2 A. My memory may be defective on that.

3 Q. And those facts that -- in fact -- let -- let me ask you
4 this: In fact after this defendant makes the statement and
5 identifies the one that's castrated, the next question is,
6 "Are you absolutely certain that's the one?" Isn't that the
7 next question in the interview?

8 A. Can you direct me to that?

9 Q. Yes, sir. It's in the first statement. It's on page
10 seven. Let me see which statement you have. (EXAMINING.)
11 Okay, it's that transcript on page seven.

12 A. (EXAMINING.)

13 Q. Down at the bottom of the page. Where the officer asked,
14 "Which boy was that?"

15 And the defendant said, "That one right there."

16 And Officer Gitchell said, "You're talking about the
17 Byers boy again?"

18 And the defendant said, "Yes."

19 Then what was the next question that Officer Ridge asked?

20 A. (EXAMINING.) "Are you sure that he was the one that was
21 cut?"

22 Q. Okay. Now, Mr. Ofshe, if the police are coercing him
23 when he has just given them the accurate information and has
24 just told them the Byers boy is the one who was castrated, are
25 you saying that it's coercive for Officer Ridge to then ask,

1 "Are you sure that he was the one that got cut?"

2 A. Well, judging from this statement apparently there was a
3 photograph of the Byers boy because he was able to say, "That
4 one right there."

5 Q. So you're presuming those facts?

6 A. I think -- it says, "Which boy was that?" And then Mr.
7 Misskelley responds, "That one right there." I read that as
8 indicating he is identifying some representation of that boy
9 right there.

10 Q. Okay, and do you know how many photographs were there?

11 A. No, I don't, and I don't know how those photographs were
12 being manipulated at the time.

13 Q. But---

14 A. I'm just pointing out that that's a possibility.

15 Q. You don't know anything as far as from the testimony or
16 from the taped confessions and anything to indicate that those
17 photos were manipulated, do you?

18 A. No, I don't.

19 Q. Okay, so you would have to presume that fact if you were
20 not to take some -- place some significance on that particular
21 statement, correct?

22 A. It's a possibility. If the record is not clear as to one
23 way or the other as to whether or not this is being
24 suggestive. This is an area that in my mind is unclear.

25 Q. Well, explain to me how it's suggestive or if -- if the

1 police are trying to coerce someone into giving them an
2 incorrect or a specific scenario, why would they go back and
3 ask them, "Are you sure that he was the one that was out?"
4 Why wouldn't they leave it alone when they had the answer they
5 wanted?

6 A. Because when they got the answer that they wanted, then
7 they emphasize it in order to stabilize that so that when you
8 get somebody where you want them, you emphasize that's what
9 you're trying to do.

10 Now, I can show you other examples of very direct leading
11 suggestions that shows that in the course of this
12 interrogation these officers were capable of doing that and I
13 know there was a picture there and it may have happened that
14 they indicated which picture should be selected.

15 Q. Well, gee, Doctor, to say it may have happened you would
16 have to assume and presume certain inappropriate police
17 conduct, wouldn't you?

18 A. I would have to assume there are other inappropriate
19 police conduct which I can specify might also have expressed
20 itself here and I might point out that you brought up this
21 point, I didn't. This is not one of my examples. This is
22 something that I would judge to be unclear.

23 Q. And that's why the answer to that -- is that not clear to
24 you that when the officers have the answer that's consistent
25 with the evidence and they keep on going and they say, "Are

1 you certain that's the one?" Doesn't that indicate to you
2 that those officers are trying to get an accurate statement
3 rather than coerce him into saying something?

4 A. Well, if we -- we're looking at an interrogation that was
5 free of the kind of gross leading and suggestion that
6 characterizes this interrogation---

7 Q. Is -- wait, let me -- let me stop you. The question,
8 "Are you certain that is the one?" -- are you characterizing
9 that as a gross leading statement?

10 A. I'm suggesting that if---

11 Q. Could you answer that question for me, please?

12 MR. STIDHAM: Your Honor, he's trying to answer the
13 question and the prosecutor won't let him.

14 THE COURT: Answer the question.

15 BY THE WITNESS:

16 A. Under some circumstances that could be and that would be
17 under some circumstances a gross leading suggestion if it were
18 done in a particular way.

19 Q. Do you have any actual facts or knowledge from that
20 transcript and those tapes and you're hearing the officer
21 testify that there was anything that would contribute with
22 that statement to make it a gross leading statement?

23 A. As I said, this is your example I think it's unclear
24 because I don't -- I don't believe the record is clear in my
25 mind as to the circumstances under which this occurred and I'm

1 simply pointing out that there are other examples of gross
2 leading, highly suggestive, if not demanding statements on
3 other points that illustrate that as an operating procedure
4 this is present in this interrogation and, therefore, there is
5 a possibility -- and I don't know the particular circumstances
6 of this particular presentation of the photograph. You
7 brought it up, I didn't.

8 Q. Okay. When you say, "It's my example", it's his voice,
9 isn't it true, Doctor? I mean, you heard the tape.

10 A. It's also -- yes, it is his voice. It is also his voice
11 that says that he arrives at the scene at nine o'clock in the
12 morning, which is the very first statement that he makes about
13 the time that this all began, and that statement is a
14 statement that because it is not the statement as I analyze
15 the influence process of this interrogation, because it is not
16 the statement that fits with the facts. The statement about
17 the time at which this crime occurred is a statement that
18 comes up and is manipulated eight different times over the
19 course of this interrogation and over the course of those
20 eight manipulations one sees a pattern of unrelenting pressure
21 on Mr. Misskelley.

22 Q. When you talk in terms of general valid---

23 A. May -- may I finish?

24 Q. Mr. Ofshe, when you talk in terms of generality---

25 MR. STIDHAM: Your Honor, may the witness finish

1 answering the question?

2 MR. DAVIS: Your Honor, he hasn't answered my
3 question yet.

4 MR. STIDHAM: He hasn't answered the question the
5 way he wants him to.

6 MR. DAVIS: Well, your Honor, I asked him the
7 question about part of the statement and he starts off
8 talking about something that's on page twenty-four.

9 THE COURT: Alright, answer yes or no and then if
10 you need to explain I'm going to permit it.

11 THE WITNESS: May I have the question again, please?

12 BY MR. DAVIS:

13 Q. I don't know what the terminology is in Berkeley,
14 California, but is it different when somebody says, "Are you
15 sure that he was the one that was cut?" Is that a leading
16 statement in California?

17 A. No, it's not a leading statement in California and may I
18 explain?

19 Q. Is it a leading statement in Arkansas?

20 A. If it is a state -- I never said it was a leading
21 statement. I think what I tried to explain and what I would
22 like to explain is---

23 Q. Well, are you -- are you going to confine your remark to
24 that statement, Doctor, or are we going to roam around the
25 entire tape recording?

1 MR. STIDHAM: Your Honor---

2 THE COURT: Yes.

3 MR. STIDHAM: He's asking questions and he didn't
4 get the right answer he wanted---

5 THE COURT: You're making a statement. Make an
6 objection if you've got one.

7 MR. STIDHAM: Your Honor, my objection is that the
8 witness should be allowed to answer the question and
9 explain his answer.

10 THE COURT: Alright, I'm going to allow him to
11 answer the question yes or no and then give your
12 explanation. Were you through?

13 BY THE WITNESS:

14 A. No, that is not a leading statement in California and I
15 think the point I was trying to make was if following
16 manipulating a suspect to a statement that the interrogator
17 likes, the interrogator is likely at that point to try to
18 reinforce that particular statement and will, therefore,
19 because it's very likely that if the person has immediately
20 said, "That's the one," however, that was accomplished.

21 To stabilize that, one would then reinforce it by
22 allowing the person to restate it, yes, I'm sure, because it's
23 a very very low likelihood that the person is not going to
24 immediately continue. That's a good tactic for stabilizing an
25 answer that you like.

1 THE COURT: Doctor, excuse me, are you assuming that
2 a single photograph of one individual was exhibited?

3 THE WITNESS: No. I am -- I am assuming that I
4 don't know how the photographs were placed, that I don't
5 know what prominence it might have been given, and I
6 don't know what indication might or might not have been
7 given, and therefore, I don't know what surrounds that is
8 not included in this record in this particular choice---

9 THE COURT: --Have you read the officer's
10 description of the showing or viewing of the photographs
11 or photograph?

12 THE WITNESS: Yes, I have.

13 THE COURT: Have you seen the photographs or
14 photograph?

15 THE WITNESS: No, I have not.

16 THE COURT: Show them to him.

17 MR. DAVIS: Your Honor, for the record I believe
18 it's marked as State's Exhibit Number One Oh Five.

19 (HANDING TO WITNESS.)

20 THE WITNESS: (EXAMINING.)

21 BY MR. DAVIS:

22 Q. Doctor, if that -- if that -- if those three photographs
23 are laid out on the table and he makes the statement that one
24 of them was cut on his bottom and is pointing to his private
25 parts at the time he does that and the officer says, "Which

1 boy was that?", and he points to the picture and says, "That
2 boy right there," are you saying that that's unduly
3 suggestive?

4 A. Or if he responds to an officer whose finger is on the
5 picture and says, "That one there." If that happened, that
6 would be a way of accomplishing that identification.

7 Q. But we're in a court of law and we deal with evidence and
8 if there's no testimony or evidence in the record or in
9 anything you've looked at to indicate that that happened, then
10 there's nothing suggestive about that question or there's
11 nothing that indicates that that response was coerced, is
12 there?

13 A. And all I said was, "That's a possibility. I don't know
14 all the facts."

15 Q. Okay. But you have to presume facts or assume things in
16 order for you to reach the conclusion that that indicates
17 coercion, isn't that correct, Doctor?

18 A. If I were to reach that conclusion about that particular
19 statement, I would agree with you. If I say, "I don't know"
20 on that particular statement, then I'm trying to say I don't
21 know.

22 Q. And, also, on that same page the defendant indicates that
23 one of the boys was being cut in the face. Isn't that
24 correct? Page seven.

25 A. Yes.

1 Q. And the question before that was, "Where did he cut him
2 at?" And Jessie's response was, "He was cutting him in the
3 face." Is there anything coercive or suggestive about the
4 question, "Where did he cut him at?"

5 A. No, my judgment is indeterminate because I don't know the
6 facts surrounding it.

7 Q. So when the defendant identified who it was who was
8 castrated and he indicated that one of the boys was cut in the
9 face, you don't know and you can't give an opinion that any of
10 those questions were coercive in nature, can you?

11 A. And the record -- no, I can't because the record that we
12 are dealing with is very incomplete because this part of the
13 record is preceded and everyone agrees by over two hours of
14 interrogation in which many subjects were discussed and in
15 which we do not know what was said on the subjects because we
16 have two hours of interaction about this for which we have no
17 record.

18 Q. And your speculation on what might have happened during
19 that time and your guess as to what occurred and what
20 transpired and what happened after reading this testimony, you
21 can't speculate any better than any of these people can, can
22 you?

23 A. Not on this particular point, no. There are other points
24 about which the record is quite clear, about which I'm happy
25 to be helpful.

1 Q. How many cases in the past twelve months have you
2 provided expert testimony on?

3 A. Perhaps five or six.

4 Q. What percentage of your income last year was derived from
5 the providing of expert testimony?

6 A. I don't know what the percentage was. I can tell you the
7 number if you'd like.

8 Q. What's that number?

9 A. In my -- I -- I earned Forty Thousand Dollars last year
10 out of this part of my professional life for which I take half
11 time leave from the university every year to free up my time
12 to do it.

13 Q. And is your going rate---

14 A. Half time unpaid leave from the university.

15 Q. Is your going rate approximately Three Hundred Dollars an
16 hour?

17 A. No, it is not.

18 Q. What is it?

19 A. My rate is a hundred and fifty dollars an hour for
20 consultation and Three Hundred Dollars an hour for time spent
21 in court or in depositions.

22 Q. Okay. So---

23 A. Because time sent in court or depositions is very, very
24 hard work.

25 Q. Okay. I will agree with that, Doctor.

1 So it's Three Hundred Dollars per hour in court and when
2 you're asked -- when you're initially asked to evaluate a
3 case, you don't get the Three Hundred Dollars an hour unless
4 you give an opinion that's consistent with what the person
5 asking you wants to hear. If they don't call you as a
6 witness, you don't get your Three Hundred Dollars an hour,
7 correct?

8 MR. STIDHAM: Judge, that's a ridiculous question.
9 It has an inference that---

10 THE COURT: --Are you -- again, you're making a
11 statement. How many times have I got to tell you, Dan.

12 Stand up first of all and say, "I object", okay?

13 MR. STIDHAM: I object, your Honor.

14 THE COURT: Alright. What is your objection?

15 MR. STIDHAM: My objection is it's not a proper way
16 to impeach the witness. It's very -- it's -- it's
17 speculation and it's -- the witness has testified, your
18 Honor, that he is a consultant--

19 THE COURT: Well---

20 MR. STIDHAM: ---to the prosecuting attorney's
21 office in several areas throughout the United States.

22 MR. DAVIS: Your Honor---

23 THE COURT: Okay. Again, that gets into statement.

24 My -- my ruling on your objection is is it's common
25 and customary practice to ask an expert what their

1 compensation for their testimony is, and I'm going to
2 allow it to that extent.

3 MR. STIDHAM: To ask him -- if he doesn't say what
4 he's supposed to say he's not going to get paid? That's
5 what the prosecutor asked him.

6 THE COURT: Well, I'll let you rehabilitate him
7 then, although I think he don't needs much help.

8 MR. STIDHAM: Thank you, your Honor.

9 BY MR. DAVIS:

10 Q. Isn't it true, Mr. Ofshe, that you actually formulated an
11 opinion before you ever heard or examined any testimony from
12 the police officers?

13 A. No. I -- I had an idea about what might have happened,
14 but I needed to hear the testimony from the officers to find
15 out much more information about what did happen. In fact in
16 order to try to get that information I tra -- I tried to
17 travel to Memphis to meet with the officers to interview them
18 about what happened so that I could have a fuller basis for
19 it, but that meeting was in part unscheduled because of the
20 airplane problems and in part apparently because they were
21 going to refuse to talk to me in any case.

22 And so at the hearing that I attended, I observed the
23 officers and listened to their testimony and in fact my
24 opinions changed very substantially because of the testimony
25 that I heard.

1 Q. Isn't it true that you had advised Mr. Stidham that you
2 had an opinion as to the coercion that was used in this case
3 prior to the time you ever heard the police officers testify?

4 A. Uh -- the opinion that I had at that point was based on
5 the materials available to me which included my having
6 interviewed Jessie Misskelley.

7 Q. Well, my question I have for you is: Didn't you
8 formulate an opinion before you ever heard the officers? And
9 you just indicated, "My opinion was", so you had formulated an
10 opinion, correct?

11 A. I had formulated a tentative opinion and I was aware that
12 there was much that I wanted to know about the interrogations
13 that I could not know from just the records, and so the
14 hearing that I attended was an opportunity to hear answers to
15 specific questions that I wanted to know from the officers
16 which allowed me to refine my opinion about what happened.

17 Q. Was your opinion before that that the officers had not
18 coerced anyone?

19 A. Well, the opinion that Mr. Misskelley's statement was a
20 coerced statement can be supported from the records that were
21 available---

22 MR. DAVIS: --Doctor -- your Honor, would he --
23 would you ask him to answer the question?

24 THE COURT: Answer yes or no and then if you need to
25 explain you're going to be permitted to.

1 BY THE WITNESS:

2 A. Could you repeat the question, please?

3 Q. Prior to hearing the police officers testify or either
4 reviewing their testimony in the form of a transcript, was
5 your opinion at that point that the police -- that the police
6 officers didn't coerce anybody?

7 A. No, that was not my opinion.

8 Q. Okay, so your opinion prior to that -- granted tentative
9 but before you even heard or sat -- saw or read anything about
10 what the police officers did -- you already formulated an
11 opinion that this was -- this confession was coercive in
12 nature, correct?

13 A. That is correct because there is adequate evidence as to
14 the coercive nature of it contained in the materials that I
15 already saw, but there were many questions that I had about
16 the specifics of it that were very unclear until I heard the
17 officers and what they said caused me to modify substantially
18 my analysis of what led to the materials that I already had
19 seen.

20 Q. How many cases in the last twelve months have you
21 testified to and indicated that there was coercion on the part
22 of police in obtaining a confession?

23 A. I can recall one that I testified to that most of my work
24 consists of evaluating the interrogation and feeding back
25 opinions to attorneys and, more than half the time those

1 opinions do not lead me back into the courtroom because I tell
2 the attorneys there is nothing for me to testify about because
3 I don't find in materials that have been provided to me
4 suggesting that there is coercion.

5 Q. How many times have you testified at the rate of Three
6 Hundred Dollars an hour that a confession was coerced?

7 A. To the best of my knowledge, never.

8 Q. How many times have you testified for hire and testified
9 that a confession was coerced or as a result of police
10 coercion?

11 A. I think that number is -- over the years I've done this
12 -- I've testified -- I've testified to coercion thirteen
13 times. Of those thirteen times at least once I was testifying
14 without fees and in no case was I paid Three Hundred Dollars
15 an hour because -- while that's my standard fee, to the best
16 of my recollection all of the other cases involved indigent
17 defendants and the State rarely pays very much money for one's
18 time to do this work.

19 So in no case has anyone ever paid me my customary rate
20 and I do it for whatever rate is appropriate once I reach the
21 conclusion that this is what the facts tell me and I have done
22 it for nothing and would do it for nothing again.

23 Q. But the truth of the matter is that the more you do it
24 and the more high profile cases you do it in, the more
25 attention you get, correct?

1 A. The more what?

2 Q. Attention.

3 A. I suppose.

4 Q. If it's my understanding, Doctor, you didn't find
5 anything coercive about the statement that Jessie Misskelley
6 made about the injuries of Stevie -- or of Christopher Byers.
7 Is that correct?

8 A. No, that is not correct. I didn't reach any conclusion
9 about those statements because I don't believe that the record
10 is sufficient for me to reach a conclusion one way or the
11 other.

12 Q. And the remainder of it is basically because you found
13 some questions that you determined to be leading?

14 A. Oh, no, not at all.

15 Q. Is that not what your testimony was earlier?

16 A. I don't believe I said that the remainder of it was
17 because I merely found the questions to be leading. My
18 recollection of my testimony was that it was much more than
19 that which I would be happy to explain to you.

20 MR. DAVIS: Your Honor, wait just a second. Your
21 Honor, we'll pass the witness.

22 REDIRECT EXAMINATION

23 BY MR. STIDHAM:

24 Q. Doctor Ofshe, you mentioned that sometimes you will
25 testify for indigent defendants. Is that correct?

1 A. I believe every time I've testified in a confession case
2 it has been for an indigent defendant.

3 Q. Were you told that this particular defendant over at
4 counsel table was indigent?

5 A. I believe so.

6 Q. Have you received any money in this case so far?

7 A. I haven't even received my expenses for the three trips
8 I've made to Arkansas. No, I haven't received any money.

9 Q. Do police officers usually yell at suspects when the tape
10 recorder is on?

11 MR. DAVIS: Your Honor, I would object to that
12 question because this individual doesn't have any
13 expertise in the field of police interrogations as far as
14 his personal experience of being there to make that
15 determination.

16 MR. STIDHAM: I'm not sure I understand his
17 objection.

18 THE COURT: Well, I'm not sure it takes an expert to
19 answer that question, so I'm going to allow him to answer
20 it.

21 MR. STIDHAM: Thank you, your Honor.

22 BY THE WITNESS:

23 A. No, when the tape recorder is on, one gets behavioral
24 statements that are tailored to the fact that the tape
25 recorder is there and so one would not expect the yelling to

1 happen.

2 In my experience the yelling and the other improper
3 activities happen when the tape recorder is off.

4 Q. Is there any difference between cops yelling at people in
5 Los Angeles or Corning, Arkansas, when the tape recorder is on
6 or off?

7 A. I don't see why.

8 Q. The prosecutor kept wanting you to ask question -- or
9 asked you questions about the coercive nature of the
10 statements on -- the questions and answers on page seven that
11 he pointed out to you on the transcript, and I kind of got the
12 impression when I was sitting over there in that chair that
13 you wanted to talk about other examples of leading and
14 suggestion that was employed by the police. Would you like to
15 talk about those?

16 A. Yes, I would.

17 THE COURT: How long are we going to be talking
18 about them?

19 MR. STIDHAM: We're all tired and we know you're
20 tired and the jury looks tired---

21 MR. FOGLEMAN: Your Honor---

22 MR. STIDHAM: ---so we won't be long.

23 MR. FOGLEMAN: ---we don't mind Mr. Stidham asking
24 questions but to try to elicit some narrative, we don't
25 think that's proper.

1 THE COURT: I'll object -- I mean I'll sustain your
2 objection to the invitation for a narrative. This
3 witness is capable of answering questions in question
4 form and answer rather than a narrative and that
5 objection will be sustained. The Court Reporter is not
6 going to be able to go much longer.

7 MR. STIDHAM: May I have just a few more minutes,
8 Judge?

9 THE COURT: Sure.

10 BY MR. STIDHAM:

11 Q. Doctor Ofshe, could you point to a few areas of the
12 interrogation which you feel are leading and suggestive?

13 MR. STIDHAM: Your Honor, may I use the word
14 coercive like the prosecutor used?

15 THE COURT: I guess that's the goose and the gander
16 thing, isn't it? Go ahead.

17 BY MR. STIDHAM:

18 Q. Could you give some examples of the police being coercive
19 and leading or suggestive during the course of the
20 interrogation?

21 A. Yes, I can. Perhaps the most powerful example in my
22 opinion is the example of the eight revisitings of the
23 question of the time at which the crimes occurred.

24 The first example occurs on page -- in my numbering --
25 eleven -- which I believe is page three -- and this is the

1 point at which Detective Ridges says, "Alright, when did you
2 go with them?"

3 Mr. Misskelley says, "That morning."

4 Detective Ridge says, "Nine o'clock in the morning?"

5 Jessie says, "Yes, I did. I went with them and then"---

6 Then they talk about walking. At that point Jessie is
7 now saying he went there at nine o'clock in the morning. I
8 believe that there is a mistyping here. I believe it's Jessie
9 said, "Nine o'clock in the morning." But this transcript does
10 not say that and I'll point that out. That's my recollection.

11 In any case he agrees or says that it was nine o'clock in
12 the morning. There is no follow-up at that point. The tape
13 recorder is on. Nine o'clock in the morning is grossly
14 inaccurate as everyone knows.

15 Detective Ridge has testified in hearings that that was
16 the first time that any time for this occurring happened and
17 in his hearing testimony at page ninety-nine of the
18 transcript. The next time the subject of the time at which
19 the events occurred comes up is on page nine of the first
20 transcribed interrogation and, at this point without reading
21 it, I'll just point out that Detective Ridge asked Mr.
22 Misskelley -- he's now revisiting the subject. He asks Mr.
23 Misskelley, "I'm not saying when they called you. I'm saying
24 what time was it that you were actually there in the par-

25 Mr. Misskelley says, "About noon."

1 Ridge says, "About noon?" -- and it has a question mark.

2 Jessie says, "Yes."

3 Ridge now says something that in my opinion was an
4 attempt to manipulate Mr. Misskelley's statement about the
5 time because Detective Ridge now says, "Okay, was it after
6 school had let out?" This is immediately after Jessie saying,
7 "It's at noon." He's now suggesting it must be later by
8 saying, "Is it after school let out?"

9 Jessie says, "I didn't go to school."

10 Ridge now has to clarify and say, "These little boys."

11 Jessie says, "They skipped school."

12 Ridge says, "They skipped school?" -- with a question
13 mark.

14 Then there was more discussion about their bikes and so
15 on. Again, there is an error. We know it's impossible for
16 these boys to have been there at noon.

17 Going on to the third example on page nineteen. Now,
18 it's Detective Gitchell who revisits the question of time
19 still because the time is inaccurate and he raises -- "Now,
20 did you say the boys skipped school that day? These little
21 boys did?" Said in that way, it's a suggestion that you
22 change your answer indicating, I'm displeased with this. This
23 isn't the right answer. Did you really say would be the
24 emphasis on that.

25 Jessie then answers. He asks -- Gitchell now asks, "What

1 time did you get there?"

2 Jessie again repeats, "I got there about nine."

3 Gitchell says, "In the morning?"

4 Jessie says, "Yes." So Jessie now attempts again to say
5 he got there at nine in the morning.

6 Now, I am of the belief that there has been testimony
7 that Jessie was roofing that morning. I believe that that was
8 testified to. So that would be an example if I'm correct in
9 that belief that Jessie was somewhere -- says he was somewhere
10 else and someone confirms that and he is now saying he got
11 there at nine o'clock in the morning. Clearly a
12 contradiction.

13 Q. Doctor Ofshe, is there another example in the second
14 recorded statement?

15 A. Yes. This goes on and is repeated several times. If I
16 can just illustrate one other point in the first statement.

17 Q. Certainly.

18 A. There is a very important example of the way in which the
19 detectives refuse to allow Jessie's inaccurate statement to
20 stand and directly manipulated Jessie's statement through
21 skillful interrogation tactics.

22 So for example, on page eighteen of the transcript at the
23 conclusion of a discussion about the supposed cult, Detective
24 Ridge now changes the subject. There is nothing that precedes
25 this about the timing, but now for the fourth time revisits

1 the timing and this time Detective Ridge says and I quote,
2 "Okay. The night you were in the woods, had you all been in
3 the water?"

4 Jessie replies, "Yeah, we'd been in the water. We were
5 in it that night playing around in it."

6 This is the first time in the record according to my
7 analysis of it and according to Detective Ridge's testimony
8 that it is directly suggested to Jessie that the correct
9 answer is, "This happened at night."

10 Immediately upon that being suggested Jessie is --
11 responds by accepting and now he starts to use the word "at
12 night", where he had never used it before, where he had
13 consistently said it was during the day. It is in direct
14 response to Detective Ridge's substitution and introduction
15 into the interrogation the correct fact that this happened at
16 night so Jessie now adopts that. That is an influence tactic.
17 It is a way of getting someone to accept something out of
18 pressure and out of suggestion.

19 Detective Ridge follows up with his victory on page
20 thirty -- page twenty-four of the transcript at the bottom
21 where Detective Ridge now capitalizing in my opinion on his
22 victory at getting night into the story now seeks to do what I
23 was describing before -- stabilize that -- by saying the
24 following -- and again, this is introduced by Ridge and there
25 is nothing preceding it from which this follows. He is

1 choosing to return to this subject and he says, "Okay, they
2 killed the boys. You decided to go. You went home. How long
3 after you got home before you received the phone call --
4 thirty minutes or an hour?"

5 Now there has been previous testimony about a phone call
6 to Jessie at home at nine P. M. That's what Detective Ridge
7 is referring to. But Detective Ridge now links this up with
8 Jessie going home and gives Jessie the choice of having
9 arrived home either thirty minutes or an hour before the phone
10 call occurred, which would mean he's now suggesting to Jessie
11 and elaborating on the story and getting Jessie to -- as he
12 next does -- Jessie says, "Uh" -- there's a silence and then
13 he says, "An hour."

14 So Ridge had given Jessie a choice. You can either say
15 you got home a half hour before the phone call or you can say
16 you got home an hour before the phone call. Those are the
17 only choices he's got. Jessie now chooses an hour.

18 Again, that's a tactic of influence. That is posing the
19 question in such a way that you only have two choices. Either
20 one of those choices, I win. Detective Ridge is using that
21 technique.

22 Then we get to the second interrogation. That's the last
23 time that the time subject comes up in the first
24 interrogation. As we know at two forty-four in the afternoon
25 -- at three-eighteen in the afternoon the first tape was

1 finished. According to Detective Gitchell no one spoke with
2 Jessie between then and the time that Detective Gitchell --
3 after meeting with the Prosecutor Fogleman -- went back in to
4 get the statement that is labeled "Interview of Jessie
5 Misskelley, Junior, Second Interview Conducted to Clarify
6 Previous Statement."

7 The last two times you will recall that Jessie said that
8 anything was brought up about time, Jessie had been
9 successfully moved to talk about the events happening in the
10 evening instead of in the morning which is where he started.
11 So now Gitchell comes in and on page one of the second
12 transcript begins with, "Jessie, uh -- when you got with the
13 boys and with Jason Baldwin when you three were in the woods
14 and them little boys come up, about what time was it when the
15 boys come up to the woods?"

16 Jessie replied, "I would say it was about five or so --
17 five or six."

18 So Jessie is now moving in the direction of later but
19 it's as if there is the original statement that he made about
20 the morning and he's being slowly moved towards the evening
21 but clearly in this statement he has not gone far enough
22 because five or six I gather from what I've been informed
23 about the testimony is too early for the boys to have shown up
24 at the woods.

25 Now, we have---

1 MR. FOGLEMAN: Your Honor, I'm going to have to
2 object to that statement by this witness. There is no
3 basis for him concluding that five or six is too early
4 for this defendant and the defendants to show up in the
5 woods. There is no basis for that.

6 THE COURT: Well, he's been talking for ten minutes.
7 I guess that's been in response to a question. I don't
8 know. What is your objection?

9 MR. FOGLEMAN: Your Honor, my objection is is that
10 he is testifying on things that are not in the record and
11 have not been testified to.

12 THE COURT: Doctor, I'm -- I'm assuming that all of
13 your testimony is based upon the testimony you've heard,
14 the statements you've read and listened to, and the notes
15 given by the officers.

16 THE WITNESS: Absolutely, your Honor, and
17 specifically on this point the transcript says when the
18 little boys come up. It is a specific statement about
19 when the children arrived.

20 THE COURT: All right. Mr. Stidham.

21 BY MR. STIDHAM:

22 Q. Your last example, Doctor?

23 A. The next after failing to get the time moved to the
24 proper time, Detective Gitchell uses another interrogation
25 tactic. He now says -- and I quote from page one of the

1 second transcript -- "Alright, you told me earlier around
2 seven or eight. Which time is it?"

3 And there are two important things about this. The first
4 one is it's obvious that Detective Gitchell is doing the same
5 thing that Detective Ridge has done earlier -- giving Jessie a
6 choice. Pick one and I win or pick two and I win -- either
7 seven or eight.

8 Gitchell can live with either answer and he's giving
9 Jessie only those two choices. But what's even more important
10 about this is that nowhere in the record, including the record
11 of what the detectives say, the notes, the specific statements
12 by Detective Ridge, the transcript of the first interrogation,
13 is there any indication that Jessie ever said -- as Detective
14 Gitchell says, "You told me earlier around seven or eight."
15 There is an absolute absence of anything indicating that.

16 That's extremely important to me because what this
17 illustrates is the legitimate interrogation tactic of making
18 up evidence, of overstating, inaccurately stating the
19 evidence. This is something that happens in police
20 interrogations all the time. It is not something that it is
21 my understanding is improper in police interrogations. It is
22 something I see all the time and it is a tactic for
23 manipulating the suspect and, in this case, based on my review
24 of the evidence there is no place at which Jessie told Ridge
25 -- told Gitchell that they had arrived there at seven or

1 eight. And in fact Detective Ridge in his testimony in the
2 hearing makes very clear that the very first time any time
3 came up was when Jessie said, "Nine o'clock in the morning."
4 And we have a complete record of every utterance from that
5 point forward. So Detective Ridge who was present with
6 Detective Gitchell says prior to the beginning of the tape no
7 time was mentioned and we note every mention of time prior to
8 that.

9 So it's my opinion that this is a tactic and it's a very
10 effective tactic because Jessie now simply repeats back to
11 Detective Gitchell what Gitchell told him. He says, "It was
12 seven or eight." Jessie doesn't even make a choice. He just
13 tells Gitchell everything that Gitchell told him. That's an
14 indication of someone who is willing to comply and does not
15 want to take any chances of making a mistake and therefore
16 being punished for it through pressure.

17 Then there's some more discussion of that and -- and it
18 changes again. But that's one example. There are many other
19 examples of -- of illustrations of manipulation on important
20 points throughout this record.

21 Q. Thank you, Doctor.

22 MR. STIDHAM: Pass the witness.

23 RE-CROSS EXAMINATION

24 BY MR. DAVIS:

25 Q. Doctor, just one question. It's certainly an option for

1 Jessie Misskelley to make the statement, I wasn't there. I
2 didn't kill anybody. I didn't see anybody killed. I don't
3 know anything about that. That is certainly an option that he
4 could have used in talking to the police officers, is it not?

5 A. Yes, it is and may I explain?

6 MR. DAVIS: Your Honor, I -- I have no further
7 questions.

8 MR. STIDHAM: Your Honor, I would like to give the
9 witness the opportunity to explain that since the
10 prosecutor brought it up.

11 MR. DAVIS: Your Honor, I don't think that question
12 calls for a response.

13 MR. STIDHAM: Well, then it wasn't a question.

14 MR. DAVIS: Other than -- other than a yes or no
15 response.

16 MR. STIDHAM: Your Honor, may the witness please
17 explain his answer?

18 THE COURT: What -- what is the -- what explanation
19 is necessary to that -- your answer?

20 THE WITNESS: The presumption that that's an option
21 presumes that the person does not feel pressure and in
22 fact the scientific literature on the subject of when one
23 gets a coerced compliant confession is when the
24 individual feels that they have no choice, cannot escape
25 the situation---

1 MR. DAVIS: Your Honor---

2 THE WITNESS: ---and can no longer resist and
3 therefore simply give up resisting and comply.

4 MR. STIDHAM: Nothing further, your Honor.

5 RECROSS EXAMINATION

6 BY MR. DAVIS:

7 Q. Doctor, just one more time. When the person is being
8 asked questions and they don't know anything about it, and
9 they don't know any of the details, they can always say, I
10 don't know. I don't know anything about it. I don't know the
11 details you're asking me about. They can always say that,
12 can't they?

13 A. They can and sometimes they get to the point at which
14 they can no longer do that and so they simply give up.

15 THE COURT: Alright, anything else?

16 MR. STIDHAM: No, your Honor.

17 (WITNESS EXCUSED.)

18 THE COURT: Do you have any other witnesses?

19 MR. STIDHAM: Your Honor---

20 THE COURT: I'm not asking for it right now. I mean
21 we've---

22 MR. CROW: Your Honor, we -- we are debating
23 recalling one witness for like one question and we'll---

24 MR. STIDHAM: Your Honor, if I could have a few
25 minutes with Mr. Crow, I think we can make a decision